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Bering Sea Tribunal of Arbitration

FUR SEAL ARBITRATION.

PROCEEDINGS *1891*
O'Fall

OF THE

TRIBUNAL OF ARBITRATION,

CONVENED AT PARIS

UNDER THE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND GREAT
BRITAIN CONCLUDED AT WASHINGTON FEBRUARY 29, 1892,

FOR THE

DETERMINATION OF QUESTIONS BETWEEN THE TWO GOV-
ERNMENTS CONCERNING THE JURISDICTIONAL
RIGHTS OF THE UNITED STATES

IN THE

WATERS OF BERING SEA.

VOLUME XIII. - *XIV*

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1895.

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FUR-SEAL ARBITRATION.

ORAL ARGUMENT

OF

SIR CHARLES RUSSELL, Q. C. M. P.,

HER BRITANNIC MAJESTY'S ATTORNEY-GENERAL,

ON BEHALF OF GREAT BRITAIN.

B S, PT XIII—1



The Department of State obtained a copy of the stenographic report of the oral arguments of British counsel before the Fur Seal Tribunal of Arbitration, Paris, 1893, through the courtesy of the British Foreign Office. The papers were handed to Mr. Bayard, Ambassador of the United States at London, with consent to their publication in the American edition of the proceedings of the Tribunal.

DEPARTMENT OF STATE,

Washington, D. C., August, 1895.



ORAL ARGUMENT OF SIR CHARLES RUSSELL.

TWENTIETH DAY, MAY 10TH, 1893.

The PRESIDENT.—Now we will hear the other side, and we are quite ready, Sir Charles Russell, to give you full attention.

Sir CHARLES RUSSELL.—Mr. President and Gentlemen, I do not propose, at this stage of the discussion, to trouble the Tribunal with any comments upon the importance of the fact of this Arbitration,—the fact that two great Powers have come by friendly agreement to submit to arbitration the differences existing between them. Nor do I intend, at this stage, to comment upon the far-reaching importance of the questions involved, nor upon the dignity of this Tribunal, which has taken upon itself the burden of dealing with those questions. I may have, at a later stage, something to say on each of these points; but I desire at once to go straight to the discussion of the subjects with which this Tribunal is charged.

Those subjects naturally divide themselves under four heads. There is, first, that group of questions which we have agreed to call questions of exclusive jurisdiction and right, embraced in the five questions of Article VI of the Treaty of Arbitration. That is the first division. There is, next, the question of Regulations, should the occasion therefor arise, contemplated by Article VII of the Treaty of Arbitration. There is, next, the claim for damages, which, so far as the case of the Government of the Queen is concerned, relates to the seizures unwarrantably made, as that Government contends, and which is dealt with by Article VIII of the Treaty of Arbitration. And, lastly, there is the claim for damages under the 5th Article of the *Modus Vivendi* of 1892.

My learned friends in their discussion have dealt in a greater or a less degree with all of these questions. The Tribunal does not require to be again told by me the position which the Counsel for Great Britain have assumed in relation to these questions; nor to be told that, upon the present occasion, I do not intend to discuss at all the question of Regulations. They belong to a different category. They involve different considerations; and, as it seems to us, they cannot with advantage or with clearness be approached until you have first determined the question whether the consideration of Regulations is to be approached in view of the existence of a legal right of an exclusive character upon the part of America, or in view of the fact, for which we contend, that the United States have no exclusive right of any kind in fur-seals, or in relation to the protection of fur-seals, or in an industry founded on fur-seals; that they have in fact no legal right of that nature at all. Therefore it is that we propose to reserve until a later occasion all discussion as to the question of Regulations.

Nor need I stop to remind the Tribunal of the position which has been consistently and persistently maintained by the Government of the Queen in relation to these two sets of questions: rights and regulations. Our position from the first has been, and is now, an absolute and complete denial of any exclusive right of property, jurisdiction, or protection; but, while that is our position, we have from the first expressed our desire to approach the consideration of the question of Regulations in a fair, just, and equitable spirit, to approach it upon the basis that this question of far-reaching is one in which there is a common interest of mankind, and which is not the exclusive appurtenance of any one Power.

Now, Mr. President, my learned friends, the learned Counsel for the United States, have occupied some twelve days in presenting their views to this Tribunal: not an hour too long in view of the importance of the questions, if it shall be found, upon consideration and examination of their argument, that that time has been devoted to topics relevant and apposite to the questions with which you have to deal. Upon that subject I must have a good deal to say; but I may be permitted for myself, and for my learned colleagues, to join in the congratulations of a complimentary kind expressed by the President upon the arguments of my learned friends. They were learned, they were erudite, they were full of what Mr. Coudert well said in reference to the argument of his learned colleague who preceded him, but which I may with equal propriety also say of the argument of Mr. Coudert himself, they were arguments full of "intellectual allurements". "Allurements" is a good word. I shall have to submit to this Tribunal that a great many of those arguments were remote indeed from any of the legal questions which you have to decide: that they have taken us very far afield: that, in this 19th Century of Christian civilization, after the world has existed I know not how many years, it is astounding that it should be thought necessary to dig, as my learned friend Mr. Carter did, down to the foundations of human society in order to try and discover those upon which the institution of property rest.

Nor can I think that at this stage of the world's existence, when we are discussing, as is admitted, questions of law,—questions of right to be determined according to law,—a Tribunal such as this can derive much assistance from courageous ascents into the mists and clouds of metaphysical and ethical discussion, such as my learned friend has made. The world has lived very long; society has, through all the ages, been struggling to evolve rules for itself, for its security, for its good order, for peace among men: rules which have been found to suit the convenience of society, which have been found to be conducive to the good order of society, and which have found authoritative expression in the tribunals of all civilized countries.

We cannot but think (we are of course taking the advocate's view of the question) that, in truth, my learned friends have been but
725 making a gallant defence of positions which, in point of law, are utterly indefensible.

Now I may assume, I think, that this Tribunal has made itself conversant with a large part, at least, of that mass of literature with which each side has burdened the Tribunal; and I think, if I am well founded in that belief, that the Arbitrators cannot fail to have marked the change of front in some very important points which has taken place on the part of those who are representing the interests of the United States. This change of front appears when you contrast their arguments to day with the position taken up in the diplomatic correspondence which

preceded this Arbitration, and in the proceedings which were instituted at the instance of the Government of the United States in its own municipal Courts.

I will only, in passing, indicate generally some of those leading changes. I do not refer to them merely for the sake of pointing out a certain inconsistency of conduct. It will be found that there is a real reason underlying that inconsistency, which ^{Changes of front in United States position.} I shall seek to develop and to bring to the notice of this Tribunal in the course of the discussion of the case. For the moment, I content myself with a general indication of some of the more remarkable changes of front.

The first is this. Although the first four questions of Article VI deal with the assertion of a claim derived from Russia,—a claim of exclusive jurisdiction and exclusive rights which it is asserted Russia exercised, and which it is further asserted passed unimpaired to the United States,—we are now told that this derivative title under Russia is a matter of practically no moment. Why? Because we are told that what Russia did needs not to be justified upon the basis of an exclusive jurisdiction, but amounted simply to such executive protective acts as any Power, apart altogether from exclusive jurisdiction, may rightfully exercise in defence of its property and interests. I shall, of course, have something to say about that in a moment: I will merely in passing call attention to the fact that it is impossible to explain the frame of those four questions consistently with any such idea of a mere inherent right of protection of property or of interest: and for this simple reason, that each of those questions is a question of exclusive jurisdiction in a defined area—namely in Behring Sea; and that if the acts of Russia had been acts of defence of property—a right which is inseparable from the possession of property—then that right would not be confined to a defined area, namely the eastern part of Behring Sea, but would be a right which would exist and follow the property wherever the property itself existed. That is the first change of front, a remarkable and significant change,—all the more remarkable when the Tribunal bears in mind the Statutes of the United States, which I shall have to examine presently; the mode in which the aid of those Statutes was invoked

726 by the agents and representatives of the Executive of the United States; and lastly, the judgments of the Courts upon those municipal Statutes, by virtue of which judgments, and by virtue of which judgments alone, they have secured the confiscation of and so affected the property in the vessels of British subjects.

The next change of front is not less remarkable. The third of those Questions in Article VI, the Arbitrators will remember, is the question, “Was the body of water, now known as Behring Sea, included in the phrase ‘Pacific Ocean’ as used in the Treaty of 1825?” The importance of the question cannot be exaggerated; because, if it were true that, under the operation of the Treaty of 1825, Russia, the predecessor in title of the United States in the Alaskan territory, had recognised the general right of fishing in the North Pacific Ocean including the Behring Sea, of course it would go a long way to negative the existence of any right to limit the right of fishing to citizens of the United States or to those authorised by the Executive of the United States. But to-day we are told by my friend Mr. Carter, in his elaborate argument, that this also is a comparatively unimportant question. The question whether, by those Treaties of 1824 and 1825, Russia recognised the right of all the world to fish in Behring Sea has become comparatively unimportant! although the responsible Minister of the United States,

after this matter had been under discussion diplomatically from August of 1886 till the end of 1890—I am referring, as of course the Tribunal will recollect, to the despatch of the late Mr. Blaine,—declared in his despatch of the 17th of December, 1890, that if Great Britain could satisfactorily establish that Behring Sea was included, in the Treaty of 1825, in the term “Pacific Ocean,” the United States had no well-founded cause of complaint against Great Britain.

It is odd that it should be so, but it is left to me, to some extent at least, to vindicate the intelligence and the perspicacity of that distinguished American statesman. He was putting forward a case, not a very hopeful one, certainly, but still a case infinitely more hopeful—if he could have established historically the acquiescence of Great Britain—infinitely more hopeful than the case which is now put forward of property, and right of protection of property, or of an industry founded upon property.

The last change of front is this. It is not, I will admit, as marked as the other two to which I have adverted. We are now told that although strictly the United States could in point of law insist upon its claim of property to the individual seals wherever they may be found,—whether it be three thousand miles south of the Aleutians, off the southern part of California, or elsewhere—yet the needs of the United States case do not require so high a position as that. Also, that while the property in the herd might be claimed by the United States, still it is not necessary to put it even so high as that. And ultimately we have come to this position—a very extraordinary position—that even if it be found, as I hope to make it clear it must be found, that neither in the seal as an individual, nor in the herd as a collection of individuals, does any legal property exist in the United States, yet they have a legal right to claim, and a legal right to exercise, a power of protection over an industry founded upon the skinning of the seals upon the Pribilof Islands.

Mr. President, from these observations you will have gathered, although I doubt not you were not unprepared for them, how widely we differ in the views which we take of the legal questions involved in this controversy. But the discussion has been exceedingly interesting; interesting to us as lawyers, mainly because of the courage—I will not say the audacity—with which my learned friends have propounded propositions of law which they affected to suggest were almost beyond question: propositions of law for which I hope to demonstrate there is no legal authority whatever.

Now let me glance at some of these propositions, they are certainly sufficiently startling. I shall have to come to closer quarters with them later, but I am at present endeavouring to present what I may be permitted to call a bird’s-eye view of the field traversed by my learned friends. I address myself principally to the argument of my learned friend Mr. Carter, because the argument of Mr. Condert was, as it seemed to us, in its major part at least, and in its more important part, addressed to the question of Regulations rather than to questions of legal right.

Now what were some of these propositions? One was that the right of protection of the property and interests of a nation are exactly the same in time of peace and in time of war: from which my friend derives the comforting conclusion that ships of a friendly power may be searched, seized, and confiscated because they are pursuing the oldest form of the pursuit of seals known in the history of the world—because they are pursuing pelagic sealing: and that the United States are

entitled to exercise those rights of war in time of peace and against a friendly power, although there has been no diplomatic expostulation or warning.

The next proposition is that the moral law and the law of nature are international law—that the terms are interchangeable; and, therefore, because the United States chooses to come to the conclusion that pelagic sealing is a crime—a grave moral wrong, and an indefensible act—therefore my friends come to the conclusion that it is to be classed with piracy; and that the sanctions which international law applies to piracy may be applied to the pelagic sealer.

Again, it is asserted that even if seals are (it is not admitted that they are) animals *feræ naturæ*, yet the property in them is in the United States, because they breed upon the islands, and have the *animus revertendi* to them.

Now here I must pause to point the two respects in which this last proposition displays, as it seems to us, a remarkable confusion of ideas. It confounds two rights perfectly clear and perfectly distinct.

One is the right in respect of animals *feræ naturæ* which the owner of the soil has, *ratione soli*, to kill those animals when they are
728 on his soil, sometimes called (I think, inaptly called) a qualified right of property: a right, in other words, which, by giving to the owner of the soil the right to exclude all others from access to it, secures to him the exclusive right, while the animals *feræ naturæ* are on the soil, of killing them. That is a distinct, clear, legal conception; a right recognized by the law as incident to property; and it is properly called the right *ratione soli*. But that does not touch or affect the question of property in those animals when they are not on the soil of the owner.

If they be domestic animals, or if they be animals which by the industry, care, and art of man have become assimilated to domestic animals, then a property may exist in them; and the right to possession follows that property even when they are off the land and out of the physical control of the owner. But the right *ratione soli*, which is exclusive of everybody else, and which is exercisable only on the soil of the owner, does not give the property in animals *feræ naturæ* when they are on the land—much less when off the soil of the owner.

Again, a further confusion. *Animus revertendi* is referred to as if the mere fact of *animus revertendi* gave property; and in the argument of my learned friend, greatly to my surprise, he did not attempt to draw any distinction (indeed he said there was none), between the *animus revertendi* which was part, so to speak, of the nature of the animal, and the *animus revertendi* which alone has anything to do with the question of property, namely the *animus revertendi* which is induced by the art, the care, the industry of man. The two things are distinct. If *animus revertendi* gives property in animals *feræ naturæ*, then the law of every civilized country would have given property in pheasants, in rabbits, in hares, in almost every class of animal which is recognized as coming under the head of game; yet it is notorious that the law of every civilized country recognizes that there is merely the exclusive right to take the game when it is upon the land of the owner; and that when the game is off the land, although it has the *animus revertendi*, yet the law does not recognize the right of property on account of that *animus revertendi*, although in that case it is to some extent produced by the art and care of man himself.

The next proposition of my friend is this: Individual ownership ought to exist in all things susceptible of ownership, and ought to be

affirmed to be in that Power which can best turn those things to account for the use of mankind. Therefore, says my learned friend, as the United States are the owners of the Pribilof Islands, and as they can kill the seals upon the Pribilof Islands with more or less discrimination, they are the owners of the fur-seals.

Next: No one is entitled to more than the usufruct of property; therefore, pelagic sealing on the high sea, which may be, or is, wasteful of the stock, is an offence against international law.

And, lastly: although neither the municipal law of the United States, nor the municipal law of Great Britain (and I will add, nor the
729 municipal law of any civilized country) would recognize property in the seals as between individuals—supposing this were a case of private assertion of right, and the Pribilof Islands belonged to a private person,—yet international law can be invoked, says my learned friend, to declare the property in the United States.

Now, Mr. President, I have to say most gravely and seriously that there is no one of the propositions essential to the case of my learned friend which he has propounded with which we can agree. It will be found, as I proceed to examine these propositions, that some of them are propositions in which the right conclusion is drawn from erroneous premises; some of them in which the wrong conclusion is drawn from correct premises; and, to vary the monotony, some in which both premises and conclusion are wrong.

Having mentioned these matters, in which I have expressed, as I am bound to do thus early in the controversy, my disagreement with my learned friends, I am glad to turn to some points as to which I find myself in agreement with them. I agree with Mr. Carter as to the division of the questions submitted to this Tribunal. I agree with him that the first five questions—those in Article VI—are questions of legal right. And I agree with him that, as regards those questions, they are referred to you as judges and jurists. But what does that import? It imports that your duty is not to make the law, but to declare the law: not to speculate what the law ought to be, but to say what the law is: not to formulate or try to formulate novel rights, but to adjudge what are existing rights.

Before I proceed to state the order of my argument, I have some other topics to refer to. I think at the very
View of United States as to nature of International Law. threshold of this enquiry, as my friend has invoked international law and has gone the length of saying that international law gives him warrant for his claim of property in the fur-seals, and as he has put forward the extraordinary proposition that the moral law and the law of nature—what the law of nature in this connexion means I do not know—are two terms interchangeable with international law,—I think it is desirable that I should at the outset, (though I shall have to recur to it) and for the better understanding of my argument, state broadly to you at this stage what our conception of international law is.

It may be admitted that all systems of law prevailing, I care not in what country, profess to be founded upon principles of morality, and upon principles of justice. Does it follow from that that every principle of justice, as one nation or another may view it, or every principle of morality, as one nation or another may view it, forms part of international law? By no means. International law, properly so called, is only so much of the principles of morality and justice as the nations have agreed shall be part of those rules of conduct which shall govern

730 their relations one with another. So far as they have by agreement incorporated into the rules which are to regulate their mutual arrangements, relations and conduct, and so far only, can there be said to be an incorporation of the rules of morality and of justice, as to which nations as well as men differ: so far and so far only can they be said to be incorporated into international law. In other words, international law, as there exists no superior external power to impose it, rests upon the principle of consent. In the words of Grotius, *Placuit ne gentibus?* is there the consent of nations? If there is not this consent of nations, then it is not international law: and I think it is very easy to illustrate that that must be so—that without that consent there cannot be said to be an *imprimatur*, which can give force and efficacy to international law. If it were not so, international law would be in a constant state of flux and uncertainty.

The ideas as to morality of civilised countries do not progress *pari passu*. There are many things which, according to some states of society, justice requires, or morality requires, but which another state of society, which boasts of a proud civilization, declines to recognize. Two instances occur to me; I may refer to them in passing. Take the case of privateering. Privateering, as members of the Tribunal are aware, has again and again been pronounced by writers on international law, and by statesmen, as being the fruitful cover and source of piracy—as a foster-brother to piracy and, therefore, a thing to be put down; and in the memorable Declaration of Paris of 1856, as the Arbitrators will recollect, Prussia, Austria, France, Russia, Sardinia, Turkey and Great Britain, assembled in Congress in Paris, agreed so far as it rested with them, and recorded it in the Treaty there signed, in a condemnation of privateering as against international morals. I think it is true to say that, except the United States of America, in this present day there is no considerable Power in the world that stands out against a condemnation of privateering. Will the United States admit that because all these great Powers concurred that makes international law? No.

The United States, for reasons of its own which I am not at all concerned in discussing now, and which may be right or wrong, was not abreast with the other Nations in that line of thought. Take again another case, the question of the Slave Trade. As far as I know, there is no difference of opinion among any of the Powers which call themselves civilised, as to the immorality of, and the true character to be given to, the traffic in human beings. But Nations have differed as to the means which should be adopted for the purpose of endeavouring to put down that inhuman traffic.

As late as 1848, although the whole voice, I may say broadly, of humanity the world over has condemned the slave trade—and no country has gone farther to make sacrifices in the same direction, to its credit, be it said, than the United States—a Judge of the High Court in Great Britain, in the case of *Buron vs. Denman*, expressly declared that slavery is not an offence against the Law of Nations, and that ownership in slaves is not forbidden by the law of nations.

731 There is a curious comment made upon this proposition at page 7 of the written argument of the United States. After referring to a decision in the same sense in the American Courts, my learned friend Mr. Carter, alluding to Chief Justice Marshall, says—

The Supreme Court of the United States, speaking through its greatest Chief Justice, was obliged to declare in a celebrated case that slavery, though contrary to the law of nature, was not contrary to the law of nations; and an English judge, no less illustrious, was obliged to make a like declaration. Perhaps the same question would in the present more humane time, be otherwise determined

No, sir, it would not. It could not, until nations have given their consent to its being treated as a crime against international law. These distinguished Judges, Chief Justice Marshall, in one case, and Baron Parke in the other, were not the *makers* of international law: they were but the *interpreters* of international law; and a Court such as this, or any Court of Judicature more permanent in its character, could do no more than they did, because there is not the necessary consensus of nations stamping with its *imprimatur* the traffic in slaves as an offence and crime against international law.

Now, this brings out, as it seems to me, in very clear relief the qualifications that are absolutely necessary to be introduced into this much too wide and, therefore, unsound general proposition of my learned friend; and I would like at this stage to show a little more amply, in opposition to it, what our case is on this point. The questions here to be decided must, at each stage of the discussion, be brought into juxtaposition with a clear, definite conception of what the law of nations is. I refer the Court to the Judgment of the Lord Chief Justice of England, Chief Justice Coleridge, in a comparatively recent case, known by the name of the "Franconia case".

(It is reported in the 2nd Vol. of the Exchequer Division of the English Law Reports, under the name of *the Queen v. Keyn*. I have the report within reach, and it is at the disposition of any Member of the Tribunal who may desire to read it.) He there says, as was in fact said with certain variations of language by all, or nearly all, the thirteen judges who took part in that judgment, that international law is nothing more nor less than the collection of usages which the civilized states have agreed to observe in their relations with one another. The law of nations incorporates many principles of ethics and of natural law; but only such as it is agreed shall be incorporated form part of that law. The phrase of Grotius, *placuit ne gentibus*, sums up the only possible and the only true idea of the law of nations; and when text-writers and theorists and diplomatists assert that such and such a usage is recognized by the law of nations, that such and such a usage is opposed to the law of nations, that such and such a right exists under the law of nations, in each case the criterion is not whether the rule so expressed, or the usage or the right so asserted, is humane, or is just, or is moral, the sole question is whether it has received the assent and consent of civilized nations: *placuitne gentibus?*

Now, side by side with this conception of the law of nations, there is going on in the world a gradual change and a gradual growth of opinion. Nations are changing their customs, acted upon by external circumstances of their time, influenced by writers and thinkers, who in their turn are influenced by the circumstances of their time; and so there is a gradual formation of a body of opinion which helps to form in the future, aids and stimulates in the future, the recognition by this or by that extension of some principle which may afterwards be brought within the area of international law. There may be opinions, or doctrines, or usages, which perhaps are making their way in the world, are perhaps appealing more or less successfully to the sympathy of thinkers in the world, which are not yet part of the Law of Nations, because nations have not consented to them. They are not the Law of Nations, but only the material out of which, it maybe, at some future time some new principle of the Law of Nations may be developed as the world thinks wise; and I point to this for the reason that my learned friend in the citations from international writers that he has made, and in a much larger number which are given but to which he did not refer, did not

draw that distinction which must be drawn between those writers and authorities, (I think erroneously called authorities), who deal with the subject with a view to discover the metaphysical grounds, the ethical reasons which may be advanced in support of this or that view, and those writers (much less interesting but much safer guides) who confine themselves to laying down what rules have in fact obtained the consent of nations. Therefore, it is important to call attention to the fact that because various writers are constantly propounding ideas of their own, suggesting these ideas as conformable to laws of natural reason and right justice, because they are convinced that their views on those subjects are right,—yet they are not to be accepted as authoritative exponents of what the law is, because neither doctrines derived from what is called the law of nature, nor philanthropic ideas as to what is just or humane, nor the opinions of text-writers however eminent, nor the usages of individual States even if submitted to and followed by other individual States, nor precedents, nor single instances,—none of these, nor all combined, constitute International Law at all; although, as I have said, they may help to stimulate the growth of public opinion among civilised communities, the outcome of which at some future stage, by means of some future development, may be the incorporation of these views, wholly or partially, into International Law.

Now, Mr. President, I thought it well at an early stage, as I must recur to this later, to state in this general way the propositions which have to be discussed. But there is one other matter as to which I am glad to say I also find myself in complete agreement with my learned friend Mr. Carter.

733 The PRESIDENT.—First may I beg to put a question? You speak of International Law as comprising the customs and usages of nations, on which different nations have agreed.

I suppose you mean not only by written agreement, but also by right of usage?

Sir CHARLES RUSSELL.—Certainly. When I say “to which they have agreed”, of course, I mean not merely or necessarily by a formal or express or written agreement, but by any mode in which agreement may be manifested, by which the Tribunal may arrive at the conclusion that they have so agreed.

Senator MORGAN.—Including acquiescence?

Sir CHARLES RUSSELL.—Certainly. I use “agreed” in that broad and general sense.

Lord HANNEN.—As a question of evidence.

Sir CHARLES RUSSELL.—As a question of evidence: the question always is, *placuitne gentibus*? You may prove that it has pleased the nations so to agree by any method by which that can be actually established; by express agreement, or by usage, usage long and generally concurred in, and so forth.

I was saying there is one other point on which I find myself in agreement with my learned friend, and that is that the mode in which this question is to be determined by this Tribunal is infinitely more important than the question itself; infinitely better were it for the world that the seals should be exterminated, and that the articles of luxury which are derived from them should perish from the face of the earth—infinitely preferable were it that that should happen than that this Tribunal should defect a hair's breadth, in the decision of the questions, from the true line of law. Now the importance of this question has been so often referred to by my learned friend, in language of great exaggeration, that I must beg permission for a few moments to reduce

Importance of subject to mankind over rated by United States.

it to something like what we conceive to be its just and true proportions. My learned friends have spoken of this fur-seal industry, and of the supply of fur-seal skins for the benefit of mankind, as if, were that supply to cease, civilization would receive a rude shock. I have only to say that fur-seal skins are not necessary to civilization, or to the happiness of mankind in this world or the next; that so far as the European uses of seal skins are concerned, I believe I am right in saying that it is a luxury or a benefit that mankind, at all events in this part of the world, has only enjoyed for less than 40 years. I think I am right in saying that it was a distinguished naturalist, Mr. Frank Buckland, who about the year 1856 discovered a method by which the longer and coarser protective hairs, which formed part of the pelage of the fur-seal, could be removed without injury, so as to disclose the closer and softer and more luxurians fur which forms the rest of the pelage—that it was only then that it came into use to any considerable extent in Europe at all.

734 Civilization went on before the advent of the fur-seal: civilization will go on if it should turn out, and we should be sorry if it so happened if it could be avoided, that the seal species should cease to exist.

I want to point out that although my learned friends have been entering into elaborate calculations as to the cost of Alaska to them, and as to the value of Alaska to them being dependent on its fur-seal fisheries, when Mr. Sumner, a well known, and I need not say distinguished United States Statesman of that day, was recommending and justifying to the legislative body in the United States the purchase of Alaska, the references to the fur-seal were of the very faintest description.

He points to the fact (it is to be found in the first volume of the Appendix of the British Case, at page 79) that various animals were to be found in the Alaska region. He refers to the sea-otters, river beavers, land otters, black foxes, black-bellied foxes, red foxes, polar foxes, lynxes, wolverines, sables, swamp-otters, wolves, bears, muskrats, seals—those are hair seals, as you will see in a moment—and so on. And lower down he refers to fur-seals, land-otters, sea-otters, walrus teeth and so on, and descants with great ability and clearness upon these various matters, but saying comparatively little about the fur-seal.

He then refers, on page 82, to what he considers the real value, namely, the *fisheries* in Behring Sea—the fisheries, that is to say, strictly so called. He says:

I come now to the Fisheries, the last head of this enquiry and not inferior to any other in importance: perhaps the most important of all. What even are sea otter skins—

Those were, the President will remember at that time, much more valuable than any other skins.

by the side of that product of the sea incalculable in amount, which contributes to the sustenance of the human family.

In very eloquent language he then descants on the great variety of fish in these regions—the halibut, salmon, cod, and the rest. I should not feel justified in troubling the Tribunal to read this at any length.

Senator MORGAN.—Sir Charles, did Mr. Sumner insist that they could sell, and the United States could buy those fisheries?

Sir CHARLES RUSSELL.—No, I do not think he does. He was a much too reputable statesman for any wild proposition of that kind.

Senator MORGAN.—Then we had access to them without buying them.

Sir CHARLES RUSSELL.—Yes, you did not buy the fisheries, but the Alaska territory and such rights as were incident to it.

Senator MORGAN.—I was enquiring what Mr. Sumner said.

Sir CHARLES RUSSELL.—Well, Mr. Sumner was a statesman, and he nowhere says that you bought the fisheries in the open seas.

Senator MORGAN.—I do not know why he alluded to the subject, unless he attached some value to the purchase of Alaska.

735 Sir CHARLES RUSSELL.—Obviously, but what he was saying was this: Here is a great territory, Alaska, purchased by us, with a great sea-board, opening upon an ocean rich in all those things that the sea contains for the benefit of mankind—fish of various kinds: opening therefore to our increasing population new avenues of industry, new opportunities of enterprise and new fields of commerce.

But it never entered the mind of Mr. Sumner to allege that, in purchasing Alaska, he was purchasing the property in the fish in the sea, or, indeed, in any of these things that I have enumerated; and he will not be found to have said anything of that kind; there was no idea that they were purchasing the exclusive rights of fishing in the open waters of the ocean; and especially there was no idea that they were buying in consideration of the value which the territory derived from the fact that furseals resorted there, as I will now proceed to show very clearly.

In 1876, a Committee of Ways and Means was appointed by the House of Representatives. And a resolution of the House was referred to it directing an investigation into certain matters relating to the lease by the United States Government to the Alaska Commercial Company, and this is the Report of that Committee of Ways and Means: (it is referred to on page 70 of the British Counter-Case).

When the proposition to purchase the Alaska territory from Russia was before Congress, the opposition to it was very much based on the alleged barrenness and worthlessness of the territory to be acquired. It was supposed that though there might be many political reasons for this addition to the American Pacific possessions, there were not commercial or revenue advantages. *The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority,—* Under our system, however, we have a very different result.

And, on the same page 70, you will find, Mr. President, an extract from, I think, the most authoritative book on the history of Alaska, I mean, Mr. Bancroft's, in which he refers to a Committee of apparently a similar kind which was appointed in 1868. There he says:

The motives which led the United States Government to purchase them (Russia's American possessions) are thus stated in a report of the Committee on Foreign Affairs, published 18th May, 1868. They were, first—

and this answers, if I may respectfully say so, Senator Morgan's question as to what were the objects of the purchase.—

the laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays and rivers of the Western World, the refusal of Russia to renew the Russia-American Fur Company in 1866; the friendship of Russia for the United States; the necessity of preventing the transfer, by any possible chance, of the north-west coast of America to an unfriendly Power; the creation of new industrial interests on the Pacific necessary to the supremacy of our empire on the sea and land; and finally, to facilitate and secure the advantages of an unlimited American commerce with the friendly Powers of Japan and China.

So much as to the motives.

Mr. Justice HARLAN.—It is not your point that the United States was unaware of the existence of the seals there, but that they did not purchase specially with reference to their value?

Sir CHARLES RUSSELL.—Quite so. I do not suggest they did not know fur seals were there. I am endeavouring to reduce to what I consider to be its just proportions the character of the question that is involved.

The PRESIDENT.—In what you have just read, there is a phrase about the American Fur-seal Company which shows that the American Fur-seal Company, which was refused a new lease by Russia, had an influence in the transaction of 1866 or 1867; and that shows I think that the American Government were awake to the importance of fur-sealing at the moment. I do not mean to say it was the only motive, of course, because there are a number of different motives which are given; but the mention of that motive shows that the fur-seal question was not immaterial even at that time.

Sir CHARLES RUSSELL.—My point is not at all that the United States did not know of these Islands, or may not have thought that there was some value in the fur-seal industry; it may have been considered to some small and limited extent; but I am citing Mr. Sumner's speech to show that he does not put that in a prominent place. I cite the Report of the United States Committee of Ways and Means to show the same thing; and, lastly, I cite the Report of 1876 in which these words are expressly used:

The value of those seal islands was not considered at all. Russia had derived but little revenue from them, indeed a sum not sufficient to pay the contingent expenses of maintaining the official authority.

The PRESIDENT.—Yes. I referred to the Committee of 1868.

Sir CHARLES RUSSELL.—I am aware you did, sir; and I was referring to it also, to show that in 1868 they gave as their reasons for the purchase—

The laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays, and rivers of the western world; the refusal of Russia—

The PRESIDENT.—Yes, that is the phrase; and I point it out to your especial attention as indicating the influence of that company, which was an American company, upon the American Government*,—that they had been made aware of the importance of these fur-seal fisheries.

Sir CHARLES RUSSELL.—I quite follow what you mean sir. I am not going at this moment to be diverted from the line I am pursuing; but it will be afterwards apparent that the company there referred to had much wider interests than in the fur-seal; they had trading interests all along the coast, and were succeeding one of the original Russian companies to a large extent, and from their point of view the fur-seal industry was only a part, though not a very considerable part of their affairs. That is all I meant to convey.

Then, the later Committee (as will be seen on the top of page 71 of the British Counter-Case), say: "The value of those seal islands was not considered at all."

The PRESIDENT.—Yes; that comes in much later; the other one was more contemporaneous with the transaction.

Sir CHARLES RUSSELL.—Then, finally, on the same page 71, Mr. Elliott, who is referred to very often by some of the witnesses called on the part of the United States as the sole authority upon the subject

* But see page 741-2.

of fur-seals, says, in the beginning of that paragraph. "Strange ignorance of their value in 1867." This, you see, is a Report made to the Government of the U. S., and recorded in 1881 among the United States Papers.

Considering that this return (that accruing from the fur-seal industry) is the only one made to the Government by Alaska, since its transfer, and that it was never taken into account, at first, by the most ardent advocates of the purchase of Russian America, it is in itself highly creditable,

and so on; and then he refers to Mr. Sumner, and thus concludes:

Therefore, when, in summing all this up, he makes no reference whatever to the seal islands, or the fur-seal itself, the extraordinary ignorance at home and abroad relative to the Pribilof Islands can be well appreciated.

He is not accurate in saying that Mr. Sumner makes no reference to the fur-seal; he does, and I have read the passage in which Mr. Sumner makes reference to it, but as a matter of comparatively not much importance.

Mr. PHELPS.—As you refer to Mr. Sumner, have you any objection to read the paragraph in his speech at the top of page 81?

Sir CHARLES RUSSELL.—It is a very long speech, and it would probably induce me to read some other passages also; but I will do it with pleasure. Do you mean the passage which begins—

The seal, amphibious, polygamous, and intelligent as the beaver, has always supplied the largest multitude of furs to the Russian Company?

Mr. PHELPS.—Yes; that is the passage.

Sir CHARLES RUSSELL.—I will read it, if you like, although it is giving an importance to the point which I did not intend to attribute it.

Among the furs most abundant in this commerce are those of the fox in its different species, and under its different names.

And then he deals with that, and says some of its furs are among the most precious; and he describes the various kinds. In the next paragraph he says,

Among the animals whose furs are less regarded are the wolverine—

And then he goes on,

Among inferior furs I may include that very respectable animal, the black bear, and so on.

738 Then he talks of the beaver, "amphibious and intelligent", which has a considerable place in commerce, and also a notoriety of its own, and so on. And in the next paragraph,

The marten is, perhaps, the most popular of all the fur-bearing animals that belong to our new possessions.

And then he goes on:

The seal, amphibious, polygamous, and intelligent as the beaver, has always supplied the largest multitude of furs to the Russian Company. The early navigators describe its appearance and numbers. Cook encountered them constantly. Excellent swimmers, ready divers, they seek rocks and recesses for repose, where, though watchful and never sleeping long without moving, they become the prey of the hunter. Early in the century there was a wasteful destruction of them. Young and old, male and female, were indiscriminately knocked on the head for the sake of their skins. Sir George Simpson, who saw this improvidence with an experienced eye, says that it was hurtful in two ways: first, the race was almost exterminated; and secondly, the market was glutted sometimes with as many as 200,000 a year, so that prices did not pay the expense of carriage. The Russians were led to adopt the plan of the Hudson Bay Company, killing only a limited number of males who had attained their full growth, which can be done easily, from the known and systematic habits of the animal. Under this economy seals have multiplied again, vastly increasing the supply.

I may supplement this on my own account with another passage.

I mention the sea-otter last; but in beauty and value it is the first. In these respects it far surpasses the river or land otter, which, though beautiful and valuable, must yield the palm. It has also more the manners of the seal, with its fondness for sea-washed rocks, and with a maternal affection almost human. The sea-otter seems to belong exclusively to the North Pacific. Its haunts once extended as far as the Bay of San Francisco, etc.

The PRESIDENT.—May I be allowed to remark that the fur-seal which is actually in fashion seems to be used as a successor to the sea-otter. You are aware that in the French language, by the custom of French furriers, a seal skin is called *peau de loutre*, which means otter skin and not seal-skin. No lady would think of asking for *peau de phoque*.

SIR CHARLES RUSSELL.—The sea-otter has practically disappeared.

The PRESIDENT.—Yes; it has practically disappeared.

SIR CHARLES RUSSELL.—It has disappeared like the buffalo and other animals.

Mr. COUDERT.—Like the southern seal.

Senator MORGAN.—You made some reference to the statesmanship of Mr. Sumner as being superior to the conception, as I understood you, that there could be any purchase and sale of fisheries in the open sea. That opinion has not always prevailed among the statesmen of the United States, I will say, for the reason particularly that in our Treaty of Peace with Great Britain in 1783 we found it necessary to incorporate in the treaty the following:

It is agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank and all the other banks of Newfoundland, the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries are accustomed to fish.

739 Of course if we had the open natural right of all mankind to fish in the sea that provision was entirely unnecessary in that Treaty. It was insisted on and put in.

The PRESIDENT.—I believe, Senator Morgan, it was an allusion to previous Treaties with France.

SIR CHARLES RUSSELL.—I am much obliged to you, sir. That question of the disputed fishing rights between the United States and Canada on the Eastern coast of America is an illustration or an analogy—I do not know which to call it—relied upon by my learned friends to which I will come in the proper order of argument; but may I, as it has been introduced in this connection, point out that what I did say in reference to Mr. Sumner and Mr. Sumner's statesmanship was, that the extravagant idea never entered into his head that by acquiring Alaskan territory he was acquiring fishes or other free swimming animals in the sea. That is what I think I conveyed, or at all events what I intended to convey; but if I may be permitted to anticipate, the President has rightly, in a sentence, indicated the nature of the question dealt with in the Treaty referred to by Senator Morgan. The state of the case is shortly this: That, in conflict with France, Great Britain, then owning the colonies of America, claimed to have acquired, partly by concession, partly by Treaty: partly by assertion of a right, acquiesced in, though to some extent disputed, certain exclusive rights of fishery.

Senator MORGAN.—But they were a hundred miles away from the coast.

SIR CHARLES RUSSELL.—I do not care where they were, with great deference; it is entirely immaterial to the point I am upon. Then came the American rebellion, and the independence of America. It thereupon

became a sovereign Power, and it claimed that as it had borne its part when a colony in acquiring these rights and in exercising these rights, it was entitled, as an independent Power, to a continuance of those rights which as a colony it had previously enjoyed. The contention on the part of Great Britain was that it had lost its right by what it was pleased to call its act of rebellion, and that it had no right to share in those rights at all; and that matter was ultimately arranged by Treaties, only one of which you have referred to, but which I will have to discuss at a later stage.

Senator MORGAN.—The question in my mind was this, Sir Charles: whether or not Great Britain and the United States had not in this Treaty of peace established the proposition that there was such a thing as ownership in the fisheries that were 50 to 100 miles away from the land, which became the subject of division of property between the mother government and the colony when the independence of the colony was accomplished?

Sir CHARLES RUSSELL.—Absolutely no assertion of property in fishes or in any other animals whatever. There was, I agree, an assertion of rights of exclusive property undoubtedly, which is a very different matter. I do not need to tell the Tribunal that nations have 740 many times—and no two countries perhaps more prominently than Spain and Great Britain—claimed exclusive control of large stretches of the sea; but they have never, so far as I know, claimed the property in free swimming animals in that area, or that they were the property of either Government, or of any individual subjects of that Government.

However, that is going rather far afield. But I am upon a question which I desire to try to follow with some closeness of reasoning. I am now dealing with the exaggerated importance given to this question; and I assume, as the President said, that this question of the fur-seals may have been one amongst many others considered in the United States, but as far as I see not pre-eminently in the minds of the United States advisers, upon the acquisition of Alaska. Their main motives undoubtedly were the motives which were set out in that Report of 1868, that it was opening a large field for new enterprise, an extent of commerce and new pursuits to a rapidly extending and growing population. But what followed the acquisition, what immediately followed and what my learned friends have themselves dwelt on as immediately following the acquisition of Alaska, shows how little conscious they were of the value, as they now conceive it to be, of these islands. What happened? In the year following the acquisition, 242,000 seals were killed upon the islands, and that not by the representatives of the United States or by persons authorized by them. In the following year, 1869, 150,000. In the following year, 1870, 87,000; making a total in three years of close upon five hundred thousand.

Mr. FOSTER.—1870 was under the lease.

Sir CHARLES RUSSELL.—1870 was under the lease; perhaps so. These are figures with which I have no doubt Mr. Foster is familiar. They are taken from the published authentic accounts of the United States, the Tenth Census Report, and certain executive documents which are referred to.

Mr. FOSTER.—We have disputed those figures in our case.

Sir CHARLES RUSSELL.—Well, I do not know what you have not disputed; but since it is put in that way, I had better give the reference.

The PRESIDENT.—The general purport is admitted, I believe.

Mr. FOSTER.—I would not have interrupted except that Sir Charles referred to my knowledge of the figures.

The PRESIDENT.—But, General Foster, I believe that the general purport is admitted, that in those two years there was a great destruction of the fur-seals.

Mr. FOSTER.—There was a great destruction in 1868, and a lesser destruction in 1869.

Sir CHARLES RUSSELL.—I have read the figures, 242,000 in 1868; 150,000 in 1869. The figures for the first year are taken from the Tenth Census Report of the United States, page 40. The figures for the second year are taken from Executive Document No. 32, page 37, of the

41st Congress. There need be no comment about these figures. 741 But there is another consideration. Who knows what part in the future, as a matter of relative importance, this seal fishery may have in the economy of the world, even from the point of view of the interest of the United States? We know that the United States have, all along this Alaskan territory, great salmon rivers, with nascent industries, which will only reach their full development when the growing population of the United States overflows to these to a large extent still uninhabited regions.

Who is to say that this fashion of the day, which may change tomorrow, may not entirely disappear: just as the fashion of the beaver disappeared when it was found that the ingenuity of man, by the invention of the silk hat, had supplied an article that was quite preferable to the "beaver"? Who knows that, compared with the permanent interest of the world in the great food supplies so much more largely in recent than in former years derived from the plentiful bounty of nature in the bosom of the seas, this ocean seal industry may not in a very short time indeed sink into a position of insignificance; and signs are not wanting that the citizens of the United States themselves regard it in that light. I should like to refer in this connection to only one manifestation of that opinion. I refer to the Report of the Board of Trade of Port Townsend, a port of Washington Territory, which you know, is immediately south of British Columbia, and abutting upon Puget Sound. I am referring to page 71 of the second part of Volume III of the Appendix to the British Case.

We do not believe that the lease of the "Pribilof Islands and adjacent waters" ever was meant or intended to mean the whole waters of Behring Sea; but that the limit of one marine league from the shore is the recognized limit, outside of which the waters are known to the civilized world as the high seas, where our citizens should be encouraged to pursue their avocations of fishing and hunting. It is shown by the reports of Government officials in the publication of the Tenth Census that the destruction of fish life by seals, sea lions, and other animals whose sole food is fish, is very largely in excess of the amount of fish taken by the whole of the fisheries of the United States; and to protect these ravenous animals is to cause the destruction of enormous quantities of nutritious food, which should be utilized as a means of supporting the lives of the millions of people in these United States.

The Chamber of Commerce consider that the order of the Government by act of Congress closing Behring Sea is an act, not for the benefit of the people to secure them a cheap article of food, but is for the sole benefit of a simple monopoly, to enable them to supply articles of luxury for the fashionable clothing of the rich. We believe this act of Congress to be a species of class legislation for the benefit of the wealthy few, and as such is opposed to the principles of sound policy; and we protest against its further continuance.

These views may be right or wrong.

Mr. PHELPS.—What city is that?

Sir CHARLES RUSSELL.—Port Townsend in Washington Territory.

Mr. PHELPS.—I did not know there was such a place.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you now.

742 Sir CHARLES RUSSELL.—Mr. President, to prevent a possible misconception, I wish to refer to the Report of the Committee of 1868, which has already been mentioned. It refers to the refusal of the Russian Government to renew the lease to the Russian American Company. The possible misconception I wish to guard against is the supposition that because the word “American” is used it was in any sense an American Company. It was not—it was the representative of the original Russian Company.

Mr. Justice HARLAN.—Of the Russian Company under its first name?

Sir CHARLES RUSSELL.—Acting under successive Russian Charters, but not in any sense an American Company or owned by American citizens. I thought it possible the President might have had a different idea in his mind.

The PRESIDENT.—I thought in fact that Americans had got into the company.

Sir CHARLES RUSSELL.—No sir they had not. One other word.—I pay the greatest deference, I need not say, to what any member of the Tribunal calls my attention to, and in reference to the observation of Senator Morgan that the United States supposed that it was buying the fisheries or the fishes in the Behring Sea (as to which I used perhaps forcible language in suggesting it was impossible to suppose a gentleman of Mr. Sumner’s knowledge and statesmanship could have entertained any such idea), I would refer Senator Morgan to page 85 of the report of the same speech to which I previously adverted—(it is in volume I of the Appendix to the Case of the British Government)—in which he points out, quite accurately, what are the advantages which the owners of territory enjoy in relation to fisheries. It is in this language:

As no sea is now *mare clausum*, all these—(that is to say the fisheries to which he is adverting)—may be pursued by a ship under any flag, except directly on the coast and within its territorial limit. And yet it seems as if the possession of this coast as a commercial base must necessarily give to its people peculiar advantages in this pursuit. What is now done under difficulties will be done then with facilities, such at least as neighbourhood supplied to the natives even with their small craft?

That is to say, the natives even with their small craft and with their imperfect appliances, by reason of their residence on the coast, had peculiar advantages in these fisheries, although as a matter of law and of right they were open to all the world. So he says the possession of Alaska will give special advantages to them in that regard.

It is right to point out that he uses this language in reference to fisheries in a more limited sense than the sense in which it has been used here. My learned friends have spoken of the Alaska seal fishery; their Statutes have treated the fur-seal industry as a fur-seal fishery, and so forth. Mr. Sumner was here particularly referring to fishery in a more limited sense; he was referring more particularly and pointedly to fish of various kinds which he mentions, but he also mentions, among others, whales; and there is no reasoning in that paragraph which would
743 not equally apply to any free swimming animal which you can find in the sea.

Senator MORGAN.—I should be very much surprised to find that Mr. Sumner had been digressing from the doctrine established at the time we obtained our independence, and was traversing the idea that there was progress in international law.

Sir CHARLES RUSSELL.—I am still endeavouring to get the Tribunal to realize something like a just view of the proportions of this case, and to discount the exaggerations which I suggest have been put forward

on the part of the United States. Now I have to call attention to the fact that when I mentioned the possible case of it being found that this industry of fur sealing, if encouraged and the species largely multiplied, might be found to conflict with more important general interests, I was not drawing upon my imagination, because we have actual experience in the legislation of other countries, that it has been found necessary to offer rewards for the extinction of animals of the same class. I would refer to the illustrations which are given, which the Tribunal will find in Vol. I of the Appendix to the Counter Case of Great Britain, page 177. The Tribunal, of course, will be prepared for the statement from me that we do not shrink from the legitimate consequences of the propositions that we are advancing.

We say, first of all, that even if the result (apart from any question of regulations which I am not now dealing with at all), of the unchecked exercise of what we claim to be our right of pelagic sealing were to be the extinction of the fur seal, that would be no reason for prohibiting the exercise of our right, if the right exist. It may be the foundation of a consideration or argument why the right does not exist; but if the right exists, and if the consequences of its exercise be the extermination of the fur-seal, we do not shrink from those consequences.

But the point I am now upon, as, of course, you will see, is somewhat different. I am pointing out what other countries have ^{Destruction of the seal may be necessary.} found it necessary to do in this regard, and you will find the legislation in relation to the Baltic fisheries, at page 177 of volume I of the Appendix of the British Counter Case. Now I ought to tell the Court that this is legislation relating, not to the fur-seal, but to the hair-seal. It makes no difference in the argument, as the Tribunal will at once see. The hair-seal is an animal pursued for the sake of its skin. Its skin is an article of commerce. It may not be so important—I am not able to judge of it relatively—as the fur-seal, but it is an article of commerce for two reasons: first for the sake of its pelage, and next for the sake of the oil which can be extracted from its body; and notwithstanding an industry largely pursued, this is the legislation:

The constantly increasing number of seals on our Baltic Coasts has become so serious a danger to our coast fisheries that it appears high time to find ways and means to keep these injurious animals away from our shores.

Ten or fifteen years ago, when our fishermen still underrated their destructiveness, and at best were amused to see one of them, it was hardly thought possible that these animals would one day endanger the fisheries on the coast of Sleswick Holstein, where they formerly appeared only in small numbers, and at places where there was not much chance of their injuring the fisheries.

It is not easy to answer the question as to how the evil can best be remedied, for even the use of poisoned fish as bait (apart from the danger connected with this method) would not be of any use, because the seals are very choice in the selection of their food, and would only take to the dead bait if there was absolutely no chance to get fresh fish, a case which will hardly ever occur in the open sea. It might be recommended to make an experiment with bow-nets made of galvanized iron wire, painted brown, like the color of the bow-nets usually employed. The shape of these bow-nets should be that of the common bow-nets used for catching cod, but the entrances to the different chambers should be so arranged as to make it easy for the seals to slip in.

And thereupon there is a suggestion by Mr. Hinckelmann as to what ought to be done.

Mr. Justice HARLAN.—Before you leave that, Sir Charles, I should like to ask, do you know whether that report was supplemented by legislation?

Sir CHARLES RUSSELL.—That I do not know. We find that there is legislation in the case of Denmark. I am not sure about the other case, but I will enquire as to that.

Senator MORGAN.—Is any of that legislation in force now?

Sir CHARLES RUSSELL.—I have just said that I am not sure whether it was followed by legislation.

Then as regards Iceland this is the note:

The attention of the Legislative Assembly was not specially directed to this matter of protecting the fisheries, nor were laws enacted on this subject before 1885; and the present laws are in many instances primitive, imperfect, and inconvenient, according to the conditions of the country. One of the worst features is that in regard to seals, which are so injurious to the salmon fisheries. This is contained in section 4 of the following statute. The defective point about this bit of legislation is that in all salmon rivers (with one exception) and their mouths, where there are seals there are also seal-catching places, so that the law is of little or no benefit to the salmon, as it is forbidden to disturb the seals in the places where they are at all easily accessible.

Section 4 referred to is as follows:

Section 4: In rivers and their mouths where there are salmon, it is allowed to shoot or frighten seals, with the restriction that the inviolability of breeding and seal-catching places, which are thus especially proclaimed, must not be infringed upon, except with the penalty of full damages, according to the estimate of good men nominated by the judge and sworn in court.

Then as to Denmark there is this:

Owing to rewards now granted by the Fishing Society of Denmark, amounting to 3 kroners for each seal killed, according to the Copenhagen correspondent of our contemporary, "Industries" the extermination of seals is now being energetically pursued in Danish waters. It appears that in those localities where the fishery industry has been pursued with least success the seals most abound. A seal is seldom seen in the neighborhood of Middelfart, in the Little Belt, as the fishermen in that neighborhood are very active in fishing and seal hunting.

Au contraire, on the small island of Hosselo, north of Zealand, one man sent in the heads of no less than 120 seals, while another man sent in 40 within the last ten months. During this period 810 seals have been killed.

745 And, finally, there is a citation on the same page, taken from a United States paper of February of 1892.

The bay fishing in Essex County, Massachusetts, has been so seriously injured by the alleged depredations of seals that the authorities offered a bounty of 1 dollar each for killing them. During 1891 the fishermen killed forty-four on the coast, and in the rivers of the county.

I do not find there was any difference made between males and females; or that the laws of Nature, so strictly insisted upon by my friend Mr. Carter, were regarded as standing in the way of what was a necessary attempt to protect a very valuable industry. I leave this subject with only one concluding suggestion. All the members of the Tribunal may not be aware—many of them I know are aware—that along the coast of Washington in United States territory, and along the coast of British Columbia, (and I think growing industries of the same kind are springing up farther north), are to be found great salmon fisheries, and great canning industries carried on in connection with these industries. I have myself seen them on the Willamette River: they are on the Columbia River: they are on the Iradis River—they are on several other rivers along that coast. Now can it be doubted—is it possible even to suggest it?—that if it were found that those seals were, in a serious degree, interfering with these canning industries, either upon the British Columbian Coast or upon the Alaskan Coast, that it would not be perfectly within the right of those who were interested, by all legitimate means, by all means in their power, short of means which would do injury to the rights of some one else or cause unnecessary or malicious injury to any one else, to do what they pleased to exterminate these animals which were preying upon and injuring what they regarded as an important and valuable industry?

Senator MORGAN.—Do you recollect whether Canada passed any Statutes offering a reward for killing seals, or whether they are in operation?

Sir CHARLES RUSSELL.—I will enquire: I am not aware of any. I rather think there are some Regulations in that sense—(whether they amount to Statutes or not, I will not say)—relating to the fisheries on the east coast; but I will enquire and endeavour to supply the necessary answer.

Now I pass from that topic, in the consideration of which I have endeavoured to get the mind of this Tribunal in a fitting frame to consider according to its intrinsic merits and just proportion what this question of pelagic sealing really is. There are some other preliminary matters which I must also refer to. The Case, the Counter Case, the Argument, printed and oral, of the learned counsel of the United States have been full of denunciations of pelagic sealing. It has not only been denounced as inhuman, but each act of the pelagic sealer has been denounced as a crime and a great moral wrong—a little worse than murder, and almost as bad as piracy. Now I wish to examine this for a moment or two, and see whether there is not pervading this style of argument the same kind of exaggeration which was addressed to the subject of the industry itself.

We start with this initial fact, that the pursuit of the fur-seal by means of pelagic sealing is the oldest pursuit of the fur-seal historically known. We start with that fact. It is a pursuit which goes back (to use my friend, Mr. Carter's expression) to prehistoric times. It is a pursuit followed by the aboriginal inhabitants along the coasts in question. But there is also something more to be said for it. My friend Mr. Condert was sympathetic, as he always is, in his denunciation of the evil caused by the destructive agencies of man as regards seal rookeries in other parts of the world. How stand the facts? Is pelagic sealing, whatever its faults, accountable for that? No. In every one of the cases which have been referred to, the cause of the extermination of the fur-seal species was the indiscriminate slaughter *upon land*. I am not suggesting for a moment that there is not a difference between the system pursued by the United States and their lessees on the Islands and that pursued in the indiscriminate slaughter on the other rookeries in the world. But the fact remains that it has been slaughter *upon land*, and in no case slaughter *at sea*, that has brought about the extermination of the seal species in any of its accustomed rookeries.

Further: it is true to say that discrimination cannot be pursued in relation to pelagic sealing—at least *practically* cannot be pursued. I presume it would be possible to distinguish a full-grown male seal from a young seal, but I take it to be common ground between us that, taking the sizes of seals two and three years of age, it would not be practically possible to distinguish between a female and a male in the water. That is an advantage, *pro tanto*, in favor of land killing. But are there no disadvantages in land killing?

I have been unable to repress a smile when reading the beautifully descriptive, but most imaginative accounts, which are given in the literature of the United States, as to the merits and blessings of killing on land. In one passage the writer has gone to the length of suggesting that the seal herd, grateful for the protection of the United States, reposing with confidence in the humanity of man, had entered into a treaty with the United States—the word “pact” I think was used—that they would offer up a certain proportion of their skins yearly as a

grateful tribute, in recognition of the protection that they derive from the beneficent rule of the Agents and Lessees of the United States.

Now, from these imaginative pictures highly creditable to the human sympathies, and to the imaginations also of those who composed them, I would like to turn in prosaic fashion to the actual facts. What are the actual facts? I am not now dealing at all, the Tribunal will understand, with any considerations which go to build up, in the estimation of the United States, their claim to property. I am simply considering whether there are not certain matters which ought to be borne in mind by this Tribunal in order that it may be able to consider

747 this question of pelagic sealing without having its reason distorted by passion or prejudice: whether there are not other facts which ought to be presented to it, in order to mitigate the tale of supposed horrors attendant upon the practice of pelagic sealing: horrors from which as they contend (but contend untruly as we submit) killing on land is free. Now for this purpose I may refer the Tribunal at once to chapter 14 of the Counter-Case of the British Government. It begins on page 260. Its subject is: "Management of the Pribilof Islands by Russia and the United States". On page 261 there is a general statement, which I will not trouble to read, of the method of driving which is there practised, as the most injurious feature of the system practised on the Pribilof Islands, and it then proceeds to point out—citing authorities upon the subject—its unnatural and destructive character.

True nature of management and killing on the Islands.

But I turn from those general arguments and general statements to page 262, where citations, very *a propos*, are taken from the reports of Mr. Elliott beginning as far back as 1872, that is to say five years after the acquisition of Alaskan territory from Russia. He says:

A drove of seals on hard or firm grassy ground, in cool and moist weather, may be driven with safety at the rate of half-a-mile an hour; they can be urged along with the expenditure of a great many lives, however, at the speed of 1 mile or 1 1/4 miles per hour; but this is seldom done.

Further on he speaks of the disposition of the old seals to fight rather than endure the panting torture of travel. and on the next page he writes:

The progression of the whole caravan is a succession of starts, spasmodic and irregular, made every few minutes, the seals pausing to catch their breath, and make, as it were, a plaintive survey and mute protest. Every now and then a seal will get weak in the lumbar region, then drag its posteriors along for a short distance, finally drop breathless and exhausted, quivering and panting, not to revive for hours—days, perhaps—and often never. During the driest driving days, when the temperature does not combine with wet fog to keep the path moist and cool, quite a large number of the weakest animals in the droves will be thus laid out and left on the track.

This prostration from exertion will always happen no matter how carefully they are driven; and in the longer drives, such as 2 1/2, and 5 miles from Zapadnie on the west, or Polavina on the north, to the village of St. Paul, as much as 3 or 4 per cent. of the whole drive will be thus dropped on the road; hence I feel satisfied, from my observation, and close attention to this feature, that a considerable number of those that are thus rejected from the drove, and are able to rally and return to the water, die subsequently from internal injuries sustained on the trip, superinduced by this over-exertion.

Then a citation is made from Lieutenant Maynard of the United States service. This is in 1874, that is to say eight years after the acquisition of the islands:

748 There has been a waste in taking the skins, due partly to the inexperience of the Company's Agent, and partly to accident and the carelessness of the natives. In making the drive, particularly if they are long on, and the sun happens to pierce through the fog, some of the seals become exhausted and die at such a

distance from the salt-houses that their skins cannot well be carried to them by hand, and are, therefore, left upon the bodies.

And the ancient Russian chronicler, to whom my friends Mr. Carter and Mr. Conder more than once referred with approval,—a cleric or bishop, I am not sure which,—Veniaminof, writing with reference to 1842, thus shewing that this is not a new idea, says:

Nearly all the old men think and assert that the seals which are spared every year *i. e.* those which have not been killed for several years are truly of little use for breeding, lying about as if they were outcasts or disenfranchised.

And Captain Scammon, also of the United States service, says:

The loud moanings of the animals when the work of slaughtering is going on begins description; in fact, they manifest vividly to any observing eye a tenderness of feeling not to be mistaken. Even the simple hearted Aleutians say that “the seal sheds tears”.

Those, you will see, are early strictures upon this method of driving. I now proceed to shew that they are methods which are continued, and that they are marked by as great cruelty and aggravation as formerly.

Mr. PHELPS.—As to one of these extracts, it is right to say we claim that is a false translation.

Sir CHARLES RUSSELL.—Which?

Mr. PHELPS.—The translation to which you alluded, of the Russian author.

Sir CHARLES RUSSELL.—Which is the one?

Mr. PHELPS.—Veniaminof.

Sir RICHARD WEBSTER.—We will get the original; we have never heard that before.

Mr. PHELPS.—It is in the Counter-Case. We have exposed it in the Counter-Case.

Sir CHARLES RUSSELL.—I do not recollect that. At present what I am concerned with is this: that this extract, I wish the Tribunal to understand, from Veniaminof is taken, and taken correctly, from the Census Report, which is an official document furnished to the United States. I understand my friend Mr. Phelps to intinate that in the way it appeared in that official document, it is erroneously translated.

Mr. PHELPS.—It is copied from Elliott's translation into the Report. The translation was made by Elliott.

Sir CHARLES RUSSELL.—I was stating it correctly, I think. Therefore what I understand is this: When we rely upon an Official document of the United States, my friend retorts upon us and says: “But the official of the United States has mis-translated some document which is referred to in that Report.” Be it so. If it is so ascertained to be, let it be made apparent.

749 But now I go on to the next page, 264, and there we have his later experience. He says in 1890—this is to be found in his Report furnished to us by the United States:

I can see now, in the light of the record of the work of sixteen consecutive years of sealing, very clearly one or two points which were wholly invisible to my sight in 1872-74. I can now see what that effect of driving overland is upon the physical well-being of a normal fur-seal, and, upon that sight, feel warranted in taking the following ground.

Would you be good enough to allow my learned friend, Sir Richard Webster, to read this page for me in order to give me a moment's pause?

The PRESIDENT.—Certainly.

Sir RICHARD WEBSTER.

The least reflection will declare to an observer that, while a fur-seal moves easier on land and freer than any or all other seals, yet, at the same time, it is an unusual and laborious effort, even when it is voluntary; therefore, when thousands of young male seals are suddenly aroused to their utmost power of land locomotion over rough, sharp rocks, rolling elinker stones, deep loose sand, mossy tussocks, and other equally severe impedimenta, they in their fright exert themselves most violently, crowd in confused sweltering heaps one upon the other, so that many are often smothered to death; and, in this manner of most extraordinary effort to be urged along over stretches of unbroken miles, they are obliged to use muscles and nerves that nature never intended them to use, and which are not fitted for the action.

This prolonged, sudden and unusual effort, unnatural and violent strain, must leave a lasting mark upon the physical condition of every seal thus driven, and then suffered to escape from the elubbed pods on the killing-grounds; they are alternately heated to the point of suffocation, gasping, panting, allowed to cool down at intervals, then abruptly started up on the road for a fresh renewal of this heating as they lunge, shamble and creep along. When they arrive on the killing-grounds, after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing; then when driven up into the last surround or "pod", if the seals are spared from cause of being unfit to take, too big or too little, bitten, etc., they are permitted to go off from the killing-ground back to the sea, outwardly unhurt, most of them; but I am now satisfied that they sustain in a vast majority of cases internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a station on the rookery, even if it can possibly run the gauntlet of driving throughout every sealing season for five or six consecutive years, driven over and over again as it is during each one of these sealing seasons.

Therefore, it now appears plain to me that those young male fur-seals which may happen to survive this terrible strain of seven years of driving overland are rendered by this act of driving wholly worthless for breeding purposes—they never go to the breeding grounds and take up stations there, being utterly demoralized in spirit and in body.

With this knowledge, then, the full effect of "driving" becomes apparent, and that result of slowly but surely robbing the rookeries of a full and sustained supply of fresh young male blood, demanded by Nature imperatively, for their support up to the standard of full expansion (such as I recorded in 1872-74),—that result began, it now seems clear, to set in from the beginning, twenty years ago, under the present system.

Sir CHARLES RUSSELL.—Now at a later stage and in a different connection I shall have to draw the attention of the Tribunal again to the statement at the bottom of page 264 of the British Counter-750 Case as to the certain destruction of its virility and courage necessary to the male seal for a station on the rookeries, as one cause which has contributed largely (with others I admit) to the deficiency in numbers.

Then on the same page is the Treasury Agent's (Mr. Goff) Report for 1890. This has nothing to do, you will understand, with the Report of Mr. Elliott. This is the independent Report of the Treasury Agent.

Sir RICHARD WEBSTER.

Now, in opening the season it is customary to secure all the two-year olds and upwards possible before the yearlings begin to fill up the hauling grounds and mix with the killable seals. By so doing it is much easier to do the work, and the yearlings are not tortured by being driven and redriven to the killing grounds.

Heretofore it was seldom that more than 15 per cent of all the seals driven in the latter part of June and the first few days of July were too small to be killed but this season the ease was reversed and in many instances 80 to 85 per cent were turned away. The accompanying percentage examples will shew the disposition of this year's drive. The first killing of fur-seals by the lessees was on the 6th of June and the scarcity of killable seals was apparent to all. The season closed on the 20th of July, and the drives in July shew a decided increase in the percentages of small seals turned away and a decrease in the killables over the drives of June, demonstrating conclusively that there were but few killable seals arriving, and that the larger part of those returning to the islands were the pups of last year. The average daily killing for the season was 400, or a daily average of 522 including only the

days worked. . . We opened the season by a drive from the Reef rookery and turned away 83 1/2 per cent. when we should have turned away about 15 per cent. of the seals driven, and we closed the season by turning away 86 per cent., a fact which proves to every impartial mind that we were redriving the yearlings, and considering the number of skins obtained that it was impossible to secure the number allowed by the lease, that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries to the detriment of the lessees, natives, and the Government.

SIR CHARLES RUSSELL.—Then Mr. Lavender, who was also an Assistant Treasury Agent of the United States, says in condemnation of these drives:

All the male seals driven should be killed, as it is my opinion that not over one half ever go back upon the rookeries again.

Then we come to an important paper read before the Biological Society of Washington by Mr. William Palmer of the United States National Museum, in which he, writing in 1891, treats the subject on the same lines, and I will ask my learned friend to read that for me. It is proper to say, as indeed this extract shows, that he has enlarged, in the earlier part of this paper, upon the evils which he conceives to be attendant upon pelagic sealing, and then he proceeds to point out that pelagic sealing is not the only cause which has worked to the detriment of the seal.

SIR RICHARD WEBSTER.—This is taken from pages 187 and 188 of the British Commissioners' Report; but it will be found in part in the Counter-Case on page 266.

But pelagic seal fishing is not the only cause of the decrease of seal-life on the Pribilofs.

Probably an equal cause is the unnatural method of driving seals that has been followed on the islands since the first seal was captured.

751 The mere killing of seals as conducted on the islands is as near perfection as it is possible to get it.

They are quickly dispatched, and without pain. One soon recognizes, as in the killing of sheep, that in the quickness and neatness of the method lies its success, all things considered.

But the driving is a totally different matter. I doubt if any one can look upon the painful exertions of this dense crowding mass, and not think that somewhere and somehow there is great room for improvement. It is conducted now as it always has been; no thought or attention is given to it, and, with but one exception, no other method has been suggested, or even thought necessary.

The fur-seal is utterly unfitted by nature for an extended and rapid safe journey on land. It will progress rapidly for a short distance, but soon stops from sheer exhaustion. Its flippers are used as feet, the belly is raised clear from the ground, and the motion is a jerky but comparatively rapid lope. When exhausted, the animal flops over on its side as soon as it stops moving, being unable to stand up.

The character of the ground over which the seals are driven is in many places utterly unfit for the purpose; up and down the steep slopes of sand dunes, over cinder hills studded with sharp rocks, some places being so bad that they are avoided by the people themselves; but the seals have been driven over the same ground for many years, and on some of the hills deep paths have been worn by the passing of tens of thousands of seals. No attempts have been made to remove the rocks or to lessen the difficulties of the passage and the seals are still driven pell mell over huge rocks and down steep inclines, where many are crushed and injured by the hurrying mass of those behind. When the drive reaches the killing ground it is rounded up and left in charge of a man or boy to await the killing, which begins at 7 a. m. A pod of perhaps 60 seals are then cut out of the drive and driven to the killers, who with long wooden clubs stun those seals that are of proper size and condition by a blow or two on top of head.

The seals that are not killed are then driven away by tin pans and a great noise, and while in an excited and over heated condition rush as fast as it is possible for a seal to go into the icy cold waters of Behring Sea.

It will thus be seen that these seals are subjected on an average from 2 o'clock in the morning until 10 to a long drive over very rough ground, then to a dense

herding, where they are continually in motion and crowding each other, thence to an intense excitement on the killing ground, and finally in a condition a little better than madness rushing into icy cold water.

Uncivilized and partly civilized man has no pity for dumb brutes, and as these drives are conducted entirely by the natives, who prefer indolence in the village to the discomforts of a drive in the fog and rain, it follows that the seals are often driven much faster than they should be, and absolutely without thought or care. But this is not all. The seals that are spared soon haul out again near a rookery, and perhaps the very next day are obliged to repeat the process, and again throughout the season, unless in the meantime they have crawled out on a beach to die, or have sunk exhausted to the bottom. The deaths of these seals are directly caused as I shall explain and, as far as I am aware, it is mentioned now for the first time.

Mr. Palmer then states that he believes death to result chiefly from the consumption of the natural store of fat while the animal is too exhausted to go in search of food. He continues:

I remember looking with curiosity for the cause of death in the first seal I found stranded on the beach. Externally there was nothing to indicate it, but the first stroke of the knife revealed instantly what I am confident has been the cause of death of countless thousands of fur-seals. It had been chilled to death; not a trace remained of the fat that had once clothed its body and protected the vital organs within. . . I opened many after this, and always discovered the same, but sometimes an additional cause, a fractured skull perhaps. I have even noted those left behind in a drive, and watched them daily, with the same result in many cases. At first they would revel in the ponds or wander among the sand dunes, but in a few days their motions became distinctly slower, the curvature of the spine became lessened; eventually the poor brutes would drag their hind flippers as they moved, and in a few days were become food for the foxes. In every case the fat had disappeared.

During the eight years minority of the few male seals that have escaped their enemies it is safe, I think to assume that at least four summers were spent in getting an experience of the drives. Does any one think that they were then capable of filling their proper functions on the rookeries?

The natives have been provided with whistles, and when a boat finds itself near a rookery (and a pretence for its presence is easily found) good use is made of them, with a consequent confusion among the seals and a probable increase in the next morning's drive.

Sir CHARLES RUSSELL.--Now finally, after speaking of the method pursued on the Commander Islands, he contrasts the state of affairs as observed by him on the Pribilof Islands, in these words:

On the American side, on the contrary, the seals are driven as fast as possible, the only ones being weeded out being those too weak to go further, while of those rounded up on the killing-ground by far the greater number are allowed to escape. Out of a drive of 1,103 counted by me only 120 were killed; the rest were released.

Now, upon that, the comment made by the British Commissioners is not, I submit, an unfair one, they say:

If it were possible to drive only those seals which it is intended to kill, little exception could be taken to the method of driving in the absence of any better method, but the mingling of seals of varied ages upon the hauling-grounds from which the drives are taken, even under the original and more favorable conditions of former years, renders it necessary to drive to the killing place many seals either too young or too old to be killed.

And then finally, at the top of page 269 of the Counter-Case:

Thus, it has occurred that, in late years, considerable and increasing numbers of breeding females have been driven to the killing-grounds with the killables, though when recognized there in the process of selecting for killing, they have been released.

Now I will only make this comment on that evidence to which I have referred: does it not seem to each Member of the Tribunal that the laudation bestowed upon the system on the Islands has been a little too unqualified: that it is difficult to say that their methods are not marked

by inhumanity and cruelty, and that it is difficult also to say that they are not followed by waste, when you have got the statements by independent persons, representatives of and connected with the Executive of the United States, pointing to the loss by thousands of seals which, subjected to this unusual pressure of locomotion on land, for which nature never intended them, are then separated from the herd, and many of them die? They die immediately from the injuries they receive, and many become utterly useless for the purpose of breeding, their courage and virility being unduly affected.

One point remains. It is still to be said for their methods on the Islands that they make the attempt to discriminate and do discriminate between the sexes; but, even as regards that, the facts show, as I shall proceed to demonstrate at this moment, that they have of late years on the Islands themselves been committing that grievous moral crime of killing females.

Now, how is that established? It is established by the evidence referred to yesterday and also at a previous sitting by my friend Mr. Coudert; but he only read (I am not making it a matter of complaint) quite naturally the passages in that evidence which were *ad rem* to the particular points that he was discussing. But I have to call your attention now to some of the other evidence, and I refer for this purpose to the second Volume of the Appendix to the Counter-Case of the British Government. I will begin at page 245. This is the evidence which my learned friends have been praying in aid, quite justifiably, upon another part of the case,—endeavouring to make out a distinction between the Alaskan and the Russian herds, as they have been called. I am not dealing with that point, as, of course the Tribunal understands, I am on the point that, according to the existing methods, there is inhumanity, there is waste, and there is not absolute discrimination as to sexes on the Islands.

I refer, first, to the gentleman who has received, I have no doubt quite justifiably, a high laudation from Mr. Coudert,—I mean, Mr. Stamp; and, if you read paragraph 5 of his affidavit, you will see that he says:

A noticeable feature about the consignments from the Pribilof Islands has been that, while formerly the consignments were entirely composed of male skins, of late years, from 1883 up to 1890, female skins have appeared among them each year in increasing numbers.

Then, on page 249,—I am only selecting those who are the most considerable witnesses referred to by my learned friend, Mr. Coudert,—in the declaration of Mr. Bevington, paragraph 3, he says:

As regards the Alaska Catch, I have during the last four or five years noticed amongst them a small quantity,—say from 10 to 15 per cent.—of female skins.

And Mr. Allhisen, on the same page, paragraph 3, says:

There is another feature in relation to the Alaska skins, namely, that they, for the most part, are entirely composed of male skins. Of late years, that is to say, from the year 1883 or 1884, I have noticed amongst this consignment a certain percentage of female skins, which percentage has increased in later years.

The same thing is to be found in paragraph 9, page 250, of the declaration of Mr. Henry Poland; and there are several more in the same sense, but I will not trouble the Tribunal by referring to them.

I say, therefore, that it stands thus: I do not at all concede (I am sure the Arbitrators will understand this) that these considerations—and I will give the reasons when the proper time comes—have anything to do with the question of affirming the right of property, or the right of protection, which of course can be only incidental

to that property. If there is no property, there is no protection, because there is nothing to protect; but I dwell upon this, because, I think it important to do so in order that the Court may see that the claim which the United States Counsel have been instructed to make, or thought fit to make, that the system pursued on the Islands is wholly free from objection on the ground of waste or on the ground of cruelty, is a claim which, when the facts are examined, is seen not to be well-founded. There is certainly this to be said—and my learned friend, Mr. Coudert, made it a subject of humorous observation, but it seems to me a just enough observation,—that the pursuit of the seal at sea does give the animal a chance of escape. The clubbing him on the head makes the islands a mere slaughter-house for the seal and gives him no chance at all. And after all there is this to be said for pelagic sealing, that at sea the seal is in his natural, or what I claim to be his natural element; and he has been furnished by nature with means of resistance to the attempts of man, with means of evading the pursuit of man, which give him a better chance of life and of escape.

Now my learned friends, as the Tribunal cannot fail to have noticed, have adopted a lofty tone in this discussion. I think you, Mr. President, said that Mr. Carter, in his eloquent address, spoke for mankind. He did. *How* he spoke for mankind I shall make apparent in a moment or two. But my learned friend, in effect, said this: "We the United States are not making this claim from any selfish motives. We are here as the friends of humanity. We acknowledge that this is not our property absolutely. We are trustees for the world at large. We are trustees: mankind the *cestuis que trustent*. We only ask to be permitted in the interests of mankind, for the benefit of mankind, to perform our office as trustees, as friends of humanity, as philanthropists, as champions of the interests of the world".

Well, I am very far from doubting the sincerity of my learned friends; but I must be permitted to point out that, while accepting these professions as sincere, their demands seem to me to be exactly the demands which would be made by a selfish Power making an effort to secure the seals for themselves; for what do they say? "We are the owners of the Pribilof Islands in Behring Sea. They are pleased pathetically to describe those Islands as the last home of the fur-seal". They say: "Give to us, the tenants and owners of these Islands, the power to exclude everybody but ourselves from the great expanse of ocean in which those Islands are situate. Put an end to pelagic sealing in the Behring Sea, and not in Behring Sea only, but justify us in stretching out the arm of legal authority over a still wider expanse of ocean.

755 Authorize us by your award to search, and if necessary to seize and confiscate, vessels that are engaged in this inhuman, this immoral traffic, or vessels that we suspect are engaged in this pursuit; and having given us that authority we will recognize our duty as trustees to mankind by giving to mankind the benefit of the fur-seal at the market price": the market price being enhanced by two considerations: the considerations, first, the duty which the United States imposes upon every fur-seal skin taken on the Islands; and enhanced, next, by the fact of the monopoly which this demand implies and secures.

I will only take leave to say that that does seem to be a very extravagant view of the obligations of a trustee for the benefit of mankind, and that I do not see in what way this profession of the duty and obligation of the trustee differs from the assertion of the most exclusive and absolute right which the most selfish nation might assert in any subject of exclusive property.

I wish to make this position as to the conditions on which they offer this commodity to mankind pretty plain. If they disapprove—and I believe they do disapprove—of pelagic sealing, I am going to give them the benefit of a suggestion which will put an end to pelagic sealing. What is it that has made pelagic sealing worth the efforts and enterprise of the men who have now made it a considerable commerce? It has been the fictitious, enhanced value that has been put upon seal-skins by reason of the exaction which the United States make in respect of every skin brought in to their dominions—an exaction from which the territories outside their dominions are free. What is that? For this is a matter that I think is not yet in the apprehension of the Tribunal.

From 1870 to 1889 the United States were paid a yearly rental of \$55,000 for the tenure of these islands. In addition to that they imposed a tax of \$2.625 per skin, which on a hundred thousand skins would amount, spreading the rental over the entire number, and adding, of course, the exaction per skin, to \$3.15 per skin, or thirteen shillings in English money. From 1890 the rent was \$60,000 yearly rental for a lease from 1890 for twenty years, which would expire, therefore, in 1910.

The tax was raised to \$9.625 per skin, and the limit was 60,000 skins per year; and in the same way, taking the yearly rental of \$60,000, and adding a proportionate part to the \$9.625 per skin, we find that the exaction in respect of each skin is \$10.62, or over 42 shillings, English currency. There is the secret of pelagic sealing. Those who think they have the right to pursue it, United States citizens be it noted amongst the rest, Canadian settlers amongst the rest, subjects of the Queen inhabiting these parts, are tempted to engage in it; and it is that very exaction which supplies the motive and gives the reason for pelagic sealing. I need not say that I am not questioning the right of the United States in its wisdom and judgment to impose any tax it pleases, under any conditions it pleases, upon those who are subject to its rule. That is not the object of my argument. My argu-

756 ment is to show that it is this very exaction which gives to those who are outside the dominion of United States law the freedom from that exaction which supplies the motive without which pelagic sealing would not be an existing thing to-day. I do not doubt the sincerity of my friends. If those who instructed them, if those who actuate the policy of the United States, desire sincerely, as trustees with no selfish purpose, as trustees for the benefit of mankind, to send these blessings abroad, to send them abroad on reasonable terms, and above all, while they are doing that, to put an end to pelagic sealing, the remedy is to be found in the direction which this suggestion of mine indicates.

Senator MORGAN.—Sir Charles, do you know whether the price at which the United States have taxed these skins has had the effect of raising the price of the Russian and Japanese catches?

Sir CHARLES RUSSELL.—I am not able, sir, off hand, to say; but I should say certainly it would have that effect too.

Senator MORGAN.—I have not seen any evidence of that fact in this case.

Sir CHARLES RUSSELL.—I think some of it will be forthcoming a little later.

I am really tempted to exclaim—I mean no offence to my learned friends—when the argument is put forward in this specious way, I am tempted to exclaim with Dr. Johnson, our great lexicographer, “Let us rid our minds of cant”. Let us approach this question fairly, look it

straight in the face, let us hear as little as possible in the future in this argument about these high philanthropic aims, this benefit to mankind, and all the rest of it.

Mr. Justice HARLAN.—Will you explain how the exaction of the United States, to which you have referred, increases the price in the London market of seal-skins taken in the North Pacific by pelagic sealers who do not have to pay this exaction?

Sir CHARLES RUSSELL.—Of course it is that very consideration which gives to the pelagic sealer in the North Pacific his margin of profit.

Mr. Justice HARLAN.—I can understand how those who take them on the islands and have to pay those exactions must ask a certain price in London in order that they may get sufficient profits; but if the pelagic sealers are not subject to those exactions, can they not undersell those who carry skins from the Pribilof Islands to the London market?

Sir CHARLES RUSSELL.—My answer is very brief. The price of the article in the ultimate market to which it finds its way, although it may be in some stages influenced by the cost of production, is ultimately and mainly influenced only by the question of supply and demand; and therefore the pelagic sealer, although of course he could afford to sell the skin at a lower price, will not sell it at a lower price than that which the market commands. The difference between the position of the pelagic sealer who is outside the area of United States legislation and the man who is within it, is that the one man has to pay this tax and the other has not. That is the difference.

757 The PRESIDENT.—Would you go so far as to say that pelagic sealing would be utterly impossible if there were not this tax to pay to the United States—that the expense, for instance of pelagic sealing would be too great for the skins caught at sea by pelagic sealing to fetch a marketable price?

Sir CHARLES RUSSELL.—I should not like to commit myself to that statement, sir, without some consideration. I should not like to say that pelagic sealing would entirely cease; but certainly it would not offer the inducements which the existing state of things does offer to pelagic sealing, for the obvious reasons that my learned friends have enlarged upon. They have established—I think satisfactorily established—that if there is no tax, the man who clubs the seal upon the island can bring the skin of that clubbed seal to the market upon cheaper terms and with less expenditure of labour than the man who has to pursue it in the open ocean; but I should not like to go the length of asserting that it would necessarily put an end to it entirely. Certainly it would to a very large extent.

Senator MORGAN.—Sir Charles, it is proper, I think to remark in regard to the policy of the United States Government in taxing the take of the seals there that it is to sustain the Government. This is the only industry upon those islands; and I think that the United States is the only country in the world whose Constitution prohibits its Government from levying an export duty. I think it is the only one.

Sir CHARLES RUSSELL.—I take the liberty of saying, sir, that I did not presume to offer any opinion in the sense of condemnation, or even of adverse criticism upon what the United States choose to do. I was merely dealing with the pretensions put forward that the United States were appearing in this matter simply as champions for the interests of the world, as friends of humanity, and were merely offering as trustees or intermediaries this article of luxury for the benefit and in the interest of mankind, or of womankind.

A complaint has been made, Mr. President, which I must notice in passing, by my learned friend Mr. Carter, and referred to also by my friend Mr. Coudert, which took this form: that if Canada had not intervened this arbitration need never have been held—in other words that the United States and the Government of the Queen would have come to terms in the matter. Is it quite right that that theme should be introduced at all? Who have a better right to speak in this matter than those who are directly interested? Who?

To the United States, with its boundless resources, this is a very small matter; to Canada, comparatively poor, a struggling but a rising colony, it is a matter of considerable importance; and surely, as the voice of Canada cannot be heard diplomatically as between her and the United States, it was not only the right but the duty of those who represented her to put forward their views, and to put forward their views as strongly as they could, as to the nature of the interests involved and the loss that might result to Canadian enterprises and commerce if the course indicated by the United States were acquiesced in. I think America ought to be the last country, its representatives the last people, to seek to limit the rights of expostulation and of action on the part of colonists. They held a very free and very correct view of their rights in that regard while they were still colonists; and in the time of Lord North, the Lord Salisbury of that day, they showed very clearly, very plainly, and, as I believe, most justifiably, that they were the best judges of what their own interests as colonists demanded.

I pass from that. A complaint has also been made about the British Commissioners; and I think it due to those gentlemen, both of whom I have the honour of knowing, to say a word or two about them.

I think before their conduct was criticised, before my learned friends with more or less vehemence asked this Tribunal to regard them as partisans, as hostile witnesses from whom they were at liberty to extract any admission which was in their favour, but were at liberty to discard all that was not in their favour—before they pronounced a judgment as to the manner in which those gentlemen had performed their duties, I think it would have been right in common fairness if my learned friends had referred to the mandate under which those Commissioners acted. If they had done so, I think they would have seen that it was impossible for them to keep out of sight in their Report what they conceived to be the evils both of management on the islands and the evils of pelagic sealing, as to which they frankly and openly avowed their opinion. Their authority was derived from two documents which are put as the preface to their Report. The first is the letter of Lord Salisbury, of the 24th June 1891. It is in the preface to the Report, and begins with this statement:

The Queen having been graciously pleased to appoint you to be her Commissioners for the purpose of inquiring into the conditions of seal life in Behring Sea and other parts of the North Pacific Ocean, I transmit to you herewith Her Majesty's commission, etc.

Let me in passing point out a mistake into which I venture to think my learned friends have fallen when they refer to this in another connection, which I am not now dealing with; but as it is under my eye, and as I probably shall not need to recur to it again I wish to make the correction in passing.

My learned friends claim this mandate, applying not only to Behring Sea but to other parts of the North Pacific Ocean, as supporting their argument that regulations, protection, and jurisdiction outside of Beh-

ring Sea was contemplated in it. I wish to remind the Tribunal, that there is in this a confusion. In the diplomatic correspondence, beginning in the time of Mr. Secretary Bayard and renewed again after a long interval, there are two lines of negotiations running on side by side almost. One of these is the consideration of the questions which have arisen in difference between Great Britain and the United States, and which, as I shall hereafter in another connection demonstrate, relate to Behring Sea and to Behring Sea only. But in addition to that there was a suggestion put forward by Mr. Bayard, and assented to by the British Government, as to an inquiry which should not be confined to Great Britain and the United States, but which should extend to other Powers interested.

The suggestion had its origin in the note, which, you will recollect, sir, was addressed by Mr. Bayard to various Powers asking for their co-operation. It was in view of that general inquiry, not restricted to the United States and to Great Britain, that the idea of the commission was originally started; but side by side with that, distinct from that, and, as Mr. Wharton says in one of the letters to which I shall hereafter refer, without prejudice to the questions in dispute between the United States and Great Britain, this question of the larger commission was being considered.

Lord Salisbury then proceeds:

The main object of your inquiry will be to ascertain "what international arrangements, if any, are necessary between Great Britain and the United States and Russia, or any other Power, for the purpose of preserving the fur-seal race in Behring Sea from extermination."

You will recollect, sir, that this idea of the Commission had originated long before the Treaty was signed.

He proceeds.

Application has been made to the United States for permission for you to visit the seal islands under their jurisdiction, and a similar request will be addressed to the Russian Government.

I pause here to ask, what was the object or the use of their having permission to visit the Commander Islands and the Pribilof Islands, unless it was to note what they saw, and, so far as it was relevant, to record, note, criticise, comment on the conditions of seal life?

Your attention should be particularly devoted to ascertaining (1) the actual facts as regards the alleged serious diminution of seal life on the Pribilof Islands, the date at which the diminution began, the rate of its progress, and any previous existence of a similar occurrence; (2) the causes of such diminution, whether and to what extent it is attributable (a) to a migration of the seals to other rookeries, (b) to the method of killing pursued on the islands themselves, (c) to the increase of sealing on the high seas, and the manner in which it is pursued.

Then they are enjoined to neglect no sources of information, and to carry on their inquiry with impartiality.

Then at a later stage—it is the only other extract with which I shall trouble the Court,—at the top of page VII, after they have been abroad, a further letter is directed to them on the 15th of January, 1892, only one passage of which I intend to read.

You will observe that Lord Salisbury says, and this is before the report is drawn out—

that it is intended that the Report of the Joint Commissioners shall embrace recommendations as to all measures that should be adopted for the preservation of seal life. For this purpose it will be necessary to consider what regulations may seem advisable, whether within the jurisdictional limits of the United States and Canada, or outside those limits. The Regulations which the Commissioners may recommend for adoption within the respective jurisdictions of

the two countries will, of course, be matter for the consideration of the respective Governments, while the Regulations affecting waters outside the territorial limits will have to be considered under clause 6 of the Arbitration Agreement.

I say that no candid man—and I think my friends are candid men—could read this without seeing that it was impossible for the Commissioners to have avoided going into the matters which they did go into. The consideration of pelagic sealing involved the question whether it had necessarily incident to it all the evils which were attributed to it; the consideration of the management of the islands involved the questions whether it was the impeccable system which its friends professed it to be, or whether there were not to be found in this management some explanatory contributory cause of the admitted decrease in the numbers of the seal herd.

MR. CARTER.—I did not object to their going into those things. You do not impute that to me; do you?

SIR CHARLES RUSSELL.—I rather thought my friend's argument—I may have misconceived it—amounted to this: "I, counsel for the United States"—and from that point of view I can quite understand my friend's position—"begin by laying down the proposition that pelagic sealing is a moral crime, that it is an unjustifiable wrong, that it is brutal, something a little worse than murder, and almost as bad as piracy." From that point of view I can quite understand his impatience with a man who has anything to say even in mitigation of pelagic sealing; but from the point of view of the Commissioners, I venture to say that they were perfectly within the lines of their duty, nay, that they would not have fulfilled their duty, provided they did it honestly, if they had not presented their views for consideration. But, as a matter of fact, if you will examine that very lengthy Report of the British Commissioners, it will be found that nine-tenths of it is a record of facts; and perhaps the highest tribute—it ought to be almost enough for me to say this—the highest tribute to their impartiality is to be found in the fact that in the enforcement of their positions on the subject of regulations, and indeed in some respects upon the subject of property, my learned friends have cited much more frequently from the Report of the British Commissioners than they have felt themselves justified in citing from the Report of their own Commissioners.

I am not going to make any attack upon the United States Commissioners. I have no such purpose. They take the standpoint that no killing should be permitted except upon the islands. If the British Commissioners had followed the same line of argument, I suppose that they would, if they had been partisans, have insisted that no killing should take place except at sea; and they certainly would have had this in their favour, as I have previously pointed out, that whatever else may be said of pelagic sealing, it cannot be truly convicted of ever having caused the extermination of the seal in any part of the world where pelagic sealing merely was practised.

But in this connection, and before the Tribunal rises, and in order that I may dismiss this topic, I would point out that both my learned friends take this lofty tone as regards pelagic sealing: yet driven by pressure of argument going on involuntarily in their own minds, aided a little, I will admit, by certain questions addressed to them in the course of argument from the bench, my learned friends have been obliged to pursue a course utterly and completely inconsistent with their profession as to pelagic sealing. Why? Because my learned friend, Mr. Carter, driven, as I say, by stress of argument and by the natural candour of his

Position taken up as to Indians inconsistent with general argument of United States.

own mind, not completely under control, says: "I must admit that Russia when she discovered the Pribilof Islands, acquired the rights in the Pribilof Islands and in the fur-seal industry connected with them, subject to the moral right of the native Indians to pursue pelagic sealing."

Moral right to pursue pelagic sealing! Moral right to commit an indefensible wrong! Moral right to commit a crime against humanity! Moral right to commit an offence a little worse than murder, and almost as bad as piracy! My learned friend had not appreciated the length to which that inconsistency leads him, and the position in which it lands him. His idea seems to have been that there were a few straggling Indians along this coast, existing from a pre-civilized occupation, who used to go out in their canoes, and when impelled by hunger or the urgent need of raiment killed fur-seals. "Quite right", said my learned friend, Mr. Carter, "Yes; kill a fur-seal for the necessities of your stomach and for the necessities of your back; but if you do more than that it is a crime. Kill for your stomach. Kill for your back"—probably he would also extend it to the backs and stomachs of the other members of the family—"but beyond that you must not go. Barter you dare not, you cannot. The destructive agencies of civilization and commerce come in. Once you do that, you are beyond the pale of civilization": and international law, in some incomprehensible way, is down upon him. He is *hostis humani generis*.

I need not say that is an impracticable kind of limitation to seek to imply; but it is not only impracticable to imply it, but as a rule at all applicable to the condition of things on this coast it is wholly foreign to it. What is the fact? My learned friend forgets that the Hudson's Bay Company, which owned a Charter as far back as the time of Prince Rupert, acquired territorial dominion in the way in which sovereigns were accustomed to grant territorial dominion in those days, over all the territory stretching westward from and contiguous to Hudson's Bay; that that company had been carrying on this commerce, and a great commerce in furs of all kinds, fur seals amongst the rest, although 762 to a limited extent, by this very system of barter with these natives along that coast. My learned friend forgets also that under a lease from Russia before the sale of Alaskan territory to the United States, for a number of years the Hudson's Bay Company had a lease of an important part of this very Alaskan territory from Russia, and in the same way along this very coast was securing by barter from the natives all the pelts on that coast, including, to a limited degree I admit, the fur-seal amongst the rest. In other words, it never was the case, so long as there was any approach of civilized man to the neighborhood at all, that there was a limitation of pelagic sealing to meet the mere necessities of the hunter, or the mere need of clothing. They have lived by it. They have bartered the products and the result of their hunting and of their industry, and so far from their being scant of raiment, and so far from their raiment consisting of what I may call barbaric material, I am told that these gentlemen, on their Sundays and holidays, sport tall hats and linen shirts, and vestments made by more civilized people than themselves; and amongst other things they own schooners.

Mr. FOSTER.—In these last days.

Sir CHARLES RUSSELL.—Well, they are progressing in civilization, I agree.

Mr. FOSTER.—And in pelagic sealing.

Sir CHARLES RUSSELL.—I do not see that that helps my learned friend at all. If they have done that, you see how fatal that is to the argument of my friend, Mr. Carter; because we have got beyond the days when the skin was necessary to be girt about the loins. We have got beyond the days when the food of the seal was needed to satisfy the primary wants of the natives.

The PRESIDENT.—Could you tell us, Sir Charles, at what time that lease between Russia and the Hudson's Bay Company was made?

Sir CHARLES RUSSELL.—Certainly, Sir. I shall be able to give you satisfactory information about it. I have not got it at this moment.

The PRESIDENT.—We should be pleased if you would give us that information.

Sir CHARLES RUSSELL.—Certainly, Sir.

The PRESIDENT.—We have decided to sit to-morrow. Although it is Ascension day, the earnestness of our task prevents our making a holiday of it, and we will sit at the usual hour.

The Tribunal accordingly adjourned until Thursday, May 11, 1893, at 11.30 o'clock A. M.

TWENTY-FIRST DAY, MAY 11TH, 1893.

The PRESIDENT.—Sir Charles, if you please, we are ready to hear you.

Sir CHARLES RUSSELL.—Mr. President, I have only an additional word or two to say upon the subject of the attack, made courteously, I admit, upon the British Commissioners. I understand the main point of that attack to be that they, instead of condemning, said something to justify and to recognize the fact of pelagic sealing. I wish now to refer to the passage to which specific attention was called by my friend. It is section 102 of the British Commissioners' Report. I will read it, and also section 103.

In regard to interests, the sealing industry is naturally divided into what may, for the sake of brevity, be termed the shore and ocean interest respectively. The rights in either case are indisputable, and the possessors of one class of these rights will not willingly allow them to be curtailed or done away with for the mere purpose of enhancing the value of the rights of their commercial rivals. Thus the only basis of settlement which is likely to be satisfactory and permanent is that of mutual concession, by means of reciprocal and equivalent curtailments of right, in so far as may be necessary for the preservation of the fur-seal.

It may be added, that the line of division between the shore and ocean interests is not an international one, and that the question of compromise as between the two industries cannot, in consequence, be regarded strictly from an international point of view. If we may judge from the respective number of vessels employed, the interest of citizens of the United States in pelagic sealing is at the present time approaching to an equality with that of Canada, while Germany and Japan have been or are represented in sealing at sea, and other flags may at any time appear. The shore rights, again, are at present chiefly divided between the United States and Russia, although Japan owns some smaller resorts of the fur-seal.

The Tribunal will see that the Commissioners are there presenting the consideration of the shore and ocean interests, as they designate them, not merely as a matter in contention between the United States, on the one hand, and the subjects of Great Britain upon the other, but they are speaking of those rights generally. They point out in the next passage that it is not an international difference merely between Great Britain and the United States, because the citizens of the United States themselves take a large and important share in pelagic sealing; and therefore the observations in those paragraphs are not confined to Behring Sea, still less to the eastern portion of Behring Sea, in respect of which the United States asserts special and peculiar claims. It must not be forgotten that, treated in that broad sense, pelagic sealing is a fact which has never been questioned, even by the United States, outside Behring Sea until this controversy has arisen.

Do not let it be forgotten that although the United States, *quâ*
764 foreigners, are restricted in efforts of legislative control absolutely to territory,—that is to say, although the effect of their legislation, as against foreigners, is confined to and does not extend beyond their own territory, an admitted principle I need not say—yet their legislation may apply to the whole world as regards their own nationals. In view of this complaint against the British Commissioners that they recognized pelagic sealing and spoke of the right of pelagic sealing we find therefore

this remarkable state of facts: First, that the United States has never by any legislation pronounced pelagic sealing to be a crime or a wrong if committed by its own nationals outside a given area; and next we have the further extraordinary fact,—all the more extraordinary when it is borne in mind that what the United States claimed the right to do as regards the ships of other nations is claimed by them as a mere protective right,—that they have never even affected to exercise that protective right outside Behring Sea even against their own nationals. The Tribunal is aware that the seizures have been confined to Behring Sea, and that there has been no pretence of even any attempt to restrain, by executive or by legislative action, pelagic sealing outside that area.

Now I have said all that I desire to say in defence of the Commissioners. So far as they are chroniclers of fact their good faith is not questioned by my learned friend: so far as they express opinions and make suggestions, those will be judged by this Tribunal upon examination according to their intrinsic merits. I only pause to point out that they have spoken in general of the right of pelagic sealing, a right I say which has never been questioned till this controversy has arisen. They then in the succeeding paragraphs proceed to consider the case, so far as that question of pelagic sealing comes into controversy as between the United States and Great Britain.

I leave this subject, not venturing to express any opinion of my own, which I conceive not to be quite regular; but humbly submitting to this Tribunal that the more the details of this Report are examined the more it will be found that these Commissioners have approached the subject with perfectly free and open minds, and have only embraced in their consideration topics which, by the terms of the mandate under which they were acting, they could not properly have excluded.

Now I have only one other matter to observe upon before I come to
Novelty of claim closer grips with the actual questions in this case. I of United States. have to draw the attention of the Tribunal to the extraordinary novelty of the claim which is here asserted. This idea, if I am able to convey it to the minds of the Tribunal, must have a very serious effect in arresting the attention and fixing the mind of each member of it upon the legal considerations, and the consequences which will follow if the right is declared to be based on legal considerations. I said yesterday, I repeat it to-day, that at various stages of the world's history, according to their varying powers, nations have from time to time advanced extravagant pretensions. They have
 765 largely acted in assertion of those pretensions upon the consideration, so it must be admitted, of their power to give effect to them. It would be idle and hopeless to undertake the task of justifying on high moral grounds, or on principles of abstract justice and equity, many principles and many acts performed by many Governments at various periods of the world's history. But those are, generally speaking, pretensions of a comparatively remote period, and before the moral force of public opinion of the world was the great controlling power which it is to-day, when the rule of might rather than the rule of right prevailed. Amongst the Powers who advanced those great pretensions, prominent among them, unquestionably, were Great Britain and Spain. They were not the only ones, for there is hardly a great Power of which the same may not be said. Amongst those pretensions were assertions of control, dominion, and sovereignty over a large extent of ocean, without physical boundary, and without any external marks of delimitation; but even in those days of assertions, unjustifiable as I believe them to have been in most cases—certainly in many—I find no record

of any claim to the property embraced in those extended limits over which dominion and sovereignty were so claimed. There was undoubtedly in connexion with those assertions, and consequent upon them, a claim to exclude others from the given area—a claim to exclusive right to deal with whatever was to be found in that given area. But that is a very different thing from an assertion of property in the particular things, the particular animals which may inhabit that area; and I say, subject to be contradicted, but without fear of contradiction, that this is the first time in the history of the world that a nation or an individual has ever claimed property in a free swimming animal in the ocean. I say, further, it follows from what I have already said, that this is the first time that an attempt has been made to differentiate one particular animal from all the other animals that dwell during a large part of their existence in the ocean.

I do not know that my learned friends would even say they were called upon to differentiate the case of the seal from that of other animals. If they made the attempt so to differentiate it, I think they would find it difficult; but to examine that field of enquiry at this moment would be to take me from the line of argument along which I am advancing.

Now, if I am well founded in this observation, it is a startling matter; and one is not surprised, therefore, to note some difficulty in finding any authority, ancient or modern, in support of this novel claim.

It is creditable indeed to the writers and publicists of America to-day that I do not know one among them, and I have made some enquiry in order to inform myself upon the subject, of reputation and authority who has been found to justify the claim which the United States put forward of property in the seal or in the seal-herd. We find a good many who take the opposite view. My learned friend Mr. Phelps indeed, is the patentee of one idea, (if an idea, by the way, can be patented), upon which a great part of the

present argument of the United States is based—I
766 mean that idea set forth in his letter, to which I

Writers in
United States
who have opposed
the claim.

shall hereafter pay some attention, written in September, 1888. My learned friend has entered the arena of public controversy in this matter; and, in Harper's Magazine for April 1891, he has published an article, very ingenious and able as you would expect, in which he amplified the idea first propounded in this letter of September, 1888. The article is, in fact, the argument which appears under my learned friend's signature in the printed documents before the Tribunal. But he was very speedily answered, and I have got here the answer written by a gentleman whose name was previously unknown to me,—Mr. Robert Rayner.

Mr. PHELPS.—He was unknown to us equally.

Sir CHARLES RUSSELL.—Well, I shall have a word to say about that presently. It was published at Salem, Massachusetts. We shall be able to give you a little later, I think, some account of who this gentleman is; but I am justified in referring to him for two reasons; first of all, because Her Majesty's Ambassador at Washington, Sir Julian Pauncefote, in sending it describes the writer as an eminent jurist, and Sir Julian Pauncefote is not a man who speaks in a haphazard way; but secondly, I will refer to this gentleman apart wholly from any additional weight to be derived from what his position or what his reputation may be, for the intrinsic merits of his answer: it is well worthy of consideration.

Mr. Justice HARLAN.—Is that the same article that appears in volume III of the British Case?

Sir RICHARD WEBSTER.—No.

Sir CHARLES RUSSELL.—That is another authority, to whom I shall refer later.

Mr. Justice HARLAN.—There is an article there signed, “Robert Rayner”.

Sir CHARLES RUSSELL.—Well, that shows that the members of the Tribunal have been very industrious in reading this literature. I have not noticed it myself but my learned friend, who is very accurate, tells me that it is not the same. However, having called attention to this article, and adopting as my own argument some of the passages in it, I will place it at the disposition of any member of the Tribunal who desires to see it, and who will judge it upon its intrinsic merits.

Mr. PHELPS.—Can you give us a copy? I have never seen it.

Sir CHARLES RUSSELL.—Well, it would have been courteous of the author to have sent you one, certainly.

General FOSTER.—Is it cited in your case?

Sir CHARLES RUSSELL.—It is remarkable that none of your friends have called attention to it.

Mr. PHELPS.—I heard a man had written something; that is all.

Sir RICHARD WEBSTER.—I may say that, at page 345, it is a reply to Mr. Felton.

Sir CHARLES RUSSELL.—At page 12 of this article, the author puts

Mr. Phelps' argument, in the following way:—these seals, making 767 their home on American soil, belong to the proprietors and are a part of their property, and do not lose this quality by passing from one part of the territory to another in a regular and periodical migration necessary to their life, even though in making it they pass temporarily through water that is more than 3 miles from land. The simple question presented is whether the United States Government has a right to protect its property and the business of its people from this wanton and barbarous destruction by foreigners, which it has made criminal by act of Congress; or whether the fact that it takes place upon waters that are claimed to be part of the open sea affords an immunity to the parties engaged in it, which the Government is bound to respect. It cannot be doubted that that is fairly stating the pith of my learned friend's contention.

The writer proceeds to answer it thus:

Mr. Phelps thinks that to the “ordinary mind” this question would not be a difficult one.

Probably not because the falseness of premises upon which the alternative is based would escape detection by such a mind,—but any mind with a grain of logic sees at once that Mr. Phelps is merely begging the real question; the primary one which must be settled in his favour before his proposition can be considered and that is: *Can we or any nation have any property whatever in seals or any wild animals found beyond the national territorial jurisdiction?* Of course Mr. Phelps, a past-master in law, knows that in law there is no property right in wild animals whether fish, mammal, or bird outside of territorial limits; that anybody and everybody is free to appropriate or kill them so long as in doing this no right of territory is violated. To enable us to exercise lawfully any right of proprietorship in wild animals like seals we must confine them within our territorial jurisdiction. To allow them to leave our territory, to escape into the “high seas”, is to deliver them up to the tender mercies of mankind in general, and to pretend to prevent non-Americans from doing what they like with seals found in the “high seas” is to fly in the face of all international law, and consequently to make ourselves ridiculous.

He then proceeds to argue in the remaining passages closely, with reference to authority, the legal proposition which is there indicated. Nor is this the only gentleman. Dr. Stephen Berrien Stanton of the New York Bar, has written a book, which is published in New York by Albert B. King, Publisher.

Mr. PHELPS.—Can you give us a copy of that?

Sir CHARLES RUSSELL.—It is very distressing that I should be obliged to furnish this American literature to my friends, but I will with the greatest pleasure.

General FOSTER.—Is that cited in your case?

Sir CHARLES RUSSELL.—I do not know, and, with great deference to Mr. Foster, I do not care.

General FOSTER.—We might have searched for it if you had cited it.

Sir CHARLES RUSSELL.—The first Edition was published in 1891. The second was published in 1892. This gentleman examines the question, and examines it from the only point of view in which up to the time of this litigation, if I may so call it, it was presented on the part of the executive authority of the United States: namely, as a question

768 whether or not the United States had by right of sovereignty a right to apply its municipal legislation to the eastern part of Behring Sea, and to base that right upon a derivative title from Russia. And when he comes to examine the question of those exclusive rights he arrives at the conclusion, which the Tribunal I think will not be surprised at, that it is impossible in view of the attitude of the United States itself in 1824, and in view of the attitude of Russia towards Great Britain as evidenced by the treaty of 1825, to assert, or rather, I would say, to substantiate or to support, any claim to exclusive jurisdiction in any part of the Behring Sea. Then he goes on to argue the question from another standpoint. He deals with the plea which my friend Mr. Phelps puts forward, and he argues strongly in favor of insisting on regulations dealing with this particular interest. I do not quarrel with his argument upon that point. I am not using it, nor is it *ad rem* to the point I am now upon—but I wish to state the full effect of it.

Mr. Justice HARLAN.—Does he not recommend prohibition with regard to pelagic sealing?

Sir CHARLES RUSSELL.—I do not think he does. I do not think he says so in terms so far as I recollect.

Mr. Justice HARLAN.—That is my recollection. I have a copy of the book and I think he does.

Sir CHARLES RUSSELL.—I will not be certain. I think what he does say, undoubtedly, is, that whatever is necessary to protect the fur-seals should be done, and very likely the inclination of his opinion is in the direction indicated by the learned Arbitrator. Of that I am not at all sure, but the point he makes is, I think, that as a matter of legal right what should be done cannot be done upon the sole authority of one nation. But, as I say, I am not citing it in that connection for the moment.

Next, there is the article in a magazine called the "Forum" by Professor James Angell: published in November, 1889.

General FOSTER.—He is an American citizen whose name we have heard before. He is a gentleman of eminence, and President of the University of Michigan.

Sir CHARLES RUSSELL.—I am very glad to have had that high testimony in his favor.

General FOSTER.—But he is not a lawyer.

Mr. Justice HARLAN.—He is the same gentleman who was on the Commission relating to the Fisheries on the Newfoundland coast.

SIR CHARLES RUSSELL.—In the beginning of his article, which is on page 92 of the first volume of the Appendix to the Case of Great Britain, he says:

Alaska is now furnishing us with two international questions of some interest and consequence. The first concerns our right (freely exercised of late under orders of our Treasury Department) to seize foreign vessels engaged in catching fur-bearing seals in Behring Sea, many miles away from land, and to send them into port for condemnation and forfeiture.

769 MR. PHELPS.—Will you kindly give the date of the article.
SIR CHARLES RUSSELL.—November 1889. Then he says:

The second concerns the determination of the boundary between Alaska and British America.

The President and the other members of the Tribunal will appreciate what that means. You recollect, Sir, that the southern portion of what is now called "Alaska" merely consists of a strip, or *lisière*, of the land along the coast, running in front of the British territory. The question of the actual boundary was left more or less in doubt according to the somewhat vague terms of the Treaty of 1825. That is not at all in question in this case, and I merely mention it to explain the second question that he here refers to. Then Mr. Angell proceeds in this article to show what will be found to have a much wider importance than at first sight may appear, that so far back as 1881, Mr. French, the acting Secretary of the Treasury, writing on the 12th March in that year says:

All the waters within that boundary to the Western end of the Aleutian Archipelago and chain of islands are considered as comprised within the waters of Alaska Territory. All the penalties prescribed by law against the killing of fur-bearing animals would therefore attach against any violation of law within the limits before described.

That is territorial jurisdiction, carrying with it the right of legislation as for territory. Then, after stating the legislation upon the subject, he proceeds to say, on page 93:

The question is whether for this laudable purpose of preserving the fur-bearing seals from extinction, and maintaining our undisputed right to control the taking of these animals on the Pribilof Islands, we may rightfully board, search, and seize foreign vessels in Behring Sea more than 3 miles away from land.

The equal right of all nations to use the high seas for any lawful purpose of commerce, navigation, fishing, or hunting is now so universally recognized; the United States have been so constantly the strong defender of this right; we have so vigorously opposed all attempts of Great Britain to search our vessels in time of peace; we have claimed so vehemently the right of fishing in Canadian waters sharply up to 3-mile line from shore, that obviously we must show some very plain and cogent reasons to justify our course in Behring Sea. What reasons have been or can be given?

Our Government has given, so far as is known, no other formal statement than that of Acting Secretary French (above quoted in part) to inform either our citizens or foreign Powers of the precise grounds on which the seizure of British sealers is to be justified. No defence of our action by Secretary Bayard, nor up to the time of this writing, by Secretary Blaine, or Secretary Windom, has been published.

But in our own newspapers editorial writers or contributors have suggested lines of defence of our action. The ground that they have generally taken as the strongest is that Russia exercised exclusive jurisdiction in Behring Sea, and that by the cession of Alaska she transferred to us the right to exercise the same jurisdiction.

Then he proceeds to discuss that question, and he arrives at the conclusion that the Treaties will not support the claim to any exclusive jurisdiction in Behring Sea. He further cites a passage from Governor Boutwell, the Secretary of the Treasury in 1872 in which he said:

I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such an attempt within a marine league of the shore.

770 I ought to say in passing that my friends say that Mr. Boutwell's letter had reference to something outside Behring Sea, outside the Aleutians, and therefore that it has not the significance which otherwise might have been attached to it. It is not very important to consider that one way or the other. Then on page 95 he proceeds to consider an argument as regards the seal fishing on the Asiatic coast:

No doubt, the condition of the Siberians on that coast would present a strong case for generous action on the part of foreigners in abstaining from interference with their means of gaining a livelihood. By common consent, out of regard to the hardships of their life, fishermen are not disturbed in their pursuits in time of war. But can the Russian argument, even if it has validity for the Siberians, be used by us? We have without any scruple, for half a century, taken whales in the seas adjacent to them. We can hardly assert with much plausibility that the members of the Alaska Commercial Company, which has the monopoly of seal catching in and near the Pribilof Islands, can plead *in forma pauperis* for protection on grounds of charity.

It may be argued that since most of the seals which are taken by the British breed on our soil in the Pribilof Islands, we have an exclusive claim to them in the sea, or at any rate a right to protect them there from extinction. But some of them breed on Copper Island and Behring Island, both of which belong to Russia. How is it possible to maintain any claim to ownership in seals on the high seas under any principle of law applicable to wild animals? We can acquire no property rights in animals *feræ naturæ* from their birth on our soil, except for the time that we hold them in our possession. A claim by Canada to the wild ducks hatched in her territory, after the birds have passed her boundary, would seem to be just as valid as ours to seals in the open sea.

I recall only one case which seems to furnish any analogy for the claim that we may regulate seal fishing in the open waters of Behring Sea. The British Government does regulate and control the pearl fisheries in the open sea from 8 to 20 miles west of the northern end of Ceylon. But it is to be presumed that this is done under sufferance of other Powers; because they have had no interest in interfering with the pursuit of the pearl divers. Should they claim the right to seek pearls in those waters, it is not easy to see how Great Britain could oppose any argument, except that of long acquiescence by them, in her exclusive possession of the pearl grounds; and it is questionable whether that argument would have much weight.

It may be said that if we have no right to exclude other nations from taking seals in the open waters of Behring Sea, and if the law and the Treasury Regulations as they now stand can be enforced against our own citizens in those same open waters, we are clearly discriminating against our own countrymen. The foreigners may kill seals at times and in places forbidden to us. This is true. It is one of the anomalies and embarrassments of the present situation.

On the whole, we find no good ground on which we can claim as a right the exclusion of foreigners from the open waters of Behring Sea for the purpose of protecting the seals.

Then having discussed the question as a matter of right, he proceeds to suggest that it is a matter in which other Powers, Great Britain, Russia, Japan and so on, are interested, and that they should and ought to agree to measures for the preservation of the species: this of course is the position we have adopted.

Lastly, I will cite another American publicist, who is editor of a well-known book, which, I, myself, have frequent occasion to use professionally, and which has now reached the 6th. edition. It is an introduction to the study of International law by Theodore

771 Dwight Woolsey—Woolsey's International Law. The edition which is before me is by his son, and certainly he does not mince matters. I need not say that patriotism would suggest to him, if his conscience as a lawyer permitted him—

Mr. PHELPS.—He is not a lawyer.

Sir CHARLES RUSSELL.—Well, if his conscience as a jurist permitted him, to say what he could; but after dealing in section 59 with the broad principle which lies at the root of this matter—that the high sea is free and open to all nations—that it cannot be the property or subject to the Empire of a particular State—that the things in it are free to all to

take them, and so forth, with which I am not now troubling you—the editor adds this paragraph:

The recent controversy between Great Britain and the United States, involving the right of British subjects to catch seals in North Pacific waters, appears to be an attempted revival of these old claims to jurisdiction over broad stretches of sea. That an international agreement establishing a rational close season for the fur seal is wise and necessary, no one will dispute. But to prevent foreigners from sealing on the high sea, or within the Kamschatkan sea (which is not even enclosed by American territory, its west and north west shores being Russian) is as unwarranted as if England should warn fishermen of other nationalities off the Newfoundland banks.

I say it is creditable to the publicists of America that they should take this true juridical and legal view of the contention put forward by the United States.

MR. JUSTICE HARLAN.—Sir Charles, the Marquis Venosta asks me whether that passage was in the original book of Woolsey, or is it a passage added by his son?

SIR CHARLES RUSSELL.—I said that it was added by the present editor. The original author is dead.

THE PRESIDENT.—What is the date of the edition?

SIR CHARLES RUSSELL.—1892. It is the 6th edition.

Now, so far as I know, (I do not, of course, venture to speak on the matter with certainty) only one publication has appeared—I am not talking of newspaper articles and things of that kind, I am talking of persons who write under their own names with some sense of responsibility and with some knowledge of the legal considerations which affect the matter—the only publication which so far has appeared is one the publication of which in its present form, I am told, we owe to the suggestion of one of the Arbitrators, Judge Harlan—I do not know whether that is correct or not. It is an address delivered to the students by Mr. James C. Welling of the Columbian University, professor of the International Law School of the University; and this book, like the others, is at the disposition of any member of the Tribunal who desires to see it.

I will only say, summarising the effect of it, that his whole argument as I have appreciated it, depends upon the correctness of an analogy which he draws between the case of bees and seals; and depends further

upon whether he has or has not rightly appreciated certain well known authorities upon the subject of bees; but I conceive

(I am not to be deflected from my line of argument to justify myself at this moment) that he is mistaken in both respects. But his argument, of course, is entitled to be treated with respect, and I am entitled to combat his view and the analogy upon which he bases that view when I come to the question of property. At present the Tribunal understands that I am calling attention to the fact that there is nobody of respectable authority that I know of, legal or juridical, to support even at this moment and even in the heat of this controversy, the case which is put forward upon the part of the United States.

Now I have ended the discussion of these matters, which are more or less of a general character, and I end it with this one observation: My aim has been to reduce this question, so far as it is a matter of money interest, to something like what I conceive to be its just proportions.

MR. JUSTICE HARLAN.—Before you leave that, what is your statement about being indebted to me for that address?

SIR CHARLES RUSSELL.—I do not know how it has reached me, but the statement was that the author had shewn you the paper and that you thought it was worth publication.

Mr. Justice HARLAN.—I never saw a line of the paper before its publication. I remember to have heard President Welling talk on the general subject, and suggested in reply to an inquiry by him as to the propriety of his expressing his opinions, that if he had matured views he could properly give them to the public in some form.

Sir CHARLES RUSSELL.—I have no doubt that is the foundation for it. The only effect on my mind was that I read that with more care and discrimination, as you have seen.

Mr. Justice HARLAN.—He, like President Woolsey and President Angel, are Presidents of Universities in America. Although none of them are trained lawyers, they are gentlemen of wide reading, and stand very high.

Sir CHARLES RUSSELL.—If I were to excise from the voluminous excerpts in the printed argument of my friends all who are not trained lawyers, the residuum would be very small.

Mr. Justice HARLAN.—I did not mean to suggest that you ought to do that, but simply to inform you who they were.

Sir CHARLES RUSSELL.—Quite so, Sir. I was about to say that my object has been to reduce this question, so far as it is a matter of money interest, to something like its just and true proportions, and to dwell upon the novelty of the claim. And now my last word in this connection is to point out in a sentence, emphasizing what my friend Mr. Carter so well said, how much more important the mode of determining this question is than the question itself. My last word in this connection is to point out the grave and far-reaching consequences of a decision which would affirm a property right in this dispute. My friends have said—I do not quarrel with it; they are probably right—that a

773 mere ordinary right of defence of property such as the law recognizes, and such as I shall hereafter explain, would be inadequate for the purposes of the protection of the fur-seal in the Behring Sea. I am willing to accept, without argument, their statement for this purpose as correct. They claim that the mere right of defence of possession would be inadequate. They say to give them the effective right of protection, they must have a right of search; they must have a right of seizure; they must have a right of confiscation; and I need not point out that such rights must have not merely a direct effect in interfering with the rights of other nations on the high seas, but must have a direct and serious effect in harassing and interfering with the commerce of the world, which has nothing to do with the question of pelagic sealing at all.

I say, therefore, that this question does involve gravely, does involve directly, the freedom of the seas and the equality of all nations, be they great or small, upon the seas.

Now, Mr. President, I proceed to state the order of the argument which I am about to present. I shall, first, consider the facts and circumstances of the seizures of British vessels Order of the argument set forth. under the executive authority of the United States Government; for it must not be forgotten, what I took the liberty a good many days ago now of reminding the Tribunal of that the Government of the Queen here is a party complaining that the property of the subjects of Great Britain has been, without legal warrant, seized and confiscated, and some of the crews of those vessels fined and imprisoned, also without legal warrant. It is part of your duty to find the facts in relation to those seizures, though it is not part of your duty to assess the claims for damages in respect to them. I shall then pass to the consideration of the first four questions, grouping them together, in

article VI of the Treaty, the question which we have called the question of derivative right under Russia. I shall then consider question 5, to which the great stress of the argument of my learned friend has been directed; and, following upon that examination I shall, asking for the patience of this Tribunal, examine the cases that have been cited and the propositions that have been based on those cases. And, finally, I shall examine the analogies sought to be drawn from the legislation of other Nations as affording some foundation for the contentions advanced on the part of my learned friend Mr. Carter; especially I shall examine the argument that in the analogy of that legislation of other civilised countries is to be found some warrant for the suggestion that international law sanctions such claims as are here advanced.

THE SEIZURES OF THE BRITISH VESSELS.

I begin, at once, with the question of the seizures.

The PRESIDENT.—You spoke yesterday, Sir Charles, of introducing into the general plan of your argument the two different questions of damages: those with reference to the seizure, and those under the 774 *modus vivendi*. At which moment of your argument do you intend to bring those questions of damages in?

Sir CHARLES RUSSELL.—At the conclusion of all questions of principle.

The PRESIDENT.—In the first part of your argument, before you enter upon the Regulations?

Sir CHARLES RUSSELL.—Certainly.

I was about to draw, as it is right I should, the attention of the Tribunal to what its function is under Article VIII. Under Article VIII, it is provided that

The High Contracting Parties having found themselves unable to agree upon a reference which shall include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it; and, being solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions, do agree that either may submit to the Arbitrators any question of fact involved in said claims, and ask for a finding thereon, the question of the liability of either Government upon the facts found to be the subject of further negotiation.

I should like the attention of my learned friends at this point for one moment. We, I think, agree (it is so stated, I think, in both Cases) that that does not involve the calling upon this Tribunal to deal with any question of amount?

Mr. PHILLIPS.—It does not.

Sir CHARLES RUSSELL.—No. We agree, therefore, that this Tribunal will not be troubled to assess, as the technical phrase is, the amount of damages. What the Tribunal will be asked to do is to find any question of fact involved in the said claim; and, so far as we are concerned, the simple facts that we request the Tribunal to find will be these. Two of them are undisputed;—first, the fact of the seizures; next, the fact that those seizures were made with the authority of the Executive of the United States,—neither of those facts is in dispute; and the only remaining one, therefore, which we shall ask the Tribunal to find is, that there was no warrant in law, in the circumstances of the case, for the seizure and condemnation of those ships, or the imprisonment of their crews.

Mr. PHELPS.—We should not regard that as a fact, as it seems to be a proposition of law.

Sir CHARLES RUSSELL.—But it must be found as a fact, though I agree it involves a proposition of law.

Senator MORGAN.—It fixes liability, does it not?

Mr. PHELPS.—Of course it does.

Senator MORGAN.—I understand the Treaty does not permit us to fix liability upon either Government, and that would fix liability, would it not?

Sir CHARLES RUSSELL.—Not necessarily; I agree it would go a very long way towards doing so.

775 The PRESIDENT.—I think, Sir Charles, you must make your distinction a little clearer.

Senator MORGAN.—It seems to me it goes the whole length.

The PRESIDENT.—You must make it clear for us that it is not liability.

Sir CHARLES RUSSELL.—Well, you are not to say, "We thereupon award and adjudge that the United States shall pay so much damages". That would be the affirmation of liability; but you are asked to find the facts as to whether the seizures occurred, as to whether they were done with the authority of the United States, as to whether there was any justification in law for them. I do not see how you can escape it; and I think the passage which I am about to read shows that the view of my learned friends was the same. You will see at page 217 of the printed Argument of the United States, a sentence which makes the matter clear.

The claims submitted on the part of Great Britain are for damages sustained by certain of its subjects by reason of the seizure by the United States of certain vessels alleged to belong to such subjects, and warning certain British vessels engaged in sealing not to enter Bering Sea, and notifying certain other British vessels engaged in the capture of seals in Bering Sea to leave said sea, whereby it is insisted that the owners of such vessels sustained losses and damages, as set forth in the respective claims.

Now I call special attention to these next paragraphs:

The right and authority of the United States to protect the seal herd, which has its home in the Pribilof Islands, and in the exercise of such right to make reprisal of seal-skins wrongfully taken, and to seize, and, if necessary, forfeit the vessels and other property employed in such unlawful and destructive pursuit, is a necessary incident to the right asserted by the United States to an exclusive property interest in said seals and the industry established at the sealeries.

We, however, preface what we have to submit on this feature of the case by saying that, if it shall be held by this tribunal that these seizures and interferences with British vessels were wrong and unjustifiable under the laws and principles applicable thereto, then it would not be becoming in our nation to contest those claims, so far as they are just and within the fair amount of the damages actually sustained by British subjects.

I care not in what form it is put; but surely it is a question of fact, aye or no, were the Canadian vessels exercising a right when they were seized; aye or no, was there, in point of fact or of law, any justification for those seizures. I care not whether the result of those findings is or is not necessary to land the United States in liability. If it be so, so much the simpler the question of the settlement of those claims; but it could not have been intended, it would have been an absurdity to suggest that this Tribunal was merely to find the fact that the vessels were seized, and merely to find the fact, which no one has ever disputed, that those seizures took place under the executive authority of the United States. It would be idle to suggest that this Tribunal was called upon merely to determine those facts about which there is no controversy; and it

776 will be observed that the language to which I have called attention in Article VIII appears to give a right to either of these parties, the United States on the one hand Great Britain on the other, to call upon the Tribunal to find any questions of fact involved in the said claims.

I cannot see any question of fact more directly involved in this claim than the question what these Canadian vessels were engaged in when they were seized, or when they were interfered with—whether they were exercising a right, whether they were committing a wrong, whether the United States had the warrant of law, or whether it was a lawless interference and lawless arrest.

Mr. PHELPS.—Perhaps I may suggest to my learned friend one very serious question of fact as it seems to me, as to whether some of these vessels were the property of British subjects at all.

Sir CHARLES RUSSELL.—I am exceedingly obliged to my learned friend for that illustration. It would be a question of fact which might or might not be submitted to this Tribunal; we do not seek to disturb or embarrass the Tribunal; if there be any real dispute of that kind, we are quite willing to leave it entirely an open question.

The PRESIDENT.—That question will perhaps be rather raised by you Mr. Phelps than by the other side.

Mr. PHELPS.—It has been raised in our argument. We do not care to discuss it if the Counsel on the other side do not. It is a fact they may or may not ask the Tribunal to decide. If they do, we dispute it. If they do not we have nothing to say.

Sir CHARLES RUSSELL.—I am obliged to my learned friend for his interposition, because I think it throws some light upon the matter. The finding that the vessels, the names of which appear in the case, have been seized and seized while exercising a legal right would not conclude the liability of the United States to pay if, for instance, it turned out that some of those vessels were owned by citizens of the United States and subject to the laws of the United States.

Lord HANNEN.—Would not that be one of the facts which we might be properly called upon to determine?

Sir CHARLES RUSSELL.—Undoubtedly, my Lord; I have said so; it might be; but it is a fact that as far as I know at present—I have not referred to Mr. Tupper, the Canadian Agent, to have his view in the matter—but so far I have no reason to suppose that that is a matter that we should care to press this Tribunal to embarrass itself with at all; but I shall answer that question at a later stage. For the present, I am content to say that the questions of fact which I submit the Tribunal ought to find are these—the fact of the seizures, which is not disputed: the fact that those seizures were made with the authority of the United States Government: and the fact that the vessels so seized were exercising a right upon the high seas: and finally, the fact, in any form in which it is desired to be couched—I care not what—that there was no warrant in law on the part of the United States for those seizures. I beg to say that the view which I am now presenting
777 is the view presented in the passage from the United States Argument to which I have already drawn your attention, and which is also in the United States Counter Case.

Lord HANNEN.—Does not your contention amount to this, that the question of the liability referred to in the 8th Article means the question of the amount of liability?

Sir CHARLES RUSSELL.—Well, that is one view, but I confess I think the word is more general. I confess the word “liability” is not narrowed, I must say, to the question of amount merely. I think the word “liability” has a wider significance.

Lord HANNEN.—Would not your contention limit it to that sense? You say we are confined to whether it was done wrongfully.

Sir CHARLES RUSSELL.—Certainly, the fact you are required to find must carry with it the consequence that the seizures were wrongful.

Mr. Justice HARLAN.—Is it the fact that they did or did not do it in violation of the law?—is that a fact?

Sir CHARLES RUSSELL.—I think it is.

The PRESIDENT.—Well, I think we will let you argue your point; but this Tribunal must reserve for further consideration whether they will or not take it as a fact.

Sir CHARLES RUSSELL.—I will also respectfully reserve to myself the right of supporting my views, because, knowing what was to be found in the Counter-Case of the United States, I really did not anticipate that there would be any difference between us on this point. It is the first time that it has been suggested to me.

Now I want to call attention to page 133 of the Counter-Case in this connection. I merely refer to it to show that they discuss the questions referred to by my learned friend, Mr. Phelps, suggesting that some of these vessels are not British-owned vessels, and they take the point which my learned friend Mr. Coudert reiterated the other day, that no damages can be awarded for prospective profits, on the ground that they were too remote. My learned friends made the argument under a misapprehension, I think, of the Geneva decision; and then upon page 134 they insist that the damages claimed are excessive; and then comes the final passage, to which I especially desire to call attention.

The United States do not deem it necessary to state in detail wherein the valuations and damages claimed are excessive and exaggerated, or submit proofs in relation thereto, further than by the analysis of said claims found in the Appendix to this their Counter Case, at page 339, for the reason—

Now this is their reason.—

That the “questions of fact involved in the claim” of either of the parties to the Treaty against the other, to be submitted to the Tribunal of Arbitration under the provisions of Article VIII, should, as this Article is understood by the United States, have relation only to such facts as tend to fix the liability of one party to the other, and do not include facts which relate to the amounts of such claims.

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—Showing that the United States took
778 the view that Lord Hannen has been good enough to express as to what was the limitation of this matter.

The PRESIDENT.—If it is more convenient for you to proceed with your argument, it is understood that the Tribunal reserves for further consideration the question which has been mooted.

Lord HANNEN.—If I may put this question to you, Mr. Phelps; it would assist my understanding, at least, of the point in difference between you, if you could with propriety answer this question: Do you consider that we finding the facts, the United States would in the future negotiations which would take place as to liability be bound by our decision of principle upon the first four questions, or would it still be open to them to say, upon the facts found, we still maintain that we are not liable to pay damages for any seizure?

Mr. PHELPS.—That is a question, my Lord, that I am not prepared at this moment, to express an opinion upon.

Lord HANNEN.—Very well, perhaps you will consider it.

Mr. PHELPS.—I may say that our view of article VIII has been simply this: that any facts which either party requested the Tribunal to find and establish by proof, bearing upon the question of claim for these seizures, would be passed upon and found as might be right by the Tribunal; and thus the whole subject of the liability of the Government

of the United States or of Great Britain to pay any amount, whether found by the Tribunal or not, in respect of those facts, would be left an open question. The material facts as to the seizure of these vessels would seem to me to be these: What vessels were seized? Did they belong to British subjects? Where were they seized? Was any claim made as a ground for seizure, except that they were engaged in the taking of seals? Such facts as that, from which, when found, might be deduced well enough the answer to the question whether upon those facts the United States ought to pay or not.

Lord HANNEN.—Well, that is the whole question over again, and all this Arbitration would go for nothing.

Mr. PHELPS.—Not necessarily.

Mr. Justice HARLAN.—Suppose this Tribunal should decide under the points in Article VI, that the United States had or had not any right of property in the seals, and had or had not a right to protect them on the high seas, you would consider the United States bound by that ruling when the two nations, if the occasion arose, got together in negotiations on the question of damages.

Mr. PHELPS.—I should, Sir, if you put that question to me at this time.

Mr. Justice HARLAN.—That is what I understand Lord Hannen's question to embrace.

Mr. PHELPS.—If that is the purport of the enquiry, Yes. I do not suppose for instance that if this Tribunal should decide that the United States had no right of property, and no right of protection, and that under the circumstances vessels were seized belonging to British
779 subjects, I do not understand that it would be open to the United States after that to insist that there was a right of seizure, and a right of protection, in the face of the decision of the Tribunal.

Lord HANNEN.—I am bound to say that, assuming that that may be taken as *authoritative*, it would meet my question.

The PRESIDENT.—And in that case the liability spoken of in Article VIII would merely refer to the question of indemnity, and then there would be no disagreement.

Mr. PHELPS.—That question, as it seems to me, which was put by his Lordship refers rather to the inference that the United States Government would feel itself bound to draw in respect of the seizure from the decision of the points of law in respect to the other branches of the case.

Lord HANNEN.—Yes. The object of my enquiry would be completely met if it can be taken as *authoritative*. We will assume for a moment that the finding would be no property. If that can be tacked on to the finding of facts as to the seizure, then that would meet that which Sir Charles has been asking for, a finding that it was an illegal seizure; and, if so, I presume that would satisfy his requirement, as undoubtedly it would meet the view which I intended to indicate in the question I put to you.

Mr. PHELPS.—Your Lordship will see that if you ask the opinion of the Counsel of the United States what would be the just and right course for the United States Government to pursue in the future negotiations if such were the finding of the Tribunal, our answer might be one way. If you ask us if we are authorised here to bind the United States to any conclusion in future negotiations, we must answer that we have no such authority and have no right to make a declaration that would bind them.

Lord HANNEN.—That is why I put in the word "*authoritative*".

Mr. PHELPS.—We are not authorized to make any such statement, or to give any such assurance. I am free to say, and I believe that to be the view of my associates, that after a finding by the Tribunal upon the five questions involved, it would not seem to me becoming on the part of the United States, who have agreed to abide by this award, to contradict the award when the question of its propriety arose upon this subordinate matter of seizure; but it must be a question for those who control the diplomatic relations of our Government, and is not a question that we are authorised in reference to.

The PRESIDENT.—That is all very well Mr. Phelps; but we have here the United States before us in the persons of their Agent and Counsel, and we have the right to ask them what is the authoritative and official interpretation put by the United States upon one word used in an article of a Treaty which limits our powers. We have the right to ask you what is the interpretation put by the United States upon those words

“question of liability”?

780 **Mr. PHELPS.**—That question the Tribunal is quite entitled to put, and that question we are quite ready to answer. We have endeavoured to answer it;—that in the discussion of questions under article VIII the Tribunal is invested with no authority whatever except to find the facts, leaving the legal consequences of those facts, so far as these seizures are concerned for future consideration.

Then if the Tribunal goes further, and asks me what that future consideration on the part of the United States Government would be, I reply in the first place that I have no doubt that it ought to regard the decision of the Tribunal as conclusive upon the questions arising under this Treaty, but that I am not authorized to go beyond this arbitration and the power with which the Tribunal is invested under this article, and give an authoritative assurance as to what those in charge of the United States Government when that time comes may do. The distinction may be a refined one, but it is one that we feel compelled to make.

The PRESIDENT.—We understand that very well. We merely wanted to know what was your interpretation of these words “questions of liability”. We know the interpretation of the English Government.

Mr. PHELPS.—Our interpretation of that is, as I have said, that article VIII simply provides for the finding of such facts—material facts of course—as either party may desire to have found and may offer sufficient evidence in support of. What consequences shall come from that finding is a point that it seems to us is not submitted to this Tribunal. It will be for the after consideration of the Government. But I should not seriously doubt, when you ask my opinion, when those points come to be considered hereafter by the United States Government, that the decision of the Tribunal upon the first five questions will be respected there as elsewhere.

The PRESIDENT.—I think there is no objection to Sir Charles arguing the question of fact, as he understands it. The court will consider whether it is one of those facts which we have to decide upon.

Mr. PHELPS.—General Foster has put in my hands a paragraph in one of the letters of Sir Julian Pauncefote to Mr. Wharton in the course of the negotiation, dated August 26, 1891, while they were discussing this eighth clause. It is on page 330 of the first volume of the Appendix to the United States Case.

He says:

My Government are unable to accept the form of clause proposed by the President because it appears to them, taken in connection with your note of the 23d ultimo, to imply an admission on their part of a doctrine respecting the liability of Govern-

ments for the acts of their nationals or other persons sailing under their flag on the high seas which is not warranted by international law and to which they cannot subscribe.

I need hardly say that the discussion of such a point (which, after all, may never arise) must prolong the negotiations indefinitely. Moreover, it seems premature to enter into such a discussion before the other questions to be submitted to the Arbitrators have been determined and all the facts on which any liability can arise have been ascertained.

781 I will read a little further down, with the permission of the Court. Sir Julian's suggestion of the form of this article shows what was in the mind of the British Government. On the same page and further down in the same letter he proposes this clause:

Either of the two Governments may submit to the Arbitrators any question of fact which it may wish to put before them in reference to the claims for compensation which it believes itself or its nationals to possess against the other.

The question whether or not, and to what extent, those facts, as determined by the Arbitrators and taken in connection with their decision upon the other questions submitted to them, render such claims valid according to the principles of international law shall be a matter of subsequent negotiations, and may, if the two powers agree, be referred, in whole or in part, to the Arbitrators.

Sir Julian says: "I do not propose the above wording as definite; it should be open to amendment on either side; but if after submitting," etc.

The remainder is not material.

That shows that the idea of the British Government as expressed by Sir Julian Panncefote then was precisely what I have endeavoured to state as our idea now, and I think there is nothing in the correspondence that will show that that idea was changed or that the language of the Treaty was modified so as to prevent any different meaning from what was there expressed. That is to say, that so far as the seizures are concerned the arbitrators simply find the facts, leaving the whole subject then for future negotiation; and therefore, charged as we are, authorized as we are, only with the representation of the Government before this Tribunal upon the points submitted by the Treaty, we are not authorized without communicating with our Government to go any further than that by giving an assurance about further negotiations. At the same time, as I have said, I should not hesitate to express my opinion as to what the result of the finding would probably be on the action of those who represent our Government.

Lord HANNEN:—You will observe, Mr. Phelps, that Sir Julian Panncefote uses an expression the equivalent of one which I have used. He says: "Findings of fact are to be taken in connection with the determination of the Tribunal upon questions of principle". I used the expression: If they were to be one tacked on to the other that would be sufficient, supposing it were an authoritative statement.

Mr. PHELPS.—That expression, however, your Lordship, is just the one which was left out of that article when it was put into the treaty.

Senator MORGAN.—Sir Charles, before you proceed I would like to say this: The President of the United States can pledge his Government diplomatically to entertain or enter into a future negotiation. I have no doubt of that; but neither the President nor any of his agents can pledge the Government to any particular result of a future negotiation, for the reason that another body has to come in and, by a two-thirds vote, ratify and confirm any negotiation before it can become any part of the supreme law. Therefore the counsel here, though they might be

782 expressly authorized by the President to make pledges to this Tribunal, could not possibly commit the American Government, under its Constitution, by agreeing that a pledge should be executed in the form which they might state. It is a peculiarity of our Government that prevents that result.

Sir CHARLES RUSSELL.—I am quite aware that according to the Constitution of the United States the Executive Government could not enter into a Treaty without the authority and sanction of the Senate.

But, Mr. President, I think we are indebted to Mr. Phelps for his interposition and for his citation from this letter of Sir Julian Pauncefote, because it explains the meaning of the word "liability" as it is used in that paragraph, and it will be found to have no relation whatever, for the reason I will give you in a moment, to the question of the liability of the United States, if in point of fact the seizures were unauthorized.

You will observe that article VIII deals with claims which may be made, either on the part of the United States or its citizens, or on the part of Great Britain and its citizens. You will observe the distinction at once between the two sets of claims. Once it is clear that the acts which are complained of are done with the authority of the Executive of the United States, it becomes the direct act of the United States: there can be no question of the liability of the Government for those acts, if the acts themselves cannot be justified; but, *per contra*, the United States were suggesting that they on behalf of themselves and their citizens might make claims against the British Government in respect of acts done by individual merchant vessels belonging to subjects of Great Britain—not public vessels belonging to the Executive, and not in any way authorized by the Executive. The question raised therefore was whether or not the British Government would be liable for the acts of private citizens in the pursuit of pelagic sealing. Sir Julian Pauncefote says:

We cannot admit as a principle of international law that a Government is responsible for what is done by a merchant ship that is bearing its flag, unless that Government has done something to adopt its act or taken the responsibility upon itself.

Therefore he says, *quoad* the claim for damages against the Government of Great Britain I am not prepared to admit that, even if it were found that the merchant vessel had done something to the interest of the United States or its citizens, which was without warrant of law, I am not prepared to admit as a principle of international law that my Government is *ipso facto* liable. That is a perfectly intelligible distinction; but it has no relation, no bearing, upon the other branch of liability, namely, the liability of the United States for the acts done under the direct authority of its executive power. I think the distinction is now apparent; and I confess upon reflection that I think that Lord Hannen was right in saying that as regards the word "liability", so far as it concerns claims of Great Britain, it can not in this connection mean anything except the amount of liability.

Lord HANNEN.—I did not intend to express a definite opinion.

Sir CHARLES RUSSELL.—No, no, my Lord; I so understood.
783 In truth when one comes to look carefully at the matter, and my friends are very candid, and I am sure will approach it in a candid spirit, how does the matter in fact stand? They have, *a priori*, in setting out the questions in article V, set out the grounds upon which they justify what they did. "We did what we did because we had rights under our title from Russia to do it—We did what we did by reason of our own inherent rights as owners of territory, and as owners of certain alleged rights incident to territory."

That is their justification for the seizures, and if that justification fails, my learned friends must candidly admit that there is no other justification. I do not care the least about the form of the thing. I want to get at the substance. And if it is clear to the mind of the Tri-

bunal that the two questions hang together, in the sense that if the questions of right are decided adversely to the United States, then there can be no justification for the seizures and there must be consequent liability for the seizures, I care not in what form of mere words that result is arrived at.

But let me finally say that this matter really is concluded from the point of view of the United States by what they themselves have said. What is the meaning of what Mr. Foster says in his very carefully prepared Counter Case on behalf of the United States? He can only mean one thing when he says at the bottom of page 134:

The United States do not deem it necessary to state in detail wherein the valuations and damages claimed are excessive and exaggerated, or submit proofs in relation thereto, further than by the analysis of said claims found in the Appendix . . . for the reason that the "questions of fact involved in the claim" of either of the parties to the Treaty against the other, to be submitted to the Tribunal of Arbitration under the provisions of Article VIII, should as this article is understood by the United States, have relation only to such facts as tend to fix the liability of one party to the other, and do not include facts which only relate to the amounts of such claims.

Mr. Justice HARLAN.—Do you understand that to be an admission that we are to find not only such facts, but also on the question of legal responsibility arising out of those facts?

Sir CHARLES RUSSELL.—These are largely mixed questions of fact and law. I think the true meaning—as the Judge is good enough to ask me the question, and I think he is entitled to a direct answer—I think the true meaning of Article VIII is simply this: That this Tribunal is not to have authority to award judgment in damages against the United States; that it is not to have authority to order the United States to pay any sum, much less to fix any sum; but that it has the authority and obligation to find the facts, whether they are partly law or partly fact. Let me point out that it is quite a mistake to suppose that this international Tribunal in affirming propositions of law is affirming propositions of law in the same sense in which a municipal Tribunal would affirm them. Foreign law is a question of fact. If Mr. Justice Harlan, sitting in his Supreme Court in Washington had to determine a question of English law, he would have to determine that, not
784 as a question of law, but as a question of fact. So as regards any other law which is foreign to the Tribunal before which it comes in question; and as regards our view of this matter it will be found that municipal law has a very important part to play in the consideration of this question.

Mr. Justice HARLAN.—May I ask you again, that I may get your exact idea—Suppose in reference to a particular vessel we should find that it was seized at a particular time and at a particular place, having previously found, let me assume for the purposes of the question, that the United States has no property in the seals and no right of protection. Do you insist that we should further find as a fact in the case that the seizures were wrong?

Sir CHARLES RUSSELL.—If no other justification was shown I should say, Yes.

Mr. Justice HARLAN.—What then is left for future negotiation?

Sir CHARLES RUSSELL.—The question of amount.

Mr. Justice HARLAN.—Only of amount?

Sir CHARLES RUSSELL.—The question of amount, and a little more than amount: a question of amount, speaking of the matter in gross; a question of liability as regards items of that amount, as for instance the question of whether the claimants put forward are entitled to claim—whether they are United States citizens. Again, the question of the principle upon which the claim is to be assessed, the question raised

by my friend Mr. Couderc as to prospective loss from the non-employment of the vessels, and questions of that kind—every question short of the affirmation of a judgment to pay is what the Tribunal is called upon as against the United States to affirm under Article VIII. That is my contention.

Mr. GRAM.—Will you allow me to ask you a question. Was the insertion of this final sentence which commences with the words, “The question of liability of the Government”, etc., due to the observations of Sir Julian Pauncefote in his note cited at page 330?

Sir CHARLES RUSSELL.—My impression is, sir, as far as I can form a judgment, that it probably was in consequence of that statement of Sir Julian Pauncefote; and I have endeavored to explain how in connection with the claim against Great Britain that word would be very properly used.

The PRESIDENT.—So that we would have to find on no question of fact except as to the amount of the liability?

Sir CHARLES RUSSELL.—Practically, in my judgment, it comes to that.

The PRESIDENT.—And that is the way in which you ask us to construe the article.

Sir CHARLES RUSSELL.—I am not calling upon you to say that in express terms; but I say that it practically comes to that.

The PRESIDENT.—And that is the same interpretation you put upon the passage you just read from the United States Counter Case?

785 Sir CHARLES RUSSELL.—Certainly. I think there is no other interpretation that can be put upon it. I will endeavor to formulate in precise language, and put in writing, so that they may be quite under the eye and clearly within the cognizance of the Tribunal, the findings that we should ask you to make. I should have thought that my learned friends and myself,—if they had authority corresponding to the authority that I as a law officer of the Crown have a right to exercise—I should have thought that we could together have determined that as regards these questions of whether the ships were American ships, the circumstances under which they were seized, the places, etc., they are matters with which this Tribunal ought not to be troubled. We are asking this Tribunal to affirm great principles, not to go into these details; and I should have hoped that before this discussion has closed, communication will have been made, if necessary, with the executive of the United States, in order that this matter may be removed from the area of controversy. There ought to be no real dispute between us on this matter.

Senator MORGAN.—The Executive cannot remove it.

Sir CHARLES RUSSELL.—I do not, with great deference, think that it is a question with which the intervention of the Senate would be called for.

Senator MORGAN.—The Senate would have to affirm any new negotiation.

Sir CHARLES RUSSELL.—No, it is a question of executive action under an existing Treaty.

Mr. PHELPS.—We shall be very willing to confer with our learned friends in regard to any questions of fact upon which we can agree, in respect to these matters. Undoubtedly many questions of fact that they may desire to have found we can agree upon; and if we can, we shall be glad to save them and the Tribunal any further trouble.

Mr. Justice HARLAN.—Still, we have upon us the responsibility to make a finding as to those facts.

Mr. PHELPS.—Certainly.

The PRESIDENT.—And upon those facts which shall be submitted to us.

Mr. PHELPS.—But upon another class of facts we are not likely to agree.

Senator MORGAN.—I will say for myself that I do not feel at liberty to make a finding upon any state of facts that has not been regularly submitted to this Tribunal under that Treaty. It says "Questions shall be submitted". That means that they shall be submitted in proper form and at the proper time.

Mr. PHELPS.—I quite agree that the finding must be by the Tribunal. What I meant to say was that I am prepared to say to the Tribunal that we have nothing in opposition to certain facts which we are not prepared to dispute.

The Tribunal here adjourned for a short while.

786 Sir CHARLES RUSSELL.—I will not pursue the discussion upon the construction of article VIII at this moment, but will content myself with saying in relation to it that we think it will assist the Tribunal if we formulate in a written paper the findings which, according to our construction of the Treaty, are findings within the meaning of article VIII, and which the Tribunal should be called upon to affirm. I will take the opportunity of saying that these statements of fact shall be submitted to my learned friend on the other side, so that when he comes to reply we may have his expression, probably of assent, or it may be in part of criticism, of those statements.

I now proceed to the consideration of the facts relating to the seizures themselves; and it will be convenient if I state briefly to the Tribunal the order of argument that I intend to pursue. I intend to bring before the Tribunal, without any colour, the facts of the seizures and the circumstances which followed them in the order of events. I shall not feel called upon to make much comment in relation to them. I shall then proceed to call the attention of the Tribunal to the diplomatic correspondence, beginning with the protests always persevered in by the British Government, following the seizures when they occurred, and examining the grounds which were put forward by the United States in supposed justification of those seizures. I shall then examine, for an important purpose, the legislation of the United States which became the basis of the judicial proceedings in the Courts in which confiscation of the seized vessels was sought; and lastly I shall examine the judgments of the judges who determined the confiscations.

The facts of the seizures.

My objects in doing this are to establish, first, that those seizures were unwarranted in point of law; to establish, next, that the executive action of the United States was based, and based solely, upon their municipal legislation, and upon the ground that the seizures took place where there was territorial dominion of the United States justifying the application of their municipal legislation to that locality; and that nowhere is there to be found any suggestion of the contention now put forward, that those proceedings were really justifiable not under the municipal legislation at all, but were justifiable and can be defended upon the ground that it was merely an invocation of the inherent right to protection which every State has the right to invoke for the protection of its property. Next, and particularly in connection with the proposition last mentioned, I propose to show, that this legislation cannot be treated as being in the nature of executive protective regulations, because it is legislation which is expressly confined, and has been judicially held to be confined, to a definite and defined area, namely the

eastern part of Behring Sea; and that that consideration makes it impossible to treat that legislation as a protective executive act, because the right of protection, if it is a right, of defence of possession, of protection of property, is a right which follows that property wherever it is, and cannot be defined or controlled within defined limits. It will be found later, if it should seem to the Tribunal that in this connection I am somewhat elaborating the point, that this will have a most important bearing upon the area of the dispute between the United States and Great Britain referred to this Tribunal; and a most important bearing also upon what is the limit and extent of the jurisdiction of this Tribunal both as to questions of alleged right and as to questions of regulations.

787 With that statement I proceed to the facts. I have in preparing my notes for this purpose endeavored to see to which of the many printed documents I could refer with the least inconvenience to the Tribunal; and I find that with hardly an exception all the documents to which I shall have to refer are to be found in the large volume, Volume III of the Appendix to the Case of Great Britain.

It will be found that very frequent references will not be required to the text, because I intend to state the facts in a narrative form, as they do not appear in that volume according to the order of date. The earlier part of my statement will be found on pages 61 and 62, and a little later on pages 22 and 23. Later still it will be found at page 40. Then we have to pass on to pages 334 and 335. There is then a passing reference to the Appendix at page 209. But within those pages practically will be found all to which I am going to refer.

These are the facts, and my friends will no doubt give them the attention they deserve; I think it will be found that I state them correctly.

The Canadian schooners, the "Thornton", "Onward" and "Carolina" were seized by the United States revenue steamer "Corwin" on the first of August 1886. They were towed to Unalaska. I do not stop to point out where they were seized, whether at 30, 40, 50 or 60 miles from the islands. I consider that unimportant because it is admitted that in each case they were seized far beyond the ordinary marginal belt of sea—the three mile limit. The crews of the "Thornton" and "Carolina", with the exception of one man and the captain on each vessel, who were detained at Unalaska, were sent by steamer to San Francisco. They were there turned adrift, while the men of the "Onward" were kept at Unalaska. The schooners and the seals found on board of them were also detained by the United States authorities. The master and mate of the "Thornton" were tried before Judge Dawson of the United States Court at Sitka on the 30th of August, 1886, and were sentenced, the captain, to a fine of \$500 and the mate \$300, and each was sentenced to be imprisoned for thirty days. In the next month, that is in September, 1886, the masters and mates of the "Carolina" and the "Onward" were condemned to undergo similar fines and similar imprisonment.

There is a painful incident in connection with the master of the "Carolina", who was an old man, and who appears to have been allowed temporary freedom and to have been found dead in some wood to which he wandered. I do not suggest that that was attributable to the direct action of the executive authorities. It is simply a lamentable event in connection with the story.

788 The other masters remaining were imprisoned for some time and finally were turned adrift, not furnished with funds, and left to find their way as best they could to their homes, some 1,500 miles distant.

On the 21st of October, 1886, the formal protest of Great Britain was recorded; and on the 4th of February, 1887, the seizures having been made in August, of 1886, orders were given by the United States Executive to discontinue all pending proceedings, to discharge all the vessels, and to release all the persons who had been arrested in connection with the seizures.

This order was in due course communicated to the United States Marshal at Sitka, who chose, for some reason that I have never yet heard explained, to disregard it absolutely. He appears to have expressed the opinion that this executive order was a forgery. He declined to act upon it. He did not act upon it until a much later period; and it was not until August, 1888—I pray your attention to this—two years after the seizure of these vessels, that effective orders were given for their release: and by the time orders were given for the release of these vessels they were lying high and dry upon the beach where they had been left to rot, in so worthless a condition that it was not considered worth while to retake possession of them for the purpose of conveying them to some port for repair.

I make only one comment upon this story, and these indubitable facts—that I think it would have been almost better if my learned friend Mr. Carter had foreborne making that commendation upon what he called the forbearance and statesman-like humanity which had characterized the Government and the Executive of the United States in this connection.

The vessels, the "Anna Beck", the "W. P. Sayward", the "Dolphin", the "Grace", the "Ada", and the "Alfred Adams", were captured in July and August of 1887. The last mentioned of these, the "Alfred Adams," escaped from capture. The others were taken to Unalaska. The officers and the crews were sent off to Sitka, taken before a judge, and bound over for trial on the 22nd of August; and then, having been kept for trial until the 9th of September, they were unconditionally released. As regards the vessels, they were sold by auction by the United States Marshal on the 26th of March 1889, excepting the "W. P. Sayward", in respect of which a bail bond had been given for her release. Whether that bail bond was paid or sued upon I do not know.

Mr. TUPPER.—No action was taken on it.

Mr. FOSTER.—We suspended action on it.

Sir CHARLES RUSSELL.—It is noticeable in respect of the vessels as to which the order for release was sent at the date I have given, that notwithstanding, after the great delay to which I have adverted, those vessels were released at the time when they proved to be worthless, the authorities sold the stores and other matters in connection with their equipment.

789 Now, what is the case which Great Britain has in point of law to establish in respect of these vessels? It is clear that all that Great Britain has to establish, to found its claim for damages for these vessels in the first instance, so as to make what is called a *primâ facie* case, is the fact of the seizures: this is not denied; next, the fact that those seizures were made with the authority of the United States: this also, is not denied; and therefore, these vessels having been seized on the high sea, the *onus* lies upon those who seek to justify those seizures, to show that they were justified in making them. That state of the case, I am sure, will not be questioned—that once the fact of the seizure upon the high seas is established, and that that seizure was with authority of the United States Government, the *onus* thereupon lies upon the United States Government, in answer to the claim for dam-

ages in respect to what is *prima facie* a grievous wrong, the onus lies upon that Government to justify its action upon legal grounds. I will discuss those legal grounds presently.

Now I turn to the correspondence which took place, and I assure the Tribunal that I will not trouble them with more than I can avoid. But it is my purpose, which I wish to make very clear to this Tribunal—though I wish to save them all the time and trouble that I can—it is my purpose that the statement I am now submitting shall cover the whole ground of this case, not perhaps perfectly or completely, but as far as I am able to do it; and I shall leave nothing unsaid which I think ought to be said in this connection, even if it should involve very considerable demands upon the patience of this Tribunal.

Correspondence
on the seizures.

I have told you, Mr. President, that the first seizures took place on the first of August, 1886. Information appears to have reached the Foreign Office in London, then presided over by the late Lord Iddesleigh, by the 21st of October of that year; and on page 20 is the first communication to which I need call your attention. It is the second communication on that page. It is addressed to Sir Lionel West, then the representative of Great Britain at Washington:

I have to request you to inform me whether the United States Government have replied to the communication which you were directed to make in my dispatch of the 9th ultimo, regarding the seizure of British vessels in Behring Sea by a United States Revenue cutter. If an answer has been received, I should be glad to receive a report of the substance by telegraph. I should be glad at the same time to know whether any appeal has been lodged against the decision of the United States Court condemning certain British subjects in connection with this matter.

Then at the bottom of that page is the further communication of the 30th of October, which is an important document. It begins—

Her Majesty's Government are still awaiting a report on the result of the application which you were directed by my dispatch of the 9th ultimo to make to the Government of the United States for information in regard to the reported seizure by the United States Revenue Cutter "Corwin" of three Canadian schooners while engaged in the pursuit of seals in Behring Sea.

790 I am inclined to think that this is one of the few letters that it may be desirable to read at length.

(Sir RICHARD WEBSTER thereupon read the remainder of the above letter, as follows:)

In the meanwhile, further details in regard to these seizures have been sent to this country, and Her Majesty's Government now consider it incumbent on them to bring to the notice of the United States Government the facts of the case as they have reached them from British sources.

It appears that the three schooners, named respectively the "Carolina," the "Onward," and the "Thornton," were fitted out in Victoria, British Columbia, for the capture of seals in the waters of the Northern Pacific Ocean, adjacent to Vancouver's Island, Queen Charlotte Islands, and Alaska.

According to the depositions inclosed herewith from some of the officers and men, these vessels were engaged in the capture of seals in the open sea out of sight of land, when they were taken possession of on or about the 1st August last by the United States Revenue cutter "Corwin," the "Carolina," in latitude 55° 52' north, longitude 168° 53' west, the "Onward" in latitude 50° 52' north, longitude 167° 55' west, and the "Thornton" in about the same latitude and longitude.

They were all at a distance of more than 60 miles from the nearest land at the time of their seizure, and on being captured were towed by the "Corwin" to Unalaska, where they are still detained. The crews of the "Carolina" and "Thornton," with the exception of the captain and one man on each vessel detained at that port, were, it appears, sent by the steamer "St. Paul" to San Francisco, California, and then turned adrift, while the crew of the "Onward" were kept at Unalaska.

At the time of their seizure the "Carolina" had 686 seal-skins on board, the "Thornton" 404, and the "Onward" 900, and these were detained, and would appear to be still kept at Unalaska along with the schooners by the United States authorities.

According to information given in the "Alaskan," a newspaper published at Sitka in the Territory of Alaska, and dated the 4th September, 1886, it is reported:

1. That the master and mate of the schooner "Thornton" were brought for trial before Judge Dawson in the United States District Court at Sitka on the 30th August last.

2. That the evidence given by the officers of the United States Revenue cutter "Corwin" went to show that the "Thornton" was seized while in Behring's Sea, about 60 or 70 miles south-south-east of St. George Island, for the offence of hunting and killing seals within that part of Behring's Sea which (it was alleged by the "Alaskan" newspaper) was ceded to the United States by Russia in 1867.

3. That the Judge in his charge to the jury, after quoting the 1st Article of the Treaty of the 30th March, 1867, between Russia and the United States, in which the western boundary of Alaska is defined, went on to say: "All the waters within the boundary set forth in this Treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must therefore attach against any violation of law within the limits heretofore described. If, therefore, the jury believe from the evidence that the defendants, by themselves or in conjunction with others, did, on or about the time charged in the information, kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal or animals, on the shores of Alaska or in the Behring's Sea east of 193° of west longitude, the jury should find the defendants guilty, and assess their punishment separately, at a fine of not less than 200 dollars nor more than 1,000 dollars, or imprisonment not more than six months, or by both such fine, within the limits herein set forth, and imprisonment.

4. That the jury brought in a verdict of guilty against the prisoners, in accordance with which the master of the "Thornton," Hans Guttousen, was sentenced to imprisonment for thirty days and to pay a fine of 500 dollars, and the mate of the 791 "Thornton," Norman, was sentenced to imprisonment for thirty days and to pay a fine of 300 dollars, which terms of imprisonment are presumably now being carried into effect.

There is also reason to believe that the masters and mates of the "Onward" and "Carolina" have since been tried, and sentenced to undergo penalties similar to those now being inflicted on the master and mate of the "Thornton."

You will observe, from the facts given above, that the authorities of the United States appear to lay claim to the sole sovereignty of that part of Behring's Sea lying east of the westerly boundary of Alaska, as defined in the 1st Article of the Treaty concluded between the United States and Russia in 1867, by which Alaska was ceded to the United States, and which includes a stretch of sea extending in its widest part some 600 or 700 miles easterly...

That should, of course, be "westerly" from the mainland of Alaska.

In support of this claim, those authorities are alleged to have interfered with the peaceable and lawful occupation of Canadian citizens on the high seas, to have taken possession of their ships, to have subjected their property to forfeiture, and to have visited upon their persons the indignity of imprisonment.

Such proceedings, if correctly reported, would appear to have been in violation of the admitted principles of international law.

I request that you will, on the receipt of this despatch, seek an interview with Mr. Bayard and make him acquainted with the nature of the information with which Her Majesty's Government have been furnished respecting this matter, and state to him that they do not doubt that, if on inquiry it should prove to be correct, the Government of the United States will, with their well known sense of justice, at once admit the illegality of the proceedings resorted to against the British vessels and the British subjects above mentioned, and will cause reasonable reparation to be made for the wrongs to which they have been subjected, and for the losses which they have sustained.

Should Mr. Bayard desire it, you are authorized to leave with him a copy of this despatch.

I am, etc.,

IDDESLEIGH.

The PRESIDENT.—I suppose there is a mistake in the print as regards the latitude where the "Onward" and the "Thornton" were seized. In this despatch it is marked 50½° north, and that would be out of Behring Sea. I suppose that must be a mistake, because nobody alleges the ships were seized out of Behring Sea.

Sir RICHARD WEBSTER.—I did not read those latitudes because I knew they were not geographically correct. It appears from other papers that they were all seized in Behring Sea.

SIR CHARLES RUSSELL.—The Tribunal will see that this is a very grave allegation. The attention of the Government of the United States is called to it as early as the 9th of October, and one would have expected that in a grave matter of this kind the Executive would have been in possession of complete information as to what the facts were.

Here are two Powers fortunately at peace and in most friendly relations with one another. A number of the vessels of one of those Powers are seized upon the sea, without any suggestion of previous diplomatic representation or expostulation of any kind; and yet as late as the 12th November, if you will turn to page 27, you will find Mr. Bayard (an able and courteous Statesman of the United States, whom I have the pleasure of knowing) writes on that day and says:

The delay in my reply to your letters of the 27th September and 21st October, asking for information, concerning the seizure by the United States Revenue cutter "Corwin" in the Behring Sea, of British vessels for an alleged violation of the laws of the United States in relation to the Alaska seal fisheries, has been caused by my waiting to receive from the Treasury Department the information you desired. . . .

My application to my colleague the Attorney General to procure an authentic Report of these proceedings was promptly made, and the delay in furnishing the Report doubtless has arisen from the remoteness of the place of trial.

As soon as I am enabled, I will convey to you the facts as ascertained in the trial, and the rulings of law as applied by the Court.

Let me ask the Tribunal to realise the position of things. He has been told that the seizure has taken place in Behring Sea, when these vessels were in pursuit of fur-seals. He has been told that they were seized at distances from land which showed that they were outside the ordinary territorial limits; and yet the Secretary of State cannot give any answer to the challenge of Lord Iddesleigh, who affirms that these facts point to a grave breach of international law, but must wait till he gets the exact information from the place of trial.

Senator MORGAN.—How can that be if the British Government disclaims all responsibility for the conduct of its nationals?

SIR CHARLES RUSSELL.—I am sure it is my fault, Sir; but the appositeness, or connection with my argument, of that remark I fail quite to appreciate.

Senator MORGAN.—I understand that the British Government has disclaimed in the diplomatic correspondence, and excluded from the Treaty, all considerations of responsibility for the conduct of its nationals in taking fur-seals. If that be so, I do not understand why it is that Mr. Bayard was required to make any representation to the British Government about a matter that he wished to redress or prevent.

SIR CHARLES RUSSELL.—Sir, I still fail, with all sincere respect, to see the connection with the argument I am pursuing.

Senator MORGAN.—I regret that you fail to see it.

SIR CHARLES RUSSELL.—I am calling attention to the fact that Lord Iddesleigh has stated facts, which are not contradicted, of the seizure of British vessels on the high sea outside territorial limits; seized not by the act of individuals, but seized by the act of the State through its Executive Authority.

Lord HANNEN.—What is your ground of complaint, Sir Charles? It was necessary to ascertain the facts, and the scene of action was a long way off.

SIR CHARLES RUSSELL.—With great deference, my Lord, No. If the case really were, that they could justify themselves as having a legislative power over Behring Sea, or, which is the case now made, as protecting their property in the fur-seals, there was a prompt and
793 immediate answer. "We have committed no offence against

international law at all." It is one of the many proofs that I am going to adduce that this case which is now presented to this Tribunal—

Lord HANNEN.—I understand that you do not make it a ground of complaint that they took time to ascertain the facts; but you say that they did not take up the ground that they are now taking up.

Sir CHARLES RUSSELL.—Certainly; that is my point; one of the many points which will go to show that as this case developed itself in the diplomatic correspondence, and as it has still further developed itself in the course of the printed argument, it has taken a form that was not present to the mind of the Executive at the time of these occurrences: as it ought to have been present if the case were as real as it is now made out.

That brings us to the 12th of November, 1886. I now refer to page 37 of the same book. We have got to the 8th of January, and Lord Iddesleigh again writes.

Referring to previous correspondence in regard to the case of the three Canadian schooners engaged in the seal fishery in Behring Sea, I transmit to you herewith a copy of a letter from the Colonial Office, with a despatch, and its enclosures, from the Governor-General of Canada, explaining the views of the Dominion Government in the matter.

Nearly four months have now elapsed since my despatch of the 9th September last was addressed to you, in which you were directed to invite the Government of the United States to furnish you with any particulars I have now to instruct you to express to Mr Bayard.

and so on.

Thereupon, the next day, as appears at the bottom of the same page, Sir Lionel West communicates with Mr. Bayard; and on the 12th of January, at page 39, Mr. Bayard writes:

Your note of the 9th instant was received by me on the next day, and I regret exceedingly that, although my efforts have been diligently made to procure from Alaska the authenticated "copies" I should not have been able to obtain them in time to have made the urgent and renewed application of the Earl of Iddesleigh superfluous.

The pressing nature of your note constrains me to inform you that on the 27th September last, when I received my first intimation from you that any question was possible as to the validity of the judicial proceedings referred to, I lost no time in requesting my colleague the Attorney-General, in whose Department the cases were, to procure for me such authentic information as would enable me to make full response to your application.

Then he says he is awaiting the papers, explains that the distance of the vessels from any land or the circumstances attendant upon their seizure were unknown to him, and then treats it, and quite accurately treats it, as a matter which is of so grave importance that it is right they should be in possession of accurate information. Then, on the 3d of February, which is on the next page, is a further letter, in which he says:

I made instant application to my colleague the Attorney General in relation to the record of the judicial proceeding.

794 and so on.

I am informed that the documents in question left Sitka on the 26th January and may be expected to arrive at Port Townsend, and so on.

and so on.

Then:

In this connection, I take occasion to inform you that, without conclusion at this time of any questions which may be found to be involved in these cases of seizure, orders have been issued, by the President's direction, for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

Now I want to know why this is so. Does any one member of this Tribunal believe that at that time, the Secretary of State being in communication with the Attorney General, as his correspondence shows, and in correspondence (who can doubt it) with the head of the Executive of the United States—I mean the President—that if they had intended to take this ground of legal justification for the seizures, they would not at least have hinted that there existed some such ground and given some indication of what that ground was? On page 85 will be found the official intimation of that release, a telegram from the Attorney General of the 26th January 1887 to Judge Lafayette Dawson and Mr. D. Ball, District Attorney, Sitka, Alaska.

I am directed by the President to instruct you to discontinue all further proceeding in the matter of the seizure of the British Vessels "Caroline," "Onward" and "Thorn-ton" and discharge all vessels now held under such seizure, and release all persons that may be under arrest in connection therewith.

I have told you what was the fate of that telegram—how the order was treated as a forged order: although sent to the Judge (as appears from the order on the same page) how it was not acted upon till the release of the vessels was useless and the men had undergone their imprisonment and suffered the penalty imposed by the judgment.

But that is, of course, a minor point. The question that the Tribunal must ask itself is, is it conceivable that that order for release could have been made upon any ground except one, namely, the advice of the responsible legal adviser of the President, that he was of opinion that it was at least doubtful whether the seizures could in any way be justified.

Senator MORGAN.—Do you mean Mr. Bayard?

Sir CHARLES RUSSELL.—I said the legal adviser, Sir?

Senator MORGAN.—Who is that?

Sir CHARLES RUSSELL.—The Attorney General, Mr. Garland; and in answer to Senator Morgan's question, which he has been good enough to put to me, I can show by the very next page that that was the view of the Secretary of State, Mr. Bayard himself. It is an extract from a paper published in Victoria.

General FOSTER.—All of these are extracts.

795 Sir CHARLES RUSSELL.—Certainly.

Senator MORGAN.—I thought you were reading from the diplomatic correspondence.

Sir CHARLES RUSSELL.—So I was, Sir, but General Foster is referring to an extract on the page in question. Of course, what I have been reading is diplomatic correspondence.

Senator MORGAN.—Yes, I thought so.

Sir CHARLES RUSSELL.—Here is a matter which, if not true, would have been denied: This is the statement in the middle of page 87.

BAYARD'S OPINION.

The following telegram is another unofficial announcement, and seems to be rather out of harmony with the official acts of the commanders of the Revenue cutters.

WASHINGTON, July 20.

Secretary Bayard, when he was shown to-day a despatch from Ottawa, stating that the Dominion Government is protesting against the discourtesy shown by the United States authorities in ignoring its demand for reparation for the seizure and detention of the British Columbia Sealers seized in Behring Sea last year, said: "In the first place no demand was ever made to our Government by any body either for the release of the vessels in question or for damages for their detention."

That is quite true.

"And in the second place, if any such demand had been made, it could not have come by any possibility from the Dominion Government, with which we have no diplomatic relations whatsoever."

That is also true.

The vessels in question were released upon representations of the British Government that they were British vessels. They were released because our right to hold them was deemed too doubtful to be enforced. Our Government did what it believed to be right in the matter, without constraint from any quarter.

Senator MORGAN.—Is that a newspaper correspondence quoting Mr. Bayard's statement.

Sir CHARLES RUSSELL.—It is exactly what I read, namely, a telegram which purports to record Mr. Bayard's opinion.

Mr. PHELPS.—In a Canadian newspaper.

Sir CHARLES RUSSELL.—I assure you these interruptions are uncalled for. I do not often complain, but I took pains to state what it was. I read the announcement of it in the paper itself. I said that it appeared in a paper which I named, published in a place I named, and I read the parts of the telegram.

The following document is another unofficial announcement, and seems to be rather out of harmony with the official acts of the commanders of the Revenue cutters.

Senator MORGAN.—I beg your pardon, Sir Charles, for the interference on my part.

796 Sir CHARLES RUSSELL.—No, Sir, not at all.

Senator MORGAN.—But I wanted to find out whether you impute those statements to Mr. Bayard as under his pen, or under his tongue, or as the results of a newspaper correspondence of what he might have said on some occasion.

The PRESIDENT.—You give credit to them for trying to represent, with correctness, the views of Mr. Bayard.

Sir CHARLES RUSSELL.—That, of course, is the point. It attributes to Mr. Secretary Bayard a certain opinion and a certain explanation of a particular course of executive conduct, namely the release of these vessels. That is published in the Press; it is published in our Case, it is part of our original case, and up to this moment it has never been denied; and I say at once, if Mr. Bayard (whom as I have already said I have the honor to know), should say that that was not true, I should accept without hesitation or qualification his statement to that effect. It is a comparatively unimportant point, because, as I said, unless that is true it is inconceivable that if the United States and their advisers had the view of their legal rights which are put forward in a later stage of this diplomatic correspondence—which are put forward in later phases of this, shall I call it "litigation"—it is inconceivable that at the time he gave this order for release Secretary Bayard's real views can have been expressed by such words as these.

"We think we are within our rights in making these seizures; we think that our rights justify us in making these seizures; we base these rights on this ground or on that ground, but as an act of good will to a friendly Government with whom previously we have had no diplomatic expostulations, and to which we had previously given no diplomatic warning—as an act of friendliness and good will to that Government, with whom we are at peace, we will, under the circumstances, release those vessels".

Senator MORGAN.—I am sure, Sir Charles, you will not object to my calling your attention, in vindication of Mr. Bayard, to the fact that in

his correspondence with the British Government on this subject—at least so far as I am advised it is so—he laid aside the question of the merits of seal fishing and seal hunting. All those questions about Behring Sea, and right of property, he set aside, with a view of discussing and settling with Lord Salisbury the question of Regulations. I do not remember that he ever took up the subject of the alleged rights of the respective parties, and dealt with that as an independent topic in his diplomatic correspondence.

SIR CHARLES RUSSELL.—Sir, we are taking time, too literally, by the forelock. We have not got to the portion of the correspondence where that appears. I shall come to that in a few moments. I am dealing with events as they appeared in January 1887: you, Sir, are referring to events as they appeared in August 1887. I will come to them in due course.

797 SENATOR MORGAN.—I am referring to the same period as you are referring to Sir Charles, in which you were stating, as I understand, that Mr. Bayard should have made an objection at that time to the action of his Government if he had dissented from it, or affirmed it if he approved it.

SIR CHARLES RUSSELL.—I do not say that he should have dissented from the action of his Government at all, because it was, as I take it, his own action to a certain extent.

SENATOR MORGAN.—I am speaking of the Judges.

SIR CHARLES RUSSELL.—He was a member of the Government. What I am pointing out is, that if there had been any conception of the existence of such legal rights as are now invoked in justification of his conduct, one would have expected to find from Mr. Secretary Bayard, or from some other executive officer, some foreshadowing of these grounds.

SENATOR MORGAN.—Certainly, if he was dealing with that phase of the question, but I do not think that he was.

SIR CHARLES RUSSELL.—His Government is charged as distinctly as a Government can be charged, in the very long despatch from Lord Iddesleigh that I have read, with a most grave offence against international law. His answer is:—I have released the vessels because I consider it too doubtful whether we were entitled to hold them.

SENATOR MORGAN.—I do not think he said that.

SIR CHARLES RUSSELL.—At present, the state of the case is, that I cannot affirm that he said it. I do not affirm that he said it, for I do not know. All I know is, that it is published that he said it, and that so far as I know up to this moment there has been no contradiction of the fact.

LORD HANNEN.—Does it appear when the record of the proceedings in the Alaskan Court was received at Washington.

SIR CHARLES RUSSELL.—It was, in fact, received in April 1887. I am now coming to it in the order of time, and Senator Morgan will find that I shall omit nothing which I conceive to be important as throwing light on what were the motives and state of opinion of the Executive at this time.

On the 12th April Mr. Bayard writes to Sir Sackville West in these terms.

SIR: I have the honour to acknowledge your note of the 4th instant relative to the fisheries in Behring Sea, and inquiring whether the documents referred to in my note of the 3rd February relating to the cases of seizure in those waters of vessels charged with violating the laws of the United States regulating the killing of fur-seals, had been received. The records of the judicial proceedings in the cases in the District Court in Alaska referred to were only received at this department on Saturday last and are now under examination.

The remoteness of the scene of the fur-seal fisheries, and the special peculiarities of that industry, have unavoidably delayed the Treasury officials in framing appropriate Regulations, and issuing orders to United States vessels to police the Alaskan waters for the protection of the fur-seals from indiscriminate slaughter, and consequent speedy extermination.

798 The laws of the United States in this behalf are contained in the Revised Statutes relating to Alaska in sections 1956-1971, and have been in force for upwards of seventeen years, and prior to the seizures of last summer but a single infraction is known to have occurred, and that was promptly punished.

That must have been some American sealer, though we have not heard of it before. I do not know the history of it. Then the letter continues:

The question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur-seals is now being considered, and I will inform you at the earliest day possible what has been decided, so that British and other vessels visiting the waters in question can govern themselves accordingly.

I am not asking the assent of the Tribunal or any member of it to any conclusion as I go on, as I have achieved my sole purpose if I have satisfied myself that I am making my motive and my argument intelligible to the Tribunal. We get here, therefore, for the first time a suggestion—not put forward as a justification—but a suggestion, which is a reference to the United States Revised Laws, sections 1956-1971; but there is no suggestion in point of fact in what sense they are supposed to apply.

Now we pass on, and on the 10th of September comes a very important communication, at page 88, from Lord Salisbury. I think this one and one other are the only two that I shall ask to be read in full; but inasmuch as this puts forward the grounds upon which Lord Salisbury supposes it is suggested that the executive action may be excused or justified, I think it desirable that they should be fully read.

Sir RICHARD WEBSTER.—It is on page 88. This is from the Marquis of Salisbury to Sir Lionel West:

FOREIGN OFFICE, *September 10th, 1887.*

SIR: By a despatch of the 30th October last the late Earl of Idlesleigh instructed you to call the attention of the United States Secretary of State to the circumstances of the seizure in Behring's Sea, by the American cruiser "Corwin" of some British Canadian vessels, and his Lordship directed you to state to Mr. Secretary Bayard that Her Majesty's Government felt sure that if the proceedings which were reported to have taken place in the United States District Court were correctly described, the United States Government would admit their illegality, and would cause reasonable reparation to be made to the British subjects for the wrongs to which they had been subjected and for the losses which they had sustained.

By a previous despatch of the 9th September you had been desired to ask to be furnished with any particulars which the United States Government might possess relative to the seizures in question; and on the 20th October you were instructed to enter a protest on behalf of Her Majesty's Government and reserve for consideration hereafter all rights to compensation.

Nearly four months having elapsed without any definite information being furnished by the United States Government as to the grounds of the seizures my predecessor instructed you, on the 8th January last, to express to Mr. Bayard the concern of Her Majesty's Government at the delay, and to urge the immediate attention of the United States Government to the action of the American authorities in their treatment of these vessels, and of their masters and crews.

On the 3rd February Mr. Bayard informed you that the record of the judicial proceeding which he had called for was shortly expected to reach Washington, and that, without conclusion at that time of any questions which might
799 be found to be involved in these cases of seizures, orders had been issued by the President's direction for the discontinuance of all pending proceedings, the discharge of the vessels referred to, and the release of all persons under arrest in connection therewith.

On the 4th of April, under instructions from me, you inquired of Mr. Bayard, in view of the approaching fishing season in Behring's Sea, whether the owners of British vessels might rely when not near land on being unmolested by the cruisers of

the United States, and you again asked when the record of the judicial proceedings might be expected. Mr. Bayard informed you, in reply (12th April), that the papers referred to had reached him and were being examined; that there had been unavoidable delay in framing appropriate Regulations and issuing orders to United States vessels to police the Alaskan waters; that the Revised Statutes relating to Alaska, Sections 1956 and 1971, contained the laws of the United States in relation to the matter; and that the Regulations were being considered, and he would inform you at the earliest day possible what had been decided, so that British and other vessels might govern themselves accordingly.

In view of the statements made by Mr. Bayard in his note of the 3rd February, to which I have referred above, Her Majesty's Government assumed that, pending a conclusion of the discussion between the two Governments on the general question involved, no further similar seizures of British vessels would be made by order of the United States Government. They learn, however, from the contents of Mr. Bayard's note of the 13th August last, inclosed in your despatch of the 15th August, that such was not the meaning which he intended should be attached to his communication of the 3rd February; and they deeply regret to find a proof of their misinterpretation of the intentions of the United States Government from an announcement recently received from the Commander-in-chief of Her Majesty's naval forces in the Pacific, that several more British vessels engaged in seal-hunting in Behring's Sea have been seized when a long distance from land by an American Revenue vessel.

Her Majesty's Government have carefully considered the transcript of record of the judicial proceedings in the United States District Court in the several cases of the schooners "Carolina", "Onward" and "Thornton" which were communicated to you in July, and were transmitted to me in your despatch of the 12th of that month, and they cannot find in them any justification for the condemnation of those vessels.

The libels of information allege that they were seized for killing fur seal within the limits of Alaskan Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States; and the United States Naval Commander Abbey certainly affirmed that the vessels were seized within the waters of Alaska and the Territory of Alaska; but according to his own evidence they were seized 75, 115, and 70 miles respectively south-south-east of St. Georges Island.

It is not disputed, therefore, that the seizures in question were effected at a distance from land far in excess of the limit of maritime jurisdiction which any nation can claim by international law, and it is hardly necessary to add that such limit cannot be enlarged by any municipal law.

The claim thus set up appears to be founded on the exceptional title said to have been conveyed to the United States by Russia at the time of the cession of the Alaska Territory. The pretension which the Russian Government at one time put forward to exclusive jurisdiction over the whole of Behring Sea was, however, never admitted either by this country or by the United States of America. On the contrary, it was strenuously resisted, as I shall presently show, and the American Government can hardly claim to have received from Russia rights which they declared to be inadmissible when asserted by the Russian Government. Nor does it appear from the text of the Treaty of 1867 that Russia either intended or purported to make any such grant; for, by Article I of that instrument, Russia agreed to cede to the United States all the territory and dominion then possessed by 800 Russia on the continent of America and in the adjacent islands within certain geographical limits described, and no mention was made of any exclusive right over the waters of Behring Sea.

Moreover, whatever rights as regards their respective subjects and citizens may be reciprocally conferred on the Russian and American Governments by treaty stipulation, the subjects of Her Majesty cannot be thereby affected, except by special arrangement with this country.

With regard to the exclusive claims advanced in times past by Russia, I transmit to you documents communicated to the United States Congress by President Monroe in 1822, which show the view taken by the American Government of these pretensions.

In 1821 the Emperor of Russia had issued an edict establishing Rules for the limits of navigation and order of communication along the coast of the eastern Siberia, the north-western coast of America, and the Aleutian Kurile and other islands.

The first section of that edict said: The pursuit of commerce whaling and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the north-west coast of America, beginning from Behring's Straits to the 51st degree of northern latitude; also from Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the south Cape of the Island of Urup, viz., to 45° 50' of northern latitude, is exclusively granted to Russian subjects; and section II stated: It is, therefore, prohibited to all foreign vessels not only to land on the coast land islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.

A copy of these regulations was officially communicated to the American Secretary of State by the Russian Minister at Washington on the 11th February 1822; whereupon Mr. Quincy Adams, on the 25th of that month, after informing him that the President of the United States had seen with surprise the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on the American Continent and a Regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within 100 Italian miles of the shores to which that claim was made to apply, went on to say that it was expected before any act which should define the boundary between the territories of the United States and Russia, that the same would have been arranged by Treaty between the parties, and that to exclude the vessels of American citizens from the shore *beyond the ordinary distance* to which territorial jurisdiction extends has excited still greater surprise; and Mr. Adams asked whether the Russian Minister was authorized to give explanations of the grounds of right, upon principles generally recognized by the laws and usages of nations, which can warrant the claims and Regulations.

The Russian Minister in his reply, dated the 28th February, after explaining how Russia had acquired her possessions in North America said:

"I ought in last place to request you to consider, sir, that the Russian possessions in the Pacific Ocean extend on the north-west coast of America from Behring's strait to the 51st degree of north latitude and on the opposite side of Asia and the islands adjacent from the same Strait to the 45th degree. The extent of Sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (*mers fermées*), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners; but it preferred only asserting its essential rights without taking advantage of localities."

On the 30th March Mr. Adams replied to the explanations given by the Russian Minister. He stated that "with respect to the pretension advanced in regard to territory, it must be ~~and~~ not only with reference to the question of territorial rights, but also to the ~~ambition~~ to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. That from the period of the existence of the United States as an independent nation 801 their vessels had freely navigated these seas, the right to navigate them being a part of that independence; and with regard to the suggestion that "the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea" because it claims territory both on its American and Asiatic shores", it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, it is not less than 90 degrees of longitude, or 4,000 miles. Mr. Adams concluded as follows: "The President is persuaded that the citizens of this Union will remain unmolested in the prosecution of their lawful commerce, and that no effect will be given to an interdiction manifestly incompatible with their rights."

The convention between the United States of America and Russia of the 17th April 1824, put an end to any further pretension on the part of Russia to restrict navigation or fishing in Behring Sea so far as American citizens were concerned; for by article I it was agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall neither be disturbed nor restrained, either in navigation or fishing, saving certain restrictions which are not material to the present issue; and a similar stipulation in the Convention between this country and Russia in the following year (15th May, 1825) put an end, as regarded British subjects, to the pretensions of Russia to which I have referred, and which had been entirely repudiated by Her Majesty's Government in correspondence with the Russian Government in 1821 and 1822, which for your more particular information I inclose herein.

Her Majesty's Government feel sure that, in view of the considerations which I have set forth in this despatch, which you will communicate to Mr. Bayard, the Government of the United States will admit that the seizure and condemnation of these British vessels, and the imprisonment of their masters and crews, were not warranted by the circumstances, and that they will be ready to afford reasonable compensation to those who have suffered in consequence, and issue immediate instructions to their naval officers which will prevent a recurrence of these regrettable incidents.

I am, etc.,

SALISBURY.

Sir CHARLES RUSSELL.—Now the Tribunal will observe that Lord Salisbury is there answering the only case which was put forward, namely the judgment of Mr. Justice Dawson, which resulted in the confiscation of these ships—which resulted, of course, in altering the property in these ships; and the surprising thing is—

The PRESIDENT.—The judgment of Judge Dawson was delivered previously to the 3rd of February.

Sir CHARLES RUSSELL.—Oh, long previously.

The PRESIDENT.—It was before the order of release was sent.

Sir CHARLES RUSSELL.—Lord Salisbury had only got before him the record of the proceedings in the Court, and the judgment of the Court of Sitka. That was the only case he had to deal with, and he deals with it in a way I shall have hereafter to refer to in another connection in considering the derivative title claimed under Russia. But will not the Tribunal be surprised to hear that that despatch of Lord Salisbury, written upon the 10th September 1887, received no answer from the representative of the United States, until the year 1890?

If I am wrong in this, let me be corrected on the spur of the moment. That despatch of Lord Salisbury deals with the only case that is suggested—he has got before him the only thing upon which he can form a judgment, namely the record of the proceedings at Sitka, and he proceeds, effectually I submit, to demolish that case. But, that I

802 may omit nothing, let me say that Mr. Bayard *had* done something meanwhile; and what was it? He had written on the 19th August 1887 the letter which has been referred to more than once in the course of the argument by learned friend, Mr. Carter. This letter is not to be found in our appendix: it is not to be found, for the reason that it was not in fact sent to us at all. It was a circular letter addressed by Mr. Bayard to the representatives of the United States in the various capitals of the world. No direct communication of this letter was made to Great Britain, but the communication was shewn or the purport of it notified to us by Mr. Phelps, the then Minister for the United States in London, on the 11th of November 1887.

I will now read that letter, which is in the first Volume of the Appendix to the Case of the United States, page 168. I desire that the Tribunal should have all the materials before them in order to appreciate, in the order of events, the position taken up by the respective Governments.

SIR: Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of fur-seal fisheries in Belhing Sea.

Without raising any question as to the exceptional measures which the peculiar character of the property in question—

That is the fur-seal fisheries—

might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am instructed by the President so to inform you—to attain the desired ends by international co-operation.

It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and by breaking up their habitual resorts has greatly reduced their number. Under these circumstances, and in view of the common interest of all nations in preventing the indiscriminate destruction and consequent extermination of an animal which contributes so importantly to the commercial wealth and general use of mankind, you are hereby instructed to draw the attention of the Government to which you are accredited to the subject, and to invite it to enter into such an arrangement.

And so on.

This was the departure point of the scheme which contemplated a set of international rules not confined to the United States and to Great Britain, but which should have the concurrence of all the other nations which were, or might be, interested. But, again, am I not justified in asking the Tribunal to note in passing here, that while there is a tentative and indirect suggestion that there may be some other ground upon which the Government of the United States may justify its action,

yet that this ground is not stated as a proposition by which Mr. Bayard desires to bind either himself or his Government, much less is it an affirmation of any legal principle upon which he feels justified in taking his stand? And now, I repeat, is it not an amazing fact that the despatch of Lord Salisbury, which I have ventured to submit 803 demolishes the only case suggested, and suggested too by the judicial record of the proceedings at Sitka, should have remained unanswered—I think it remains unanswered to this day—but remained without any appearance of answer until the 22nd of January 1890, or more than two years after its despatch?

Now, I do not seek to be drawn into any bye-issues. As Lord Salisbury, who had succeeded to Lord Iddesleigh, believed, there had been a breach of a promise made that no further seizures should be effected; and Lord Salisbury records his statement that he had been so assured in a letter of the 8th of April, 1888, which is to be found at page 189 of the large volume. It refers to an interview with Mr. Phelps, stating that he was very anxious for despatch because of the destruction of the species which was going on, and which he considered a matter of grave moment; and then he proceeds.

He informed me, therefore, unofficially, that he had received from Mr. Bayard a private letter, from which he read to me a passage to the following effect: "I shall advise that secret instructions be given to American cruizers not to molest British ships in Behring Sea at a distance from the shore, and this on the ground that the negotiations for the establishment of a close time are going on."

And then:

But, Mr. Phelps added, there is every reason that this step should not become public, as it might give encouragement to the destruction of seals that is taking place.

And so forth. It is a bye-point, and I do not seek to dwell upon it. There must have been some misunderstanding because, as a matter of fact, we know that the seizures were renewed.

Meanwhile, there is a change of Government in the United States, and in March, 1889, President Harrison succeeds to President Grover Cleveland; and Mr. Blaine succeeds, as Secretary of State, to Mr. Bayard. And I will only say that I have myself very little doubt (if I may, for the moment, intrude a suggestion of that kind, which means no disrespect to anybody) that judging from the tenor of Mr. Bayard's communications and the position he took up, and the executive action that he authorised and directed.—I cannot doubt that if he had continued Secretary of State, we should have had the case settled as a matter of common interest, and discussed as a matter of common interest, to all the Nations; and certainly some of the portions of the claim now put forward never would have been heard of, because they are inconsistent with the attitude which he himself, in his executive capacity, took up.

But Mr. Blaine, on the 22nd of January, wrote his celebrated despatch, which is known as the *contra bonos mores* despatch; and there is that very great break, partly accounted for by the fact, I 804 admit, that negotiations were going on which it was hoped might end the whole difficulty, but still I cannot believe that if in the minds of the advisers of the United States there had been present, even in a faint degree, the existence of definite legal grounds upon which their action could be defended or justified, that we should not have had some assertion of it at some time or other in answer to these communications of Lord Iddesleigh, in the first instance, and Lord Salisbury, in the second. On the 22nd of January comes this despatch; and I will just notice, in passing,

that, at page 315, there is a letter from Lord Salisbury on the 2nd of October, 1889, in the middle of which he says:

In a despatch to Sir Lionel West dated the 10th September, 1887, which was communicated to Mr. Bayard, I drew the attention of the Government of the United States to the illegality of these proceedings, and expressed a hope that due compensation would be awarded to the subjects of Her Majesty who had suffered from them. I have not since that time received from the Government of the United States any intimation of their intentions in this respect, or any explanation of the grounds upon which interference with the British sealers had been authorised. Mr. Bayard did indeed communicate to us unofficially an assurance that no further seizures of this character should take place.

And so on.

Now, we come to the celebrated *contra bonos mores* despatch, at page 396, dated the 22nd of January. I may relieve the minds of the Tribunal at once by saying that I am not going to read it all, as it has been already read more than once. Of course, if there is any passage in connection with that doctrine which throws light upon it, I will read it if my learned friend suggests. This is the celebrated sentence.

Several weeks have elapsed since I had the honour to receive through the hands of Mr. Edwardes.

Subjects which could not be postponed have engaged the attention of this Department, and have rendered it impossible to give a formal answer to Lord Salisbury until the present time.

In the opinion of the President the Canadian vessels, arrested and detained in the Behring Sea, were engaged in a pursuit that is in itself *contra bonos mores*—a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. To establish this ground, it is not necessary to argue the question of the extent and nature of the sovereignty of this Government over the waters of the Behring Sea; it is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty the Emperor of Russia in the Treaty by which the Alaskan territory was transferred to the United States. The weighty considerations growing out of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government.

And then he proceeds to argue upon the ground that this is an immoral traffic, that it is a traffic which interferes with the rights of the Government and people of the United States, and then he proceeds, rather adroitly, having made some approaches to argument in support of his own view, to shift the *onus*.

He says at the bottom of page 397:

Whence did the ships of Canada derive the right to do in 1886 that which they had refrained from doing for more than 90 years ?

And finally he refers to the fisheries on the banks of Newfoundland as if suggesting there was some parallel, and he refers to dynamite or giant-powder explosions—those I will refer to because they are afterwards used by Mr. Phelps. He asks why the two cases are not parallel. I will attempt to give the answer a little later. And he finally says:

In the judgment of this Government the law of the sea is not lawlessness.

Which is a graceful piece of alliteration.

Nor can the law of the sea and the liberty which it confers and which it protects be perverted to justify acts which are immoral in themselves.

Well I need not say therefore that in this despatch, although he suggests that there may be grounds based upon jurisdiction derived from Russia, his main ground is that the thing is *contra bonos mores*, a crime in itself, a crime which they, the United States, have a right to complain of, because it is an injury to them.

Well, now, what is the subsequent course which this correspondence takes? It may be described in a sentence, though I have two more despatches to refer to, one at a little length. Lord Salisbury meets him upon his own ground and says: You say that this is *contra bonos mores*; Have nations said it? You say that this is an injury to your rights. What are your rights? Upon what law are they defensible? By what law are they recognized and protected?

From that moment you will find that Mr. Blaine, driven from his *contra bonos mores* ground, driven from the field, recurs to the Russian derivative title, and thereafter, until he comes to cite with approbation an eloquent passage from a communication of my learned friend Mr. Phelps, we hear no more of the *contra bonos mores* doctrine.

Now, in the few moments that remain, I should like to call attention to that despatch of Lord Salisbury, which I take leave to say is a despatch that has not been answered, and I submit cannot be answered. It will be found on page 462.

In the beginning of that despatch, which I will not read, he repeats, as every fair man arguing is bound to do, fully and fairly what is the contention of his adversary. He says: You say that our vessels were engaged in a pursuit *contra bonos mores*: You say that these fisheries were under the exclusive control of Russia: You say that the seals being taken by pelagic sealing in the open sea will speedily destroy the species. Now how are these arguments taken to pieces?

With regard to the first of these arguments, namely that the seizure of the Canadian vessels in the Behring Sea was justified by the fact that they were engaged in a pursuit that is in itself *contra bonos mores*—a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States, it is obvious that two questions are involved; first whether the pursuit and killing of fur-seals in certain parts of the open sea is, from the point of view of international morality, an offence *contra bonos mores*; and secondly, whether, if such be the case, this fact justifies the seizure on the high seas and subsequent confiscation in time of peace of the private vessels of a friendly nation?

806 Can any one doubt that that is the test which must be applied, and the only test that ought to be applied to the proposition so propounded by Mr. Blaine? You say this pursuit is *contra bonos mores*. I do not agree with you. Has law declared it so? According to international morality even has it been so declared? It does not become immoral according to international law merely because you choose to say it is so! And even if that were so you still lag behind the necessities of your position, because you have still to shew that even if it were *contra bonos mores* international law would justify you in seizing in time of peace and in confiscating the ships of a friendly nation. He then proceeds to argue the broad principles which cannot be doubted, and cites in support of them the utterances of a wise President of the United States (President Tyler) who after stating there was a right to detain and search a vessel on suspicion of piracy goes on to say:

With this single exception no nation has in time of peace any authority to detain the ships of another upon the high seas on any pretext whatever outside the territorial jurisdiction.

Then Lord Salisbury goes on to point out, as I have already taken occasion to point out that even in the case of the slave trade, a practice which the civilized world has agreed to look upon with abhorrence, the right of arresting the vessels of another country engaged in that trade is only exercisable by special international agreement. And he finally draws this conclusion.

But Her Majesty's Government must question whether this pursuit can of itself be regarded as *contra bonos mores*, unless and until for special reasons it has been agreed by international arrangement to forbid it.

Placuitne gentibus? Do the nations of the world agree that this is a thing to be treated as *contra bonos mores*, and to be visited with their condemnation? Then he proceeds.

Fur-seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius* until they are caught. No person, therefore, can have property in them until he has actually reduced them into possession by capture. It requires something more than a mere declaration that the Government or citizens of the United States, or even other countries interested in the seal trade, are losers by a certain course of proceeding, to render that course an immoral one.

And so on. And then he comes to the second argument, as regards Russia and as the argument which is there set out, and set out very well, is one which I must refer to myself in some detail, I will spare the Tribunal the reading of it at this stage. Finally, he deals with the question of whether the effect of pelagic sealing is to be treated as a fact beyond denial or doubt—that the taking of seals in the open sea will lead to their extinction; and expresses his view upon a point which deals, not with question of property or property right, but of regulations; and he deals with it upon the information then before him.

807 He says in that regard:

The negotiations, now being carried on at Washington, prove the readiness of Her Majesty's Government to consider whether any special international agreement is necessary for the protection of the fur-sealing industry. In its absence (that is, of international agreement) they are unable to admit that the case put forward on behalf of the United States affords any sufficient justification for the forcible action already taken by them against peaceable subjects of Her Majesty engaged in lawful operations on the high seas.

So that there is the position; and this is the last observation I take leave to make to day; the position from the first taken up and consistently maintained by Great Britain is this "A denial of your right; an utter inability on your part to justify by legal argument, or upon legal grounds, your claim of property, or property right or property interest; an inability on your part, even if you had such right, to justify what you have done in protection of that right. But, at the same time, while your right is denied, while your action, even if the right existed, is unwarranted, still the Government of Great Britain is anxious, is willing, is ready, to join in dealing with this matter by international arrangement, which shall recognise that this is not a matter of exclusive interest in the United States, but a matter of interest to the world."

The Tribunal adjourned till to-morrow morning, the 12th of May, at 11-30 o'clock.

TWENTY-SECOND DAY, MAY 12TH, 1893.

Mr. TUPPER.—Mr. President, I would like to say that the reason why none of the proofs of the last day's arguments appear upon the table of the Tribunal this morning is that, yesterday being a Public Holiday, the printers were not at work; but yesterday's report and the report of today's argument will be sent to each Member of the Tribunal on Saturday.

Sir CHARLES RUSSELL.—The Tribunal will remember that the letter of Lord Salisbury of the 22nd of May, 1890, at page 462 of Volume III of Appendix to the British Case, to which I yesterday referred, and to which I intend to make no further detailed reference, took up the three grounds set forth in the argumentative letter of the Secretary of State, Mr. Blaine, of the 22nd of January. It dealt with the question whether the pursuit of fur-seals by pelagic sealing was *contra bonos mores*, and it went to the heart of the question, by putting the single point: Can you say that, in the point of view of international morality, international law has ever declared that it was *contra bonos mores*: your assertion does not make it so?

He then proceeds to deal with the derivative claim under Russia; and, lastly, he deals with the question of fact, as to which he expresses his disagreement, upon the evidence before him, from the view of Mr. Blaine as to the effects of pelagic sealing.

Now, I stated in commenting on that letter that Mr. Blaine's reply, to which I am now going to call attention, and which you will find at page 497 of the same volume, does not make even an attempt to grapple

with any except one of the points dealt with in the previous despatch of Lord Salisbury, to which it purported to be a reply. My learned friend, Mr. Carter, speaking almost in a tone of apology for Mr. Blaine, said that he had innocently—I think my learned friend used the word

“innocently”—that he had innocently allowed himself to be diverted from the true ground upon which the case of the United States ought to have been based; that he followed the scent of the herring drawn across the track by this astute statesman, Lord Salisbury; and that he did, in his answer to Lord Salisbury's despatch, omit the cardinal point of what is now said to be the United States case.

Now this despatch, which is to be found, as I think I have said, in page 457 of the same book, is one of appalling length. It extends from page 457 to page 506! I follow the example of my learned friend

809 Mr. Carter in declining to read it, and for this reason: I may describe it, and describe it with perfect accuracy, as being an elaborate and very ingenious argument upon the construction of the Treaties of 1824 and 1825; an argument by which Mr. Blaine proves to his own satisfaction that the Ukase of 1821, by which Russia claimed the right to exclude all persons or all ships of other citizens from within 100 miles of the coast, was not affected by the Treaties of 1824 or 1825 at all: that those Treaties operated south of the Aleutian chain; but that the Ukase was recognized and continued to be acted upon, and acquiesced in, so far as Behring Sea was concerned.

Now I am stating his argument fairly I think, and with sufficient fullness. I will not deal with that argument in this connection, for the obvious reason that I must combat his views when I deal with the construction of the Treaties and consider the first four questions of Article V; and, as the Tribunal will see I am endeavoring as far as possible to avoid repeating myself, I must reserve that argument till its proper place in the discussion. The purpose I am now upon is to show to the Tribunal that whereas the case of derivative title under Russia, of exclusive rights and exclusive jurisdiction under Russia, is so prominently put forward in the diplomatic argument, the case which is now relied upon—the inherent right in every nation to exercise such protective measures as its interests in its own view demand—while I will not say is wholly left out of sight, takes indeed a very unimportant place in the discussion. I justify that by making but one reference before I leave this despatch. The whole pith of this argument is summed up on page 506; and at the first sentence on that page the point to which his argument is addressed is brought out.

It only remains to say that whatever duty Great Britain owed to Alaska as a Russian province, whatever she agreed to do, or to refrain from doing, touching Alaska and the Behring's Sea, was not changed by the mere fact of the transfer of sovereignty to the United States. It was explicitly declared in the VIth article of the Treaty by which the territory was ceded by Russia, that the cession hereby made conveys all the right, franchises and privileges now belonging to Russia in the said territory or dominions, and appurtenances thereto.

And he proceeds, and I read this for an additional reason, beyond that of wishing to show his contention:

Neither by the Treaty with Russia of 1825, nor by its renewal in 1843, nor by its second renewal in 1859, did Great Britain gain any right to take seals in Behring's Sea. In fact, those Treaties were a prohibition upon her which she steadily respected so long as Alaska was a Russian province. It is for Great Britain now to show by what law she gained rights in that sea after the transfer of its sovereignty to the United States.

Mr. Justice HARLAN.—Sir Charles, was there a formal renewal of the Treaties in the year he refers to, or was it an inaccurate use of the word?

Sir CHARLES RUSSELL.—Well, Sir, I think it is quite correct. 810 I read that latter sentence for a reason that I think will justify me in the opinion of the Tribunal—That latter sentence is a complete misconception of the legal position of Great Britain in respect of the fishing rights in Behring Sea. We do not assert, we never have asserted, that Great Britain gained by her Treaties any rights in Behring Sea. Russia had no capacity to confer those rights—no power except the power of might, if she tried to exercise it and was successful, to prevent the exercise of those rights. We refer to those Treaties only to show that Russia, having asserted claims which were inconsistent with those rights, withdrew from that assertion, not that she conferred the rights upon us. The rights did not depend upon her or upon her will: they are part of the rights which belong to mankind and to all nations in common.

Then finally, following an ingenious device in argument, he winds up by seeking to put the onus on Great Britain, and asks how the ships of Canada derived a right in 1868 which they had not exercised for 90 years: upon what grounds we can defend in the year 1886 a course of conduct in the Behring Sea which had been carefully avoided ever since its discovery; and finally, by what reasoning her Majesty's Government conclude that an act may be committed with impunity against the rights of the United States which had never been attempted against the same rights when held by Russia?

I will only observe in passing that this is quite a mis apprehension of the position in which the question is to be viewed, and that the latter one of those suggestions begs the question which was really in dispute.

Now I have only one further reference to make to this correspondence, and it is of a general nature. Several subsequent letters passed, Lord Salisbury combating, demolishing as I submit, the argument of Mr. Blaine on the construction of the Treaty; and, finally, with the despatches of 17 December, 1890, the discussion on paper substantially came to an end. That despatch will be found on page 37 of the second part of the large volume. This is a still more appalling letter in point of length, because the letter itself extends from page 37 to page 56, and with its inclosures it extends, I think, to about page 64. I again have pleasure in following the judicious example of my friend Mr. Carter; I will not read it. I give the same reason which I have given in reference to the previous despatch, because I have to deal with that matter as a separate argument.

The whole of this letter is conversant with the same question of justification under derivative right from Russia, with one exception, and that is the exception which is to be found in the concluding part of the letter at page 56. It is the letter which begins with that remarkable statement that my learned friends are not now prepared to endorse or to agree with, on page 37, in which Mr. Blaine, a man of acuteness of mind having obviously carefully studied the question, and having at his command I presume the best legal ability which the Bar of the

811 United States can furnish him with—and we know how high that ability is—states that if Great Britain can show that Behring Sea was included in the phrase “Pacific Ocean” in the Treaties of 1824 and 1825, then the Secretary of State representing the United States, must admit that the United States have no well grounded complaint against her. Now this is a serious statement. It is a statement made after the matter has undergone prolonged discussion. We have now arrived at the month of December, 1890, the discussion arising out of seizures which had taken place in August, 1886. Therefore, four years and some months have elapsed during which the question has been thrashed out in discussion on both sides: and, as one may naturally presume, discussed in the Cabinet Councils both in Great Britain and in America. Yet here is this statement. “Satisfy us that Behring Sea was included under the description of “Pacific Ocean” in the Treaties of 1824 and 1825, and we admit that we have no well grounded complaint against you”. I shall support that proposition of Mr. Blaine in argument. It is the proposition that has to be established, that, unless there was acquiescence, or recognition, or a course of conduct which estops or binds England in relation to asserting rights in Behring Sea, if she shows that Behring Sea was in fact included in the Pacific Ocean, then she establishes two things, first of all, that Russia, if she ever made the assertion, did not persevere in it: and next, if the Treaty does include and cover Behring Sea under the phrase “Pacific Ocean” that it was a clear and distinct recognition by Russia of the rights of Great Britain to fish in Behring Sea. But there is, as I have said, one qualification upon this statement, and it is this; on the 12th September, 1888, my learned friend, Mr. Phelps, had written, not to the Government of Great Britain, but to his own Government a letter which has since become important. It was not communicated to the Government of Great Britain, it lay I will not say “*perdue*”, but, unnoticed apparently in the archives of the Foreign Secretary for two years and some months, and Mr. Blaine, coming across it, reproduces it and

hands it down to posterity in his despatch, with which I am now dealing. In introducing it, he says the United States does not claim that Behring Sea is a *mare clausum*; but he goes on to say

At the same time the United States does not lack abundant authority, according to the ablest exponents of international law, for holding a small section of the Behring Sea for the protection of the fur-seals.

What he means by that phrase, I do not know; I cannot even guess. Does he mean that the section from the line of demarcation from Behring Straits traced upon both of the maps, running west of the Pribiloff Islands and between the Commander Islands and the western end of the Aleutian Chain,—does he mean that that is a small section of Behring Sea? I do not know what he means; I do not know whether he had any real conception in his own mind of what he meant; but we have had no explanation. Then he proceeds:

812 Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum*.

Lord HANNEN.—May that not be connected with the proposition made in the previous paragraph, as to a circuit drawn round the island like that which was drawn with reference to Napoleon at St. Helena.

Sir CHARLES RUSSELL.—That, probably, is the idea, my Lord.

Lord HANNEN.—It follows it immediately afterwards.

Sir CHARLES RUSSELL.—I am obliged, my Lord; that probably is the idea; but I have, however, to observe that it is inconsistent with the entire argument in the earlier part of his despatch.

Lord HANNEN.—Yes. It is a fresh proposal.

Sir CHARLES RUSSELL.—I was going to say, my Lord, it was a fresh proposal, probably in reference to the suggestion of the concurrence of Great Britain in Regulations. That may be the explanation of it.

Mr. Justice HARLAN.—The paragraph marked “6” is one of the original six questions.

Sir CHARLES RUSSELL.—Yes; that is probably the explanation.

Then he proceeds to give this quotation from Mr. Phelps' letter, as to which I am doing no discredit to the arguments which are advanced in the printed argument before you when I say, that upon examination that part of it which particularly refers to the supposed claim of property in the industry, and protection which it is claimed is a right incident to that property in the industry—that that argument is but an amplification of this passage from Mr. Phelps' letter.

Now, I have said that that argument, amplified in the printed paper before the Tribunal, I will deal with, of course, in the appropriate order. I am not now upon it; but, before I leave it, I wish to ask the Members of the Tribunal to turn back to page 55: about 20 lines from the bottom of that page, where this sentence occurs:

It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years.

Then he comes to an enumeration practically, if not exactly, in the form in which they stand in the Treaty of Arbitration, of the five questions being those that we have agreed to call, and properly to call, questions of exclusive right and jurisdiction.

Now, I pass from the correspondence; and I am glad to relieve the Tribunal from the necessity for any further reference at this stage to it.

HISTORY OF UNITED STATES LEGISLATION DEALING WITH ALASKA.

I must now call the attention of the Tribunal to the history of United States legislation upon this question so far as it relates to this matter of the fur-seals, and in endeavouring to fix upon the book which will save the members of the Tribunal from endless shifting about of references, I find that the 1st volume of the Appendix of the Case of the United States will be found to contain all of it.

Mr. Justice HARLAN.—Do you mean at page 92?

Sir CHARLES RUSSELL.—I meant page 95, and I refer to page 95 for this reason—because from page 95 there are set out the Revised Statutes, some of which are previously set out in the earlier part.

Mr. Justice HARLAN.—I may explain to you, Sir Charles, that in 1873 went into effect what are called the Revised Statutes of the United States, the main object of which was to put, in the form of a revision the substance of the statutes already in force on the same general subjects.

Sir CHARLES RUSSELL.—So I understand. I am very much obliged for the explanation, Sir. It was indeed on that understanding that I desire to refer to page 95, and I have taken the trouble to examine and to note, and I will give the date, when each of these enactments was originally passed. I will give the date when the particular provision originally became law.

Now section 1954 became law on the 27th July 1868, and if I might respectfully suggest, it would not be unimportant if the date were noted opposite each of these paragraphs. Now these are the words of section 1954:

The laws of the United States relating to customs, commerce, and navigation, are extended to and over all the mainland, islands, and waters of the territory ceded to the United States by the Emperor of Russia, by Treaty concluded at Washington on the 30th day of March, A. D. one thousand, eight hundred and sixty seven, so far as the same may be applicable thereto.

Now, no lawyer will doubt that that standing by itself is strictly a territorial statute, that that statute is one which no judge or no lawyer would construe as applying outside the limits of territorial sovereignty of the State which enacted it. Nobody will doubt that. What is doubtful on the construction of the statute itself is what is meant by "the waters of the territories ceded"; and it will be found in all these provisions, (whether by accident or design I know not), that there lurks a grave uncertainty, even down to the very last enactment of 1889, after the questions in controversy between the two Powers have arisen. But I am now submitting, as a lawyer to lawyers, as a matter of construction, that if this came to be construed, as to its application to foreigners not subject to the laws of the United States, no lawyer and no judge would construe it as having effect outside the territorial limits of the State. Those territorial limits of the State might, of course, include portions of water, and in some cases very considerable portions of water; but as regards territory abutting on the open sea, they could, according to international law, only extend to the marginal belt now fixed by common consent of nations at three miles.

Senator MORGAN.—I do not desire, Sir Charles, to disturb you in your argument, but may I call your attention to the fact that in 1846, I think it was, Great Britain and the United States divided the straits of Juan de Fuca, which were the open sea, and part of the North Pacific Ocean, and a sea, by the way, in which the seal herds were found, and where fishing for seal was first started—they divided it

by a line which in no place approached within six miles of either coast, and in many places it is 40 miles away from either coast, and it is the boundary line between Great Britain and the United States now.

Sir CHARLES RUSSELL.—I am aware of that, Sir.

Senator MORGAN.—That destroyed the three-mile territorial limit, as I suppose, and substituted, in place of it, the other line.

Sir CHARLES RUSSELL.—If you, Senator, think this is *ad rem* (and I say it with the unfeigned respect that I desire to pay to your observations) I will endeavor to make some kind of answer. In the first place I should require to know a little more about the precise circumstances of the water which is called the Straits of Juan de Fuca, which leave Puget Sound on the one hand and pass Victoria on the other: whether or not it came within the category of land-locked waters, and so forth.

Senator MORGAN.—They are not land-locked waters.

Sir CHARLES RUSSELL.—I am merely suggesting that I should require to know more about this before expressing an opinion.

Senator MORGAN.—The lakes are I think.

Sir CHARLES RUSSELL.—I should then require to know how far the concurrence of other nations had been given to the arrangement made between the two Powers who owned the adjoining territory; and lastly I should express the opinion, for what that opinion is worth, that if that could be properly called the "high sea", and other nations were not concurring in its appropriation between these two Powers, that the effect of that treaty would be binding on these two Powers, and on these two Powers only.

Senator MORGAN.—I am only speaking of the fact that the United States and Great Britain in their treaties had established the proposition that a water boundary may be established by treaty, and upon the high seas.

Sir CHARLES RUSSELL.—I think it would be founding, if I may respectfully say so, Senator, a tremendous conclusion upon a very small base of premises to say that because, in that particular case, that particular treaty had been entered into, it was the affirmation of a principle of general application.

The PRESIDENT.—The same argument applies as to the line established between Russia and America at the moment of the cession of territory in 1867.

Sir CHARLES RUSSELL.—That was between those two: It would be binding as between those two, but if it interfered with the rights of nations on the high sea it would have no binding force or operation whatever upon them. But I beg with all deference to decline to be called upon to justify everything that the United States has claimed, or even everything that Great Britain has claimed.

815 Senator MORGAN.—I called your attention to it because you seemed to think there was some uncertainty in the Act of Congress on the subject, whereas we consider there is absolute certainty, because we legislated according to our boundaries.

Sir JOHN THOMPSON.—I think it will be found that that was not a Treaty dividing water on the high seas outside the three mile limit, but fixing the boundary line behind which you were to ascertain the respective properties of the nations; and its bearing was ascertained by its course on the high seas.

Sir CHARLES RUSSELL.—I have no doubt about it. But let there be no misapprehension upon what I am now saying. I am not contesting the right of the United States to make any law it pleases over any area it pleases so far as it purports to bind only its own nationals—that is not

my argument at all—I was pointing out that this would be construed to mean one which only applied to foreigners within the territorial limits of the legislative enacting Power. That was my point. But I was pointing out too the uncertainty that, on the face of the Statutes, seemed to prevail even as against their own nationals in the use of the vague words, “and waters of the territory ceded”. That is all I desire to say.

Now the next section, section 1955, was passed also in 1868, and it may be convenient to note the date on the margin of that section. It is a section which is in the nature of a revenue section. It says:

The President shall have the power to restrict and regulate or to prohibit the use of fire-arms, ammunition and distilled spirits into and within the Territory of Alaska; the exportation of the same from any port or place in the United States when destined to any port or place in that Territory, and all such arms, ammunition and distilled spirits exported or attempted to be exported from any port or place in the United States, and destined for such Territory, in violation of any regulations that may be prescribed under this section, and all such arms, ammunition and distilled spirits landed or attempted to be landed or used at any port or place in the Territory, in violation of such regulations, shall be forfeited; and if the value of the same exceeds 400 dollars.—

certain consequences are to follow. Then it goes on:

And any person wilfully violating such regulations shall be fined not more than 500 dollars or imprisoned not more than six months. Bonds may be required for a faithful observance of such regulations from the master or owners of any vessel departing from any port in the United States having on board fire-arms, ammunition or distilled spirits, when such vessel is destined to any place in the Territory or if not so destined, when there is reasonable ground of suspicion that such articles are intended to be landed there in violation of law.

And so forth.

It is a convenient opportunity to observe (without discussing it at length, which I must do a little later on) that this is a revenue enactment—an enactment for the protection of the revenue, and the revenue laws are all aimed at the prevention of offences the completion or consummation of which involves an offence on land; it is the bringing things into the territory against the laws of the territory; and for the enforcement of those laws a certain margin outside the three-mile limit, under the principle of what is known as the “hovering Acts”, is, by the common consent of a good many nations—I think it would be a little doubtful to affirm it as a principle of international law at this moment, for I think it has not reached that stage—it is simply that a number of nations have agreed to pass laws of that kind for themselves; and where they find their nationals in the case of other Powers attempting to violate those laws, they have acquiesced in their being treated as offenders against the law, and have not intervened to protect them when they believed they were intentionally endeavouring to violate the laws which they had passed.

Senator MORGAN.—Probably it may become international law by long acquiescence.

Sir CHARLES RUSSELL.—Probably its growth may be in that stage of gradual development to which I referred in some introductory observations which I made a few days ago.

Now section 1956 was also passed in the year 1868. It is these terms:

No person shall kill any otter, mink, marten, sable or fur-seal or other fur-bearing animal within the limits of Alaska territory or within the waters thereof;

There still is the vagueness to which I have referred.

And every person guilty thereof shall, for each offence, be fined not less than 200 dollars nor more than 1,000 dollars, or imprisonment not more than six months, or

both; and all vessels, their tackle, apparel, furniture and cargo, found engaged in violation of this section shall be forfeited. But the Secretary of the Treasury shall have power to authorize the killing of any such mink, marten, sable or other fur-bearing animal, except fur-seals, under such Regulations as he may prescribe; and it shall be the duty of the Secretary to prevent the killing of any fur-seal, and to provide for the execution of the provisions of this section until it is otherwise provided by law; nor shall he grant any special privileges under this section.

Now I make the same comment in passing: there is the vagueness as regards the phrase "within the waters of Alaska territory", leaving it undetermined whether it means the whole of the waters east of the line of demarcation, or whether it means only the ordinary three-mile belt. I am not talking of bays, land-locked waters, or matters of that kind—that will be always understood; but so far as it was limited to the three-mile limit, then it was perfectly within the competence of the United States to bind foreign subjects as well as its own nationals; but if it extended further than those limits, it could have no application to foreigners at all.

Now the next section—section 1957, was also passed in 1868. It says:

817 Within limits of the same, shall be prosecuted in any district court of the United States in California or Oregon, or in the district Courts of Washington; and the collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties or forfeitures under this and the other laws extended over the Territory, and to keep and deliver the same to the marshal of some one of such Courts; and such Courts shall have original jurisdiction and may take cognizance of all cases arising under this Act, and the several laws hereby extended over the Territory, and shall proceed herein in the same manner and with the like effect as if such cases had arisen within the district or territory where the proceedings are brought.

I merely ask the Tribunal to take notice, in passing, that such Courts are to have *original* jurisdiction. They are "Instance Courts", as they are sometimes technically called.

Section 1958 was also passed in the year 1868, and is in these terms. It is not very important:

In all cases of fine, penalty, or forfeiture, embraced in the Act approved 3rd March, one thousand, seven hundred and ninety-seven, chapter 13, or mentioned in any Act in addition to, or amendatory of such Act, that have occurred or may occur in the collection district of Alaska, the Secretary of the Treasury is authorized

to exercise the power of remission, and so on.

Now comes the first section of the legislation dealing with the Islands of St. George and St. Paul—the first legislative Act of the United States in which the Islands of St. George and St. Paul are directly dealt with, and that was passed on the 3rd March 1869.

The islands of St. George and St. Paul in Alaska are declared a special reservation for Government purposes, and until otherwise provided by law it shall be unlawful for any person to land or remain on either of those islands, except by the authority of the Secretary of the Treasury, and any person found on either of those islands, contrary to the provisions hereof, shall be summarily removed; and it shall be the duty of the Secretary of War to carry this section into effect.

I have no comment to make on that except to observe that it was entirely within the competence of the Legislature of the United States to make that provision, if it desired, binding on the whole world. It was their territory; they had the right to say who shall and who shall not land there.

Sir JOHN THOMPSON.—Can you give the date of that?

Sir CHARLES RUSSELL.—It became law on the 3rd March, 1869.

The next section, 1960, was passed on the 1st July, 1870. I might indeed, if I wished to divert from the line which I am upon, and if I were to follow the broad and generous lines of my friend Mr. Carter's argument, have pointed out that this attempt to prohibit access of other persons, and so shut out this island from the commerce of the world, would hardly be in accordance with my friend's broad and generous conception of the duties and rights of nations; but I do not dwell on that topic.

Now section 1960 provides:

It shall be unlawful to kill any fur-seal upon the islands of St. Paul and
818 St. George, or in the waters adjacent thereto, except during the months of June, July, September and October in each year; and it shall be unlawful to kill such seals at any time by the use of fire arms, or by other means tending to drive the seals away from those islands, but the natives of the islands shall have the privilege of killing such young seals as may be necessary for their own food and clothing during other months, and also such old seals as may be required for their own clothing, and for the manufacture of boats for their own use; and the killing in such cases shall be limited and controlled by such regulations as may be prescribed by the Secretary of the Treasury.

Well, so far as this deals with the killing of seals upon the islands, again, of course, it is perfectly competent to bind the whole world. Of course you cannot kill seals on the land unless you are on the land or very close to it on the territorial waters; and therefore it is within the competence of the United States, by the use of the words in that section "or in the waters adjacent thereto", construed as a Judge or a lawyer would construe them, still to mean (unless there was something in the context which showed a different meaning was intended), the marginal belt of three miles; the principle of course being, *Terræ dominium finitur ubi finitur armorum vis*.

Section 1961, passed in the year 1870, provides:

It shall be unlawful to kill any female seal, or any seal less than one year old, at any season of the year except as above provided: and it shall also be unlawful to kill any seals in the waters adjacent to islands of St. Paul and St. George, or on the beaches, cliffs, or rocks where they haul up from the sea to remain; and every person who violates the provisions of this or the preceding section shall be punished for each offence—

And so on.

I make as to that the same comment which I made with regard to the previous section.

Section 1962, which was also passed in 1870, is in these terms:

For the period of 20 years from the first July, one thousand eight hundred and seventy, the number of the fur-seals which may be killed for their skins upon the island of St. Paul is limited to seventy-five thousand per annum; and the number of fur-seals which may be killed for their skins upon the island of St. George is limited to twenty-five thousand per annum.

But the Secretary of the Treasury may limit the number. There is no objection to that; it is quite within the competence of the Legislature.

Section 1963 was also passed in the year 1870; and this becomes a little important:

When the lease heretofore made by the Secretary of the Treasury to the Alaska Commercial Company of the right to engage in taking fur-seals on the islands of St. Paul and St. George pursuant to the act of the 1st July 1889—

I do not know what that Act is. I think we have not got it—however it is not important.

General FOSTER.—It is the Act authorising the lease.

Sir CHARLES RUSSELL.—I thank you; that I gathered; but I think it is not set out.

819 General FOSTER.—Not here.

Sir CHARLES RUSSELL.—It was the first Act authorising the lease:

When any future similar lease expires, or is surrendered, forfeited or terminated, the Secretary shall lease to proper and responsible parties, for the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, their comfort, maintenance, and education, as well as to the interests of the parties heretofore engaged in trade, and the protection of the fisheries; the right of taking fur seals on the islands herein named, and of sending a vessel or vessels to the islands for the skins of such seals, for the term of twenty years at an annual rental of not less than fifty thousand dollars, to be reserved in such lease and secured by a deposit of the United States bonds to that amount; and every such lease shall be duly executed in duplicate and shall not be transferable.

Mr. Justice HARLAN.—Sir Charles, if I might interrupt you for a moment, you read that as if it referred to an Act passed in 1889. It is *Chapter 1889*, and the Act of the first July 1870. No doubt you will find that provision in the act of 1870.

Sir CHARLES RUSSELL.—I think very likely you are right, Sir. I misread the chapter for the year. Now section 1964 says:

The Secretary of the Treasury shall take from the lessees of such islands in all cases a bond—

And so on. I need not trouble about that.

Then section 1965, passed in the same year, says:

No persons other than American citizens shall be permitted, by lease or otherwise, to occupy the islands of St. Paul or St. George, or either of them, for the purpose of taking the skins of fur-seals therefrom, nor shall any foreign vessels be engaged in taking such skins; and the Secretary of the Treasury shall vacate and declare any lease forfeited if the same be held or operated for the use, benefit or advantage, directly or indirectly, of any person other than American citizens.

I am afraid with regard to this provision the idea of trusteeship for the benefit of mankind was not quite present to the mind of the framer of this particular provision.

Now section 1966, which was also passed in the year 1870, says:

Every lease shall contain a covenant on the part of the lessee that he will not keep, sell, furnish, give or dispose of any distilled spirits or spiritous liquors—

I need not trouble you with that.

Now section 1967, passed also in the year 1870, provides:

Every person who kills any fur-seal on either of those islands, or in the waters adjacent thereto, without authority of the lessees thereof, and every person who molests, disturbs, or interferes with the lessees, or either of them, or their agents or employes in the lawful prosecution of their business, under the provisions of this chapter, shall for each offense be punished as prescribed in section nineteen hundred and sixty-one; and all vessels, their tackle, apparel, appurtenances and cargo, whose crews are found engaged in any violation of the provisions of the sections nineteen hundred and sixty five to nineteen hundred and sixty eight, inclusive, shall be forfeited to the United States.

Senator MORGAN.—What is the penalty attaching to the provision in the last sentence that you read Sir Charles?

820 Sir CHARLES RUSSELL:

Every person who kills any fur seal on either of those islands or in the waters adjacent thereto, without authority of the lessees thereof—

Senator MORGAN.—The last clause.

Sir CHARLES RUSSELL.

And every person who molests, disturbs, or interferes with the lessees, or either of them, or their agents or employes in the lawful prosecution of their business under

the provisions of this chapter, shall for each offence be punished as prescribed in section nineteen hundred and sixty one; and all vessels, their tackle, apparel, and appurtenances, and cargo, whose crews are found engaged in any violation of the provisions of sections nineteen hundred and sixty-five to nineteen hundred and sixty eight, inclusive, shall be forfeited to the United States.

Senator MORGAN.—The forfeiture applies to all those offences?

Sir CHARLES RUSSELL.—Yes.

Senator MORGAN.—I am mistaken. I thought it applied only to the killing of female seals.

Sir CHARLES RUSSELL.—Not at all, Sir; this section makes it an offence to kill any fur seal on either of the Islands without the assent of the lessees. It makes it an offence to kill any fur seal "in the waters adjacent thereto"—whatever those words mean. It makes it an offence also for any person to molest, disturb or interfere with the lessees in the lawful prosecution of their business; and it attaches to all those offences the consequences to be found in the sections referred to, which include fine and imprisonment; and it also attaches the further sanction and penalty that the vessels, apparel, and so on, shall be forfeited to the United States.

I need not point out this is a very wide reaching section, perfectly within the competence, again, of the United States to pass, so as to bind its own nationals, perfectly competent for the United States to pass so as to bind all within the extent of its territorial dominion, but not beyond.

Senator MORGAN.—Would it be competent to treat it as a hovering Act, to prevent an offence against the revenue?

Sir CHARLES RUSSELL.—Certainly, if an offence is contemplated to be committed on the territory, which is the principle of the revenue Acts, certainly, within the limitations and qualifications which I shall have to explain when I deal with that subject. Applied, as you will see this municipal law has been applied, it means this, that anyone who kills a fur-seal any where east of the line which has been called, for brevity, the line of demarcation, is (as it has been construed) liable to fine, imprisonment, and to the forfeiture of the ship to the United States. Section 1968 which was also passed in 1870, is:

If any person or Company, under any lease herein authorized knowingly kills or permits to be killed any number of seals—

and so on, there are penalties. Then section 1969, also passed in 1870 is

In additional to the annual rental required to be reserved in every lease—

821 there is the annual tax or duty of two dollars on each fur skin.

Then section 1970, also passed in 1870, provides.

The Secretary of the Treasury may terminate any lease given to any person, company or corporation, on full and satisfactory proof of the violation of any of the provisions of this chapter, or the regulations established by him.

that is, the Secretary of the Treasury. Then section 1971.

The lessees shall furnish to the several masters of vessels employed by them certified copies of the lease, which shall be presented to the Government revenue officer.

I need not read that. And then section 1972,

Congress may, at any time hereafter, alter, amend, or repeal, sections from 1960 to 1971, both inclusive, of this chapter.

That is to say, to turn back for one moment, section 1960 is the one which makes it unlawful to kill any fur-seal on the islands or in the waters adjacent thereto except in particular months: Section 1961 makes it unlawful to kill any female seal—those are the particular sections of importance: Congress may alter or repeal those sections, a pro-

vision which I do not myself appreciate. I should suppose it was always in the competence of the Legislature, by a subsequent provision, to repeal them.

Mr. Justice HARLAN.—I can tell you briefly the history of those words in our Statutes.

Sir CHARLES RUSSELL.—It would be interesting, Sir, no doubt.

Mr. Justice HARLAN.—Our Constitution says that no State shall pass a law impairing the obligation of contracts, but these provisions are not applicable to Acts of Congress. The words referred to by Counsel were inserted to avoid any question of the Legislature divesting vested rights. Charters frequently reserve the right to alter or amend, to prevent any question being raised that subsequent legislation deprived a party of vested rights.

Sir CHARLES RUSSELL.—The next section became law on the 5th March, 1872, and that is section 1973.

Mr. GRAM.—When was section 1972 made law?

Sir CHARLES RUSSELL.—That became law in 1870. By section 1973 the Secretary of the Treasury is authorized to appoint one agent and three assistant agents; and by section 1974, also passed in 1872, they are to receive a certain amount of pay. By section 1975 the agents are not to be interested in any lease, and by section 1976 they are empowered to administer oaths. All those sections were passed in 1872, but they are not very material.

Now the next legislative Act is Chapter 64, on page 99 of this volume. It became law on the 24th March 1874, and it provides that

An Act to amend the Act intituled "an Act to prevent the extermination of fur-bearing animals in Alaska", approved July 1st 1870, is hereby amended, so as
822 to authorize the secretary of the Treasury, and he is hereby authorized to designate the months in which fur seals may be taken for their skins on the Islands of St. Paul and St. George in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island respectively.

Now up to this time the Tribunal will perceive that two expressions have been used. So far as regards water, which is the point in question, in describing the extent of the application of the legislation in the Statute of 1868, the laws relating to commerce and to navigation—I do not stop to observe upon the consequences of this extension of the laws of commerce—are extended among other things over all the mainland, islands and waters of the territory ceded. That is one expression; but in every subsequent enactment down to 1889, which I have not yet touched upon, the words are "and waters adjacent thereto". It stands thus: "the law is to extend to the mainland, islands and waters of the territory ceded"; and the alternative expression is "waters adjacent thereto".

Now, in 1889, an important Act was passed; and, before I call attention to this legislation, I ask permission for one moment, because it is matter of interest and, I think, not without importance, to show what was the state of opinion in America among its most distinguished and influential citizens and legislators upon this subject of public fishing rights in waters adjoining a particular territory. I mention it here, as I always try to do, in the order of time. We have got now to the eve of the legislation of 1889. There was then existing another dispute between Great Britain and the United States. Of course, there is an
Statute of 1889.
eastern as well as a western coast of America, and the question arose as to what were the rights of the United States to fish in the waters adjoining Canadian territory, Newfoundland, and so forth; and there was a certain amount of friction existing between the two

nations on the subject, and a distinguished English Statesman, Mr. Chamberlain, was despatched in 1888 upon a pacific mission to America. The matter finally resolved itself into a very small and fine point. The general rule as to the three miles from the shore as an international principle was hardly in question; but the point arose how it was to be applied in the case of embayed waters. On the part of Canada, it was claimed that, where the bay ran to a considerable extent into the territory of Canada, that the Canadians should have exclusive rights even if the mouth of the bay was more than 6 miles wide, that is to say if it was of greater width than it could be protected by the *vis armorum*—three miles on each side. They contended for a wider application. That was resisted by the United States; they claimed that they had the right to enter any bay which was wider at its mouth than six miles, and had the right to fish up to within 3 miles of the coast of that bay, following from point to point the sinuosities of the bays; and, finally, the majority of the Senate recommended, for the settlement of the differences, that the limits should be fixed at 10 miles; that is to say, that wher-
 823 ever at the mouth of the bay the land approached within 10 miles, the exclusive right should be considered as belonging to the Power owning the territory. The matter came to be discussed in Committee, and among the influential Members of the Committee was one of your distinguished body; and he, with three other gentlemen, signed a minority report. The signatures are those of John T. Morgan, Eli Salisbury, Joseph E. Brown, and H. B. Payne; and their argument was a very sensible one; they did not want this restricted limit. I am reading from the Senate "Miscellaneous Documents", 1st session, 50th Congress, Volume 2, page 65. The gentlemen who formed this minority had very wisely in their minds the fact that I have mentioned, that this great Power, the United States, has interests on both sides, west and east; and this is the language they use in their Report:

A vast extent of the coast of the Pacific reaching to the Arctic Circle, and destined to become a more important fishing ground than the Atlantic coasts, must be affected by the principles of international law which the United States shall assert as defining the limits seaward from the coast of our exclusive right to fish for seals and sea otters and whales, and the many varieties of food fishes that swarm along the coast of Behring Sea and the Straits. We might find in that quarter a very inconvenient application of the doctrine that by the law of nations the three mile limit of the exclusive right to fishery is to follow and be measured from the sinuosities of the coasts of the bays, creeks and harbours that exceed six miles in width at the entrance, and an equally inconvenient application of our claim for full commercial privileges in Canadian Ports for our fishermen when applied to British Columbian fishermen in our Pacific Ports, which are nearer to them than to our fisheries in Alaska.

There is a great deal of weight, I need not say, looking to the source from which it comes, in that statement; but I call attention to it in view of the broad suggestion which is now propounded, that at the very time that these statesmen were considering this matter in 1888, the United States asserted that she had, first of all, under her title from Russia, and next as inherent in her right of territorial dominion, the right of stretching out its arm of authority over the whole of Behring Sea and to exclude others from the pursuit of seals and sea-otters and whales,—and I do not see why it should stop at fur-seals or at the many varieties of food fishes that swarm along the coast of Behring Sea and the Straits,—I say this is very strong evidence, indeed, that that principle of international law to which we have adverted was a principle recognized by the public men of authority in the United States; but that what this minority was struggling against,—and in the point of view of international interests I do not complain of their struggling against it—was a limitation in the application of principle

on the east coast of America which might conflict with some interests they would feel bound to assert or feel justified in asserting on the other coast.

Senator MORGAN. That treaty was rejected by the Senate.

Sir CHARLES RUSSELL. It was, quite true, as I am glad to be reminded by the Senator. They took the narrow line. They were for close and strict limitation.

824 Now, before I call the attention of the Tribunal to this Statute of 1889, as to which I must make some comment, I wish to give its history. It is not long, and if the Tribunal will turn to the original Case of Great Britain, the history there begins on page 123. I hope I need not remind the Tribunal of the point to which all this discussion is tending. I am upon the question of seizures, and I am pointing out that the seizures were based upon municipal legislation and upon municipal legislation alone; and I want to demonstrate only that the theory which is now put forward was never dreamt of until at a later stage of the discussion some ingenious mind suggested it.

In 1889, what was the state of things, to begin with? The state of things was this; that three years before, namely in 1886, vessels of subjects of the Queen had been seized for fur-sealing in Behring Sea; that those seizures had been repeated in 1887; that there had been no seizures in 1888; I think that seizures were further repeated in 1889. Now that was the state of the case; and you have seen from the diplomatic correspondence up to that time what was the attitude and the justification of the United States. I will read from the Case, p. 123.

During the fiftieth session of the House of Representatives, in 1889, the Committee on Marine and Fisheries was directed "to fully investigate and report upon the nature and extent of the rights and interests of the United States in the fur-seals and other fisheries in the Behring Sea in Alaska, whether and to what extent the same had been violated, and by whom; and what, if any, legislation is necessary for the better protection and preservation of the same!"

The Committee reported, upholding the claim of the United States to jurisdiction over all waters and land included in the geographical limits stated in the Treaty of Cession by Russia to the United States.—

Senator MORGAN.—That was a House Committee, was it not?

Sir CHARLES RUSSELL.—Yes; it is called a Committee of the House of Representatives. I need not stop to point out that that was an assertion of territorial dominion over that area.

The Committee reported, upholding the claim of the United States to jurisdiction over all waters and land included in the geographical limits stated in the Treaty of Cession by Russia to the United States, and construing different Acts of Congress as perfecting the claim of national territorial rights over the open waters of Behring Sea everywhere within the above-mentioned limits.

The report states:

The territory of Alaska consists of land and water. Exclusive of its lakes, rivers, harbours, and inlets, there is a large area of marine territory which lies outside of the three-mile limit from the shore, but is within the boundary-lines of the territory transferred by Russia to the United States.

And the Report concludes thus: •

That the chief object of the purchase of Alaska was the acquisition of the valuable products of Behring Sea.

I need not point out that the fur-seal is not the only valuable product of the Behring Sea, and that that is an assertion of territorial
825 dominion and sovereignty, which, of course, carries with it, if well-founded, the exclusive right to take the products, whatever they are, of that Sea.

That at the date of the cession of Alaska to the United States, Russia's title to Behring Sea was perfect and indisputed.

That, by virtue of the Treaty of Cession, the United States acquired complete title to all that portion of Behring Sea situated within the limits prescribed by the Treaty. The Committee herewith report a bill making necessary amendments of the existing law relating to these subjects, and recommend its passage.

It then proceeds to describe the amendments, as declaring the true intent and meaning of section 1956. That, the Tribunal will remember, is the section which prohibits the killing of any otter, mink, marten, sable, or fur-seal or other fur-bearing animal within the limits of Alaska territory or in the waters thereof:

That section 1956 was intended to include and apply, and is hereby declared to include and apply, to *all the waters of Behring Sea in Alaska embraced within the boundary-lines mentioned and described in the Treaty with Russia, dated the 30th March, A. D. 1867, by which the Territory of Alaska was ceded to the United States; and it shall be the duty of the President at a timely season in each year to issue his Proclamation, and cause the same to be published for one month in at least one newspaper published at each United States port of entry on the Pacific coast, warning all persons against entering said Territory and waters for the purpose of violating the provisions of said section; and he shall also cause one or more vessels of the United States to diligently cruise said waters and arrest all persons, and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein.*

The Bill, Mr. President, did not pass the House of Representatives, but this section was added by the House as an amendment to a Bill for the protection of the salmon fisheries of Alaska, which originated in the Senate.

The Senate however refused to accept the amendment of the other House, and the Bill was accordingly referred to a Conference of the Houses, and the section, as finally modified and adopted in the Act of the 2nd March 1889, reads as follows:

This is as it stands in the book at page 99, and it will be observed that it did not pass the legislative bodies and ultimately become law in the terms in which it was recommended: those terms being that it should apply "to all the waters of Behring Sea in Alaska embraced within the boundary-lines mentioned and described in the Treaty with Russia". The earlier statute runs thus: "The laws... are extended to and over all the main-land, islands and waters of the territory ceded to the United States by the Treaty with Russia"; and the section as it was actually passed runs as follows:

That S. 1956. . . is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea.

Now I really have to ask, what was the reason of the change? Was it intended that the change should mean anything, or was it intended that it should mean nothing?

Was it intended to be left in a position in which, without asserting dominion over all the waters of Behring Sea, it should yet be so vaguely framed that the executive authority would be entitled to invoke an interpretation of it as if it included all the waters of the Behring Sea as part of the dominion belonging to Alaska territory? In this discussion also one of your Tribunal took part, and, as the Tribunal would be prepared to expect, a sensible part. First of all, instead of being a substantive Act dealing with this question, it is smuggled into (if I may use the expression) an Act dealing with an entirely different matter—an Act for the protection of the Salmon Fisheries of Alaska; and when it came up, Mr. Senator Morgan (I now refer to page 249 of vol. III of the Appendix to the Case of Great Britain) says:

I wish to say just this: That in the Report made by the Committee the rights of the Government of the United States were not considered, and not intended to be

considered. We only arrive at the conclusion that the question presented in the amendment of the House is of such a serious and important a character that the Committee on Foreign Relations would not undertake at this time to pronounce that kind of judgment upon it which is due to the magnitude of such a question.

Very wise words.

I desire that the Bill as it passed the Senate originally should pass,
That is the Salmon Fisheries Bill.

because it protects the salmon and other fisheries in Alaska, about which there is no dispute; but this particular question is one of very great gravity and seriousness, and the Committee on Foreign Relations, or at least a majority of the entire Committee, did not feel warranted in undertaking to consider it at this time.

Mr. Justice HARLAN.—I think those observations of Mr. Sherman following that are important.

Sir CHARLES RUSSELL.—I will read them by all means.

Senator MORGAN.—I should like to say this, that we were then in full course of negotiations with Great Britain for the settlement of these disputed questions, and it was submitted by the Committee of Foreign Relations to the Senate that that diplomatic effort should not be obstructed by summary legislation.

Sir CHARLES RUSSELL.—I think nobody can doubt the perfect wisdom of that view which operated upon your mind, but it did not operate apparently upon that of the majority of the legislative body.

The point is not what individual Senators, however wise and eminent, held in the matter, but what the Legislature has done; and that I am now proceeding to consider. But in answer to Mr. Justice Harlan, I will of course, read, Mr. Sherman's speech.

General FOSTER.—He was chairman of the Committee.

Sir CHARLES RUSSELL.—I am much obliged.

I intended, when the amendment was properly before us, to say to the Senate that the Committee on Foreign Relations were of the opinion that while there was no objection at all to the Senate Bill as it passed [that is the Salmon Fisheries Bill] it being for a clear and plain purpose, the question proposed by the House in the form of an amendment was a grave one, and had no relation to the subject-
827 matter of the Bill, and ought not to be connected with it, had no connection really with it, and involved serious matters of international law, perhaps, and of public policy, and therefore it ought to be considered by itself.

I was directed by the Committee to state that the subject-matter, the merits of the proposition proposed by the House, were not before us, and not considered by us, and we are not at all committed for or against the proposition made by the House. We make this Report simply because it has no connection with the Bill itself, and it ought to be disagreed to and abandoned, and considered more carefully hereafter. I, therefore, ask for a Committee of Conference on the disagreeing votes of the two Houses.

Ultimately it was passed in the form in which it stands on page 99.

“That section 1956 of the Revised Statutes of the United States is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea, and it shall be the duty of the President, at a timely season in each year, to issue his Proclamation, and cause the same to be published.”

Senator MORGAN.—The word “dominion” used in that statute, I beg leave to say, Sir Charles, is the word used in the Treaty. Of course its signification as that statute has presented it must, in the absence of an interpretation by the Legislature, depend on the judgment of the courts as to what dominion included.

Sir CHARLES RUSSELL.—I do not know whether the Tribunal heard that. It is not without some consequence perhaps. The learned Senator has said that that word “dominion” as introduced in that section

is so introduced because it is found in the Treaty of 1867. I beg leave to observe, with great deference to the learned Senator, that when I come to deal with that Treaty of 1867 it will be found that there is no such word in it as "dominion", that it has been changed in the translation, and that "rights of sovereignty," which is the expression in the treaty, has been incorrectly interpreted in the English version into the word "dominion."

Senator MORGAN.—I never heard that, as to the word "dominion", there was a mistranslation of the treaty. I understand the Treaty was drawn up in English and French.

Sir CHARLES RUSSELL.—I think not, sir, with great deference.

Mr. Justice HARLAN.—Yes. Here it is in French on page 76.

Mr. FOSTER.—It is in English and in French. The United States Government never makes a Treaty in a foreign language.

Senator MORGAN.—The word "dominion" was used.

Sir CHARLES RUSSELL.—In my judgment the point is not a material one, but as matter of fact when I come to deal with that Treaty I will point out the construction that is erroneously placed upon some words in that Treaty, judged at least by the French original. I do not myself consider that the word is one of importance. It is a mere matter of translation.

My point upon this Statute of 1885, of course, is that it is a piece of *ex post facto* legislation, which purports to extend the operation of the earlier Acts. It is declaratory of the meaning of those earlier Acts, but it substitutes words much wider in their scope and capable of being interpreted to mean, and I think what I have read shows they were intended to mean, the assertion of dominion, of territorial sovereignty, over the waters of Behring Sea within the limits of the Treaty of cession of 1867; therefore, the particular question to which Senator Morgan has been good enough to draw my attention would not in that connection be material.

So much for the statutes. Now still pursuing the same line to which I am closely adhering, and demonstrating to this Tribunal that as against British subjects the municipal law alone was invoked and put into operation, I have to say that there was no suggestion at any place, or at any time, or by any person, of that which one would have expected, if such a case had been in the minds of the Executive, and which must have been put forward in the simplest form thus: We are proceeding against your subjects for violation not of our municipal law, but merely in pursuance of that inherent right which we have to protect our property and our interests, wherever that property or those interests may be injuriously affected.

Now I wish to make this matter clear beyond all possibility of doubt; and one therefore naturally turns to see what were the grounds upon which those representing the United States Executive invoked the authority of their municipal courts and claimed sentence of imprisonment, fine and confiscation. For that purpose, of course, one naturally turns to the pleadings in the case.

PROCEEDINGS IN THE ALASKAN COURT.

The case is presented to the Court, and it must be dealt with by the Court *secundum allegata et probata*. Accordingly I turn to page 65 of Volume III of the Appendix to the British Case. On that page will be found the libel:

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF ALASKA.

The United States, Libellant, v. The Schooner "Thornton", her Tackle, etc.—On Libel of Information for being engaged in the Business of killing Fur-seal in Alaska.

TRANSCRIPT OF RECORD.

On the 28th day of August, 1886, was filed the following Libel of Information:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.
AUGUST SPECIAL TERM, 1886.

To the Honourable LAFAYETTE DAWSON, *Judge of said District Court:*

The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in Court in his proper person, in the name and on behalf of the said United States, against the schooner "Thornton", her tackle, apparel, boats, cargo, 829 and furniture, and against all persons intervening for their interests therein, in a cause of forfeiture, alleges and informs as follows:

That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1st day of August, 1886, within the limits of Alaska territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel, commonly called a schooner, the "Thornton", her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:

That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this Court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore-mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

Wherefore the said Attorney prays that the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

M. D. BALL,
United States District Attorney for the District of Alaska.

That libel was amended and appears in its amended form on page 71, at the bottom of the page. It is not amended in any matter material for this purpose, except so as to bring the men as persons under the cognizance of the court. They were afterwards subjected, as you know, to fine and imprisonment; which has also an important bearing as to whether it was under municipal law or not that these proceedings were founded.

Then there is a demurrer, at the bottom of page 72:

1. The said claimant by protestation, not confessing all or any of the matters in said amended information contained to be true, demurs thereto and says that the said matters in manner and form, as the same are in the information stated and set forth, are not sufficient in law for the United States to have and maintain their said action for the forfeiture of the property aforesaid.

2. The said claimant by protestation denies that this Court has jurisdiction to determine or try the question hereby put in issue.

3. And that the said claimant is not bound in law to answer the same.

That demurrer was overruled. I do not think I need trouble you with it.

Senator MORGAN.—Was there an intervention of the owner in that case?

830 Sir CHARLES RUSSELL.—Yes, of the owner or the person interested; I think the owner. I wish to go over all these, so that I need not have to recur again to the pleadings in the other cases. I am merely giving the “Thornton” as a sample case in 1886. The others were similar.

I will now turn to page 112 of that large volume, which relates to the later seizures.

The PRESIDENT.—Your point is that the prosecution was always had under section 1956?

Sir CHARLES RUSSELL.—Yes, sir. I find I ought to refer the Tribunal for one moment to the beginning of the proceedings in the “Sayward” case, as they were similar to the later prosecutions. It is on page 83, at the bottom of the page, vol. III.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

United States v. Geo. R. Ferry and A. Laing.—Information.

DISTRICT OF ALASKA, ss.

George R. Ferry and A. Laing are accused by M. D. Ball, United States District Attorney for Alaska, by this information, of the crime of killing fur seals within the waters of Alaska Territory, committed as follows:

The said George R. Ferry and A. Laing on the 8th day of July, A. D. 1887, in the District of Alaska and within the jurisdiction of this Court, to wit, in Behring's Sea, within the waters of Alaska Territory, did kill ten fur seals, contrary to the Statutes of the United States in such case made and provided, and against the peace and dignity of the United States of America.

Dated at Sitka the 23rd day of July, 1887.

I need not trouble you with the pleadings, which were based upon the same line; but I now proceed to show the grounds upon which the judgment of condemnation of the court was invoked, and that will be found at page 112, these being the grounds filed in the Court, and presented as the case of the United States, upon which the demand for judgment was based. It appears that we have got these proceedings from *The New-York Herald* of October 18, 1887. You will see at the bottom of page 112 a not unimportant statement. *The New-York Herald* is an important paper published, as you know, in New-York, and indeed I may say in Paris also:

The Government here are in receipt of advices from Sitka, which contain the brief which is understood to have been prepared at Washington and recently filed in the Court at Sitka by Mr. A. K. Delaney, as counsel for the United States Government.

Therefore it was under high auspices.

Mr. FOSTER.—That is a despatch from Ottawa, published in the *Herald*.

Sir CHARLES RUSSELL.—There is no doubt about the fact, but if my friend intimates to me that he has any doubt about the fact I will pursue the evidence that shows it.

Mr. FOSTER.—I am simply calling attention to the fact that the despatch originates from Ottawa, Canada.

831 Sir CHARLES RUSSELL.—It does not matter very much where it originates.

The PRESIDENT.—You mean, as a matter of fact, that the pleading was prepared at Washington?

Sir CHARLES RUSSELL.—Precisely. Mr. President I would ask you to kindly allow my friend Sir Richard Webster to read the whole of this, as it is one of the few documents I shall desire to read *in extenso*.

Senator MORGAN.—Is that a brief in the case?

Sir CHARLES RUSSELL.—Yes; it is the formal pleading filed at Sitka on behalf of the United States.

Senator MORGAN.—It is not a brief then; it is a part of the case?

Sir RICHARD WEBSTER.—In the pleadings in those Courts both sides file a brief in the Court itself; it is not the same thing as a brief of counsel.

Sir RICHARD WEBSTER thereupon read to the Court the following verbatim copy of the brief:

Case.

The information in this case is based on Section 1956 of Chapter 3 of the Revised Statutes of the United States, which provides that "No person shall kill any otter, mink, marten, sable or fur-seal, or other fur-bearing animal within the limits of Alaska Territory or in the waters thereof."

The offence is charged to have been committed 130 miles north of the Island of Ounalaska, and therefore in the main waters of that part of Behring's Sea ceded by Russia to the United States by the Treaty of 1867. The defendants demur to the information on the ground.

1. That the Court has no jurisdiction over the defendants, the alleged offence having been committed beyond the limit of a marine league from the shores of Alaska.

2. That the Act under which the defendants were arrested is unconstitutional in so far as it restricts the free navigation of the Behring's Sea for fishing and sealing purposes beyond the limits of a marine league from shore. The issue thus raised by the demurrer presents squarely the questions:

- (1) The jurisdiction of the United States over Behring's Sea.
- (2) The power of Congress to legislate concerning those waters.

The argument.

The fate of the second of these propositions depends largely upon that of the first, for if the jurisdiction and dominion of the United States as to these waters be not sustained the restrictive Acts of Congress must fall, and if our jurisdiction shall be sustained small question can be made as to the power of Congress to regulate fishing and sealing within our own waters. The grave question, one important to all the nations of the civilized world, as well as to the United States and Great Britain, is "the dominion of Behring's Sea."

The Three Mile Limit.

Concerning the doctrine of international law establishing what is known as the marine league belt, which extends the jurisdiction of a nation into adjacent seas for the distance of 1 marine league, or 3 miles from its shores, and following all the indentations and sinuosities of its coast, there is at this day no room for discussion. It must be accepted as the settled law of nations. It is sustained by the highest authorities, law-writers, and jurists. It has been sanctioned by the

832 United States since the foundation of the Government. It was affirmed by Mr. Jefferson, Secretary of State, as early as 1793, and has been reaffirmed by his successors—Mr. Pickering, in 1796; Mr. Madison, in 1807; Mr. Webster, in 1842; Mr. Buchanan, in 1849; Mr. Seward, in 1862, 1863, and 1864; Mr. Fish, in 1875; Mr. Evarts, in 1879 and 1881; and Mr. Bayard, in 1886. (Wheaton's International Law, vol. I, sec. 32, pp. 100 and 109.)

Sanctioned thus by an unbroken line of precedents covering the first century of our national existence, the United States would not abandon this doctrine if they could; they could not if they would.

Landlocked Seas.

Well grounded as is this doctrine of the law of nations, it is no more firmly established as a part of the international code than that other principle which gives to a nation supremacy, jurisdiction, dominion over its own inland waters, gulfs, bays, and seas. If a sea is entirely enclosed by the territories of a nation, and has no other communication with the ocean than by a channel, of which that nation may take

possession, it appears that such a sea is no less capable of being occupied and becoming property than the land, and it ought to follow the fate of the country that surrounds it. The Mediterranean in former times was absolutely inclosed within the territories of the Romans, and that people, by rendering themselves masters of the strait which joins it to the ocean might subject the Mediterranean to their Empire, and assume the dominion over it. They did not by such proceeding injure the rights of other nations, a particular sea being manifestly designed by nature for the use of the countries and nations that surround it. (Vattel's Law of Nations, pp. 129 and 130.)

Chancellor Kent, in 1826 before the doctrine as to the marine league limit was as firmly established as it now is, says:

"It is difficult to draw any precise or determined conclusion amid the variety of opinions as to the distance a State may lawfully extend its exclusive dominion over the seas adjoining its territories and beyond those portions of the sea which are embraced by harbours, gulfs, bays, and estuaries, and over which its jurisdiction unquestionably extends." (Kent, vol. I, p. 28.)

Jurisdiction of States.

It thus appears that, while in 1826 the limit of the marine belt was unsettled, the jurisdiction of a state over its inland waters was unquestioned.

"In the laws of nations bays are regarded as a part of the territory of the country when their dimensions and configurations are such as to show that the nation occupying the coast also occupies the bay as a part of its territory." (Manning's Law of Nations, p. 120.)

"An inland sea or lake belongs to the state in which it is territorially situated. As illustrations, may be mentioned the inland lakes whose entire body is within the United States, and the Sea of Azof." (Wheaton's International Law, vol. I, sec. 31.)

"Rivers and inland lakes and seas, when contained in a particular State, are subject to the Sovereign of such State." (Idem, vol. III, sec. 300.)

"Undoubtedly it is upon this principle of international law that our right to dominion over such vast inland waters as the Great Lakes, Boston Harbor, Long Island Sound, Delaware and Chesapeake Bays, Albemarle Sound, and the Bay of San Francisco rests. This country, in 1793, considered the whole of Delaware Bay to be within our territorial jurisdiction, and it rested its claim upon these authorities, which admit that gulfs, channels, and arms of the sea belong to the people within whose land they are encompassed." (Kent's Com. vol. I, p. 528.)

The Doctrine Always Asserted.

It thus appears that our Government asserted this doctrine in its infancy. It was announced by Mr. Jefferson as Secretary of State, and by the Attorney General in

1793. Mr. Pickering, Secretary of State in 1796, reaffirms it, in his letter to the 833 Governor of Virginia, in the following language: "Our jurisdiction has been fixed to extend 3 geographical miles from our shores, with the exception of any waters or bays which are so land-locked as to be unquestionably within the jurisdiction of the states, be their extent what they may." (Wheaton's International Law, vol. I, sec. 32, pp. 2-100.)

Mr. Buchanan, Secretary of State to Mr. Jordan, in 1849 reiterates this rule in the following language: "The exclusive jurisdiction of a nation extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea enclosed by head lands." (Idem p. 101.)

Mr. Seward, in the Senate in 1852, substantially enunciates the same doctrine by declaring that if we relied alone upon the old rule that only those bays whose entrance from headland to headland do not exceed six miles are within the territorial jurisdiction of the adjoining nation, our dominion to all the larger and more important arms of the sea on both our Atlantic and Pacific Coasts would have to be surrendered. Our right to jurisdiction over these rests with the rule of international law which gives a nation jurisdiction over waters embraced within its land dominion.

Behring's Sea Inland Water.

It thus appears that from our earliest history, contemporaneously with our acceptance of the principle of the marine league belt, and supported by the same high authorities is the assertion of the doctrine of our right to dominion over our inland waters under the Treaty of 1867, and on this rule of international law we base our claim to jurisdiction and dominion over the waters of the Behring Sea. While it is, no doubt, true that a nation cannot by treaty acquire dominion in contravention of the law of nations, it is none the less true that, whatever title or dominion our grantor, Russia, possessed under the law of nations at the time of the treaty of ces-

sion in 1867, passed and now rightfully belongs to the United States. Having determined the law, we are next led to inquire as to whether Behring's Sea is an inland water or a part of the open ocean, and what was Russia's jurisdiction over it.

Behring's Sea is an inland water. Beginning on the eastern coast of Asia, this body of water, formerly known as the Sea of Kamchatka, is bounded by the Peninsula of Kamchatka and Eastern Siberia to the Behring's Strait. From the American side of this strait the waters of the Behring's Sea wash the coast of the mainland of Alaska as far south as the Peninsula of Alaska. From the extremity of this peninsula, in a long, sweeping curve, the Aleutian Islands stretch in a continuous chain almost to the shores of Kamchatka, thus encasing the sea.

Russia's Title and Dominion.

It will not be denied that at the time the United States acquired the Territory of Alaska by the Treaty of 1867, the waters of the Behring's Sea washed only the shores of Russian territory. The territory on the Asiatic side she had possessed "since the memory of man runneth not to the contrary." Her title to the other portions of those shores and her dominion over the waters of the Behring's Sea are based "on discovery and settlement."

Possession and Supremacy.

The right of a nation to acquire new territory by discovery and possession has been so universally recognized by the law of nations that a citation of authorities is scarcely necessary. Upon this subject the most eminent as well as the most conservative of authorities says: "All mankind have an equal right to things that have not yet fallen into the possession of any one, and those things belong to the person who first takes possession of them. When, therefore, a nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has sufficiently made known its will in this respect it cannot be deprived of it by another nation."

834 "Thus navigators going on voyages of discovery, furnished with a commission from their Sovereign, meeting islands or other lands in a desert state, have taken possession of them in the name of their nation, and this title has been usually respected, provided it was soon followed by a real possession." "When a nation takes possession of a country to which no prior owner can lay claim, it is considered as acquiring the empire or sovereignty of it at the same time with the domain." "The whole space over which a nation extends its government becomes the seat of its jurisdiction and is called its territory." (Vattel, p. 98.)

Such being the law, we are led to inquire as to on what discoveries, possessions, and occupation Russia's right to dominion in North America is based.

Historical Sketch—1725—1867.

In 1725, under the commission of that wondrous combination of iron and energy, Peter the Great, an expedition was organized, crossed the continent from St. Petersburg to Kamchatka, where a vessel was constructed, and in July 1728 sailed for explorations to the north and east. That vessel was the "Gabriel". Her master was Vitus Behring, a name destined to historical immortality. On the expedition Behring crossed the waters of the Sea of Kamchatka, discovered and named the Island St. Lawrence midway between which and the Asiatic mainland our boundary-line is laid down by the Treaty, and after passing through the straits which bear his name returned to St. Petersburg.

In 1733 a second expedition was organized under the auspices of the Government and the commission of Queen Anne, and with Behring, raised to the rank of Admiral, at its head, repeated the long and dreary journey across Siberia, and in June, 1741, sailed for new discoveries. In July of that year Behring sighted the American continent, some authorities claim at the 58th degree of north latitude, others at the 50th degree. The latter is probably correct, as it rests on the authority of Stellar, who accompanied the expedition, and Behring undoubtedly sailed as far south along the American coast as the 45th parallel, in accordance with his instructions. But what is more pertinent to this inquiry, he discovered several of the Aleutian Islands and the Komandoroff group or complot. On the larger of this complot, which bears his name, the hardy navigator, after shipwreck, died on the 19th of December, 1741.

Russian Discovery.

But the spirit of Russian discovery survived him, and from the starting point he began traders, hunters, and adventurers made their way from island to island until the whole Aleutian Chain, and with it the mainland, was discovered. In 1743, 1745, 1747, and 1749 a Cossack sergeant named Bossoff made four consecutive voyages from

the mainland of Kamchatka to the Behring and Copper Islands in vessels of his own construction. In 1745 a sailor named Nevidchinof, who had served under Behring, crossed the channel which connects the North Pacific Ocean with the Behring Sea and discovered the islands of Attu, and Agatoo, the former of which now marks the western limit of our land dominion. In 1744 a small Russian merchant vessel reached the island of Atka and some of the smaller islands surrounding it.

Ten years later Glottoff, in a ship belonging to an Okotsk merchant, advanced as far as the island of Oniak, and subsequently discovered Onnalaska and the whole of that group of the Aleutian Chain known as the Fox Islands. He made a map of his explorations, which includes eight islands east of Onnalaska. In 1760 a Russian merchant, Adreian Tolstyk, landed on the island of Adak, explored it and some of the surrounding islands, and made a report of his discoveries to the Russian Crown. This group was named after him, the Adreian Islands. The next year a ship belonging to a Russian merchant named Beehevin made the coast of the Alaska Peninsula, and in the autumn of 1762 Glottoff, who discovered Onnalaska and the Fox group, reached the island of Kodiak. In 1768 two captains of the Imperial Navy, Krenitzen and Leveshoff, sailed from Kamchatka in two Government vessels, and the former passed the succeeding winter at Kodiak, and the latter at Onnalaska.

835 Twenty-five years succeeding the death of Behring the spirit of discovery had planted the Russian ensign along the entire Aleutian Chain from Behring's Island to the mainland of the North American Continent.

After the Seals.

Possession and occupation followed the foot-steps of discovery, and settlements and trading posts were established at the more favorable points along the line. Expedition stimulated by the large remunerations of the fur traffic, were constantly fitted out at the ports along the shores of the Sea of Okotsk and the mouth of the Amoor river for voyages of trade and exploration in the new country. Lieut. Elliott, in his report on the seal islands, published with the 10th Census of the United States, estimates that no fewer than 25 companies with quite a fleet of small vessels were thus employed as early as 1772. Under the auspices of one of these companies, Shelekoff, a merchant of Rytsk, founded the first permanent settlement on the island of Kodiak in 1784. From this point exploring expeditions were sent out, one of which crossed the Strait between Kodiak and the mainland which bears Shelekoff's name, and explored the coast of the mainland as far as Cook's Inlet, upon the shores of which in 1786 a settlement was established.

Another pushed along the coast to Prince William Sound and Cape St. Elias, the latter of which was located by Behring in 1741. In 1788 another of Shelekoff's ships visited Prince William's Sound, discovered Yakutat Bay, and made a thorough exploration of Cook's Inlet. In the meantime, in 1786, Gehrman Pribilof, a Muscovite ship's mate, sailed from Onnalaska in a small sloop called the "St. George" discovered the islands which bear his name, located in the heart of the Behring Sea, and now far famed as the only seal rookeries in the known world.

Baranoff's Mission.

In 1790 the Shelekoff company placed at the head of all enterprises in the new country that restless spirit whose energy clinched Russia's dominion to her possessions in North America, Alexander Baranoff. Arriving at Kodiak, he changed the headquarters of the company to the harbor of St. Paul, where the village of that name now stands, and the next year one of his skippers passed round the extremity of the Alaska Peninsula and along the Northwestern coast to Bristol Bay, discovering Kvichak river and the Lake Llamna, and crossed the portage to the mouth of Cook's Inlet, thus finding the safest and quickest means of communication between Shelekoff's Straits and the Behring Sea.

In 1794 Baranoff established a ship yard at Resurrection Bay on Prince William Sound. About this time the first missionaries of the Greek church arrived, and Missions were established at Kodiak, Onnalaska and Spruce Island. The next year Baranoff extended his operations and trading posts to Yakutat Bay. Following this was the consolidation of all Russian interests in North America, giving rise to the Russian-American Company, which was chartered the year that Baranoff founded Sitka, 1799. The possessions and supremacy Russia gained under this Corporation have been so universally acknowledged and widely understood as to scarcely need comment. Under this Company, chartered by the Crown, patronized by nobility, sustained by the sinews of consolidated capital, and led by the tireless energy of Baranoff, new explorations and settlements inevitably followed.

As early as 1806, aside from trading posts and Settlements along the Aleutian Islands, we find the Russian-American Company had established fourteen fortified

stations from Kodiak to the Alexander Archipelago, now known as Southeastern Alaska—one at Three Saints Harbour, one at St. Paul Island, one on the island of Kodiak, one off Afognak Island, one at the entrance of Cook's Inlet, three on the coast of the inlet, two on Prince William Sound, one at Cape St. Elias, two on Kautat Bay, and one at New Archangel, on the Bay of Sitka.

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Along the Coast.

After the death of Baranoff, in 1819, his successor in charge of the affairs of the Company, Lieutenant Yanovsky, made extensive explorations of the coast and mainland above the Alaska Peninsula. One expedition explored and made a preliminary survey of the coast from Bristol Bay as far as the mouth of the Kuskovim River, discovering and locating that stream and also the Island of Nunivak, on parallel 60th degree, in Behring's Sea. Another passed beyond the mouth of the Yukon to Norton's Sound, and another entered the Nuslegak River just above Bristol Bay, pushed into the interior, and crossed the mountains and tundras into the valley of the Kuskovim. Following these, in 1824 and 1826, were the explorations and surveys of Etholin and Luedke, further north on the coast of the mainland.

In 1824 that eminent divine of the Greek Church, Bishop Veniaminoff, visited the coast between Bristol Bay and the Kuskovim, establishing missions, chapels, and churches. Previous to this time, in 1815, Lieutenant Kotzebue, under the patronage of Count Rumiantzo, had discovered and surveyed Kotzebue Sound and the Arctic coast of America as far as Cape Lisburne. Lieutenant Tebenkof, of the navy, in 1835, established missions and redoubts at St. Michael's, on the Norton Sound, and in 1838, an expedition fitted out by him located Point Barrow. Meanwhile, expeditions had penetrated into the interior. Glaznof ascended the Yukon as far as Nulato, and made the first portage between that river and the Kuskovim in 1836, while Malakof reached the same point from the redoubt established by Veniaminoff on the Nuslegak, by way of that river and the Kuskovim.

They were followed by Lieutenant Zagoskin, of the Imperial Navy, who in 1842-3 with five assistants made extensive explorations of basins of the Yukon and Kuskovim, a voluminous journal of which is now in print.

Unbroken Possession.

This brings us to the close of the first century of Russian discoveries and occupation in North America. It is needless to follow further, as the twenty-five years intervening between 1842 and the date of the treaty of the United States are but a continuation and repetition of Russian occupation and supremacy of this territory. That possession was never changed or broken until it passed to the United States under the Treaty of 1867. The archives of Russia will further show that the Imperial Government itself not only fostered these discoveries, but from the earliest period has asserted and exercised dominion over the North American possessions.

The discoveries of Behring in 1728-1741 were under Royal Commission. In 1766 Tolstyk, after his discovery of the Adreian group of the Aleutian chain, was granted special privileges in the new possessions by an Edict of Catherine II. The expedition of Kreutzen, of the Imperial Navy, to Oounimak Island in 1758 was under commission of the same Sovereign. Upon the Report of the Committee of Commerce and the recommendation of the Governor-General of Siberia in 1768, Shelikof was granted a credit from the Public Treasury of 200,000 roubles to carry forward his enterprises in North America. By a Ukase of Catherine II in 1793 Missions of the Greek Church were established in the new dominion, and a Colony was also founded in Kodiak under Royal Edict.

The Russian American Company.

The Charter of the Russian American Company issued in 1799 declares Russia's dominion in the following language: "By the right of discovery in past times by Russian navigators of the Northwestern part of America, beginning from the 55th degree of North latitude and the chain of islands extending from Kamechatka to America and Southward to Japan, graciously permit the Company to have the use of all hunting grounds and establishments now existing on the Northwestern
837 coasts of America, from the above-mentioned 55th degree to Bering Strait, and on the same on the Aleutian Kurile Islands situated on the Northeastern Ocean."

In conclusion, the Charter enjoins: "All military and civil authorities in the above mentioned localities not only not to prevent the company from enjoying to the fullest extent the privileges granted but in case of need to protect them with all their power from loss or injury, and render them, upon application of the company, all aid, assistance and protection."

This assertion of dominion by Russia was reiterated in 1820, when, by an Imperial Ukase, Alexander I granted the second charter to the Russian American Company, renewing its privileges for twenty years, and was again asserted in 1844 by the granting of the third charter, which not only increased the privileges of the company, but also provided a system of colonial government for the Russian American colonies for the twenty succeeding years.

Russian Ordinance of 1821.

All these assertions of jurisdiction and dominion passed unchallenged, but in 1821 the Imperial Government had issued an ordinance regulating traffic in its Asiatic and American possessions, and reserved exclusively to subjects of the Russian empire "the transaction of commerce, the pursuit of whaling and fishing, or any other industry, on the islands, in the harbors and inlets, and in general along the Northwestern coast of America, from Behring Strait to the 51st Parallel of North Latitude, and in the Aleutian Islands, and along the coast of Siberia and on the Kurile Islands from Behring Strait to the Southeastern promontory of the Island of Urup—viz, as far south as latitude 45 degrees and 50 degrees North".

This Ordinance called forth the protests of the United States and Great Britain, and protracted discussions followed. A critical examination of the diplomatic correspondence between the United States and Great Britain on one side and Russia upon the other will disclose that the points in dispute in the controversy were the assertions of Russia to exclusive jurisdiction over the Pacific Ocean, the assertion of dominion over the coast of North America from the 55th parallel south to the 51st. (See note of Mr. Adams, American Minister to Russia, to the Russian Minister March 1822.)

Following these discussions came the Treaty of 1824, between Russia and the United States, and the analogous Treaty of 1825 between Russia and Great Britain. By these Treaties Russia receded from her assertion of exclusive jurisdiction over the Pacific Ocean, and abandoned her claim to possessions on the coast of North America, south of 54° 40'.

The Treaty.

The following are the Articles of the Treaty between the United States and Russia germane to the questions involved in the case:

ARTICLE I.

"It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives saving always the restrictions and conditions determined by the following Articles."

ARTICLE II.

With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the High Contracting Powers from becoming the pretext of an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment without the permission of the Governor or Commander, and that reciprocally the subjects of Russia shall not resort without permission to any establishment of the United States upon the north-west coast.

ARTICLE III.

It is, moreover, agreed that hereafter there shall not be formed by the citizens of the United States, or under authority of the said States, any establishment upon the north-west coast of America, nor in any of the islands adjacent to the north of 54° 40' north latitude, and that in the same manner there shall be none formed by the Russia subjects, or under the authority of Russia, south of the same parallel.

ARTICLE IV.

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country. (Wheaton's International Law, vol. I, pp. 2-112.)

The Treaty between Russia and Great Britain contains substantially the same provisions. Neither in the Treaties nor in the correspondence, is any reference made to Russia's claim of dominion over the Behring Sea. If in the diplomatic correspondence leading up to the Treaty any challenge as to the jurisdiction of Behring Sea had been made, why was it not settled by the Treaties? Did the High Contracting Powers to these Treaties enter into a discussion lasting nearly two years as to one matter and make adjustment by Treaty as to other matters?

The Convention between Russia and Great Britain aside from disposing of the question of Russia's asserted sovereignty over the Pacific Ocean and fixing the Southern limit of her possession on the western coast of North America, also established the dividing line of their respective North American possessions from 54.40 north to the frozen ocean, which boundary-line is incorporated *verbatim* into the Treaty of Cession of 1867 from Russia to the United States. (Treaty of 1867, Article I.)

If differences existed as to the dominion of the Behring's Sea, why were they not also settled, as that manifestly would be a part of the object of holding the Convention?

Russia's jurisdiction.

It cannot be successfully maintained that by such terms as the "Great Ocean" the "Pacific Ocean" or the "South Sea", the High Contracting Powers referred to the Behring's Sea. Aside from this, it is stipulated in both Treaties that the ships, citizens, and subjects of either Powers may reciprocally frequent the interior seas, gulfs, harbours, and creeks of the other on the North American coast for a period of ten years. The only interior sea on the North American Coast was the Behring's Sea held by Russia. If that was a part of the "Pacific Ocean", or the "Great Ocean", or the "South Sea", or belonged to the high seas under the law of nations, why the term "interior sea" and why should the United States and Great Britain accept a ten years' limit of the right of navigation, fishing, and trading in an interior sea if they had the unconditional right to frequent those waters under the law of nations?

This section of the Treaty, therefore, really concedes Russia's dominion over Behring's Sea. Chancellor Kent alludes to this subject as the "claim of Russia to sovereignty over the Pacific Ocean north of the 51st degree of latitude". (Kent Vol. 1, p. 28.)

A summary of results following the discussions and Conventions as to the Royal Ordinance of 1821 is the abandonment by Russia of her claim to sovereignty over the Pacific Ocean; a surrender of her claim to the North American coast south of 54 degrees 40'; a settlement by Russia and Great Britain as to the boundary-line of their possessions in North America; agreements as to settlements upon each other's territory and navigation of each other's waters, but no surrender of Russia's jurisdiction over the Behring's Sea.

Powers of Congress.

Upon this branch of the subject, the power of Congress, over Behring's Sea, there seems to be little room for discussion. The power of a nation to control its own dominions is one of the inherent elements of sovereignty.

"When a nation takes possession of certain parts of the sea, it takes possession of the empire over them as well as of the domain on the same principles which are advanced in treating of the land. These parts of the sea are within the jurisdiction of the nation and a part of its territory; the Sovereign commands them; he makes laws and may punish those who violate them; in a word, he has the same rights there as on the land, and in general every right which the laws of the State allow him". (Vattel's "Law of Nations", p. 130.)

By the Treaty of 1867, "the cession of territory and dominion therein made is declared to be free and unencumbered by any reservations, privileges, franchises, grants or possessions. . . . and conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion and the appurtenances thereto". (Treaty Article 6.)

The Constitution of the United States declares that all Treaties made under the authority of the United States shall be the supreme law of the land. (Constitution of the United States, Article 6.)

That same instrument vests in Congress "the power to make all needful rules and regulations respecting the territory or other property belonging to the United States". (Constitution of the United States, Article 4 section 3.)

Manifestly, the Acts of Congress contained in chapter 3, Revised Statutes of the United States, "relating to the unorganized Territory of Alaska", and under which the information is brought, are embraced within these constitutional provisions.

Conclusion.

The foregoing record may contain but a meagre idea of the indomitable energy and perseverance displayed by the Russian people in acquiring empire in North America, beginning with discoveries of Behring in 1728, and extending for more than a century and a quarter, wherein they braved the perils of land and sea, overcame a savage native population, faced ice and snow, storm and shipwreck, to found and maintain empire on these rugged shores. Enough has been said to disclose the basis of Russia's right to jurisdiction of the Behring's Sea under the law of nations, viz., original possession of the Asiatic coast followed by discovery and possession of the Aleutian chain and the shores of Alaska north, not only to Behring's Strait but to Point Barrow and the frozen ocean, thus inclosing within its territory, as within the embrace of a mighty giant, the islands and waters of Behring's Sea, and with this the assertion and exercise of dominion over land and sea.

Such is our understanding of the law, such is the record. Upon them the United States are prepared to abide the Judgments of the Courts and the opinion of the civilized world.

Senator MORGAN.—Is there any dispute about that long and historical résumé found in that statement?

Sir CHARLES RUSSELL.—I do not think anything which would need criticism of it in any detail. I do not think it is historically correct in some particulars, but I do not think they are of sufficient importance to require notice.

Senator MORGAN.—Generally it is historically correct.

Sir CHARLES RUSSELL.—I should say so.

840 Mr. PHELPS.—Perhaps it is only fair to my learned friends to state that, upon any investigation we have been able to make, we have no reason to suppose that that case was prepared by anybody connected with the Government of the United States in Washington, or used in that case.

It is telegraphed from Ottawa, and that is the first and all that we know about it.

Sir CHARLES RUSSELL.—Then I must say this is the most extraordinary case of a forgery that the world has ever known.

Mr. PHELPS.—I do not mean to say that it was a forgery. It was not used in the case, so far as we have learned.

The Tribunal here adjourned for lunch.

The PRESIDENT.—Sir Charles, if you will continue your argument, we are ready to hear you.

Sir CHARLES RUSSELL.—Mr. President, I am not surprised, nor do I in the least complain, of the interposition of my friends at the point at which the discussion broke off. It is a very important point indeed to ascertain whether this is a genuine brief, and important also, although not so vitally important, to ascertain whether it was prepared at Washington. But whether it was prepared at Washington or whether it was prepared elsewhere, it was prepared by the Counsel who were put forward to represent the views and the contentions of the United States, and to formulate the grounds of fact and of law upon which those views were based, and by which they were to be defended.

Senator MORGAN.—Are the names of those counsel given, Sir Charles?

Sir CHARLES RUSSELL.—Yes: Mr. A. K. Delaney; and I will only say that it is obvious upon the face of the document itself that it was prepared not only by a man of considerable ability, but by a man who had devoted considerable research and thought to the subject, and one, moreover, who had access to official documents and records in the preparation of this "brief" to be laid before the Court; and certainly it is a very high testimony to the ability of the counsel in this rather out of the way place, if, without instructions from Washington, and

without having the materials for this argument put at his disposition from Washington, he was able to frame so exceedingly good a one. But I hardly think he could, without authority from "head-quarters", if I must use that expression, have ventured to speak in the way he has done of these contentions unless he was so authorised, for he concludes with these words:

Such is our understanding of the law, such is the record. Upon them the United States are prepared to abide the judgments of the Courts and the opinion of the civilized world.

Now I wish to put this Tribunal in full possession of how this brief has been introduced into our Case: how it has been drawn to the attention of the United States Counsel, and how they have 841 dealt, or rather failed to deal, with it. In the first instance it is introduced into the original Case of Great Britain. You will find it, Mr. President, at page 127.

The Counsel appearing for the United States Government, to justify the seizure of the "Anna Beck" and other vessels in 1889, filed a brief, from which the following extracts are taken.

Now in the margin you will see that we refer to the documents from which that is originally taken, namely the Blue Book—that is to say, the parliamentary Blue Book of Great Britain—and also to Appendix, vol. III—the large volume from which I have been reading it this morning.

But I am now in a position to inform you that we have actually in this building, at this moment, the gentleman who forwarded that very document to the "New York Herald". The "New York Herald", as I have said, and as you know, is a paper of some importance. It appears to be published in the "New York Herald", with the statement that it is understood to have been prepared in Washington—a statement never denied; and the gentleman is prepared to state—he will be put on any affirmation that the Court think desirable—that he received that as the brief prepared at Washington from the gentleman who represented the Government of the Queen watching the proceedings, who, in his turn, stated that he had received it from the Counsel engaged in the case; and therefore I think the chain of evidence is rather complete upon the point.

Senator MORGAN.—You mentioned a fact, Sir Charles, that I was not aware of before. You speak of the Counsel representing the Government of the Queen in these cases.

Sir CHARLES RUSSELL.—He was watching the proceedings.

Senator MORGAN.—In these cases?

Sir CHARLES RUSSELL.—So I have been informed.

Senator MORGAN.—In Alaska?

Sir CHARLES RUSSELL.—So I have been informed. But the matter does not stop there. I proceed to the next stage. I find this very document referred to in another place. I must trouble the Tribunal to refer for a moment to page 279 of vol. III of the Appendix to the British Case, and you will see the document headed Appendix, No. 2:

Extract from the Report of the Governor of Alaska for the Fiscal Year 1887. Protection of fur-seals:

In connection with these seizures, from which it seems to me no other inference can be drawn than that our Government is determined to assert and maintain the right of exclusive jurisdiction over all that portion of Behring's Sea ceded to it by Russia, I can only reiterate that part of my last Annual Report, in which I essayed, rather feebly I fear, not only to show the necessity of such a policy to the preservation of the sea-fur industry, but the wrong its abandonment would inflict upon the very considerable number of native people who wholly or in large part depend upon it for a livelihood, and whom, it appears to me, it is the duty of the Government to protect.

In view of the fact that the seizure of these vessels and their forfeiture has raised an international question of grave importance, I have thought it proper to include with this Report a copy of the brief submitted by the Queen's Counsel in 842 the case of the British schooners, together with the argument of the United States attorney and the opinion of the Court.

Honourable A. K. Delaney, Collector of Customs having been designated as special Counsel on account of the illness and subsequent death of Colonel M. D. Ball, United States District Attorney, represented the Government and made what I think will be generally conceded a most able and forcible, if not wholly unanswerable argument.

So that this gentleman making his Official Report as Governor of Alaska forwards also a copy of this document, and any difficulty or difference that arises between my friend and myself upon the complete authenticity and reliability of the "brief" we have cited, would of course at once be removed by the production of the document which the Governor of Alaska enclosed. If my friend can produce it, I think it will be found that the two documents are, *verbatim et literatim*, in agreement.

Senator MORGAN.—Sir Charles, I am not sufficiently familiar with the proceedings of the British or Canadian Tribunals, to ascertain without enquiry from you, what is meant there by the brief of "the Queen's Counsel".

Sir CHARLES RUSSELL.—It clearly means that he was the Counsel representing the case of the British owners of schooners.

Senator MORGAN.—That means Counsel appearing for the Government.

Sir CHARLES RUSSELL.—No; it means a Counsel who is a "Queen's Counsel", just as my friend is a "Queen's Counsel", and as I am.

Senator MORGAN.—It is the description of his position in the profession?

Sir CHARLES RUSSELL.—It is the description of the position in the profession of the Counsel in the case of the British schooners.

Now I am going to refer to that brief. The brief in answer to the case on the part of the United States is to be found in the same book—that large volume—page 100; and as I understand the procedure in the Court upon this point—I am speaking without certain knowledge upon it, and I should therefore be glad to be corrected, but I gather from what appears, and from other information, that the course is that stated by my learned friend Sir Richard Webster, namely, that the proceedings originate in a libel or summons, and that, after that, the counsel for the Libellant files his Brief, or what we should call in Great Britain "Statement of Claim"; that being filed, the other side files, in his turn, his "Brief", which is the answer which the Defendant puts forward to the Statement of Claim; and, accordingly, the Brief on behalf of the owners of the schooners, and filed in the Court, is set out at page 100 of that large volume. I am not going to trouble the Court to read it, but I wish to show that the person who prepared this brief had before him the Brief on the part of the Libellant, because he follows the various grounds, which he takes one by one—very much shorter—as an answer generally speaking is shorter than the original allegation which is traversed)—very much shorter, but taking up all the points.

843 Senator MORGAN.—I think what you call a "Brief", we call a "Libel" or "Information".

Sir CHARLES RUSSELL.—It is variously phrased, "Case", "Factum", "Statement of claim", "Declaration". There are varying phrases for it.

Senator MORGAN.—The proceedings on the part of the Claimant we should term here an "Intervention", if there is an Intervention.

Sir CHARLES RUSSELL.—In this Brief (which I do not propose to trouble the Court by reading) he proceeds to state, in the first paragraph,

under what section the vessels in question are seized, these vessels being the "Anna Beck", the "Dolphin", the "Grace" and the "W. P. Sayward". Referring then to the statutes (with which I do not trouble the Tribunal), he then refers, in the next paragraph, to the "Rights of Great Britain and the United States", respectively. He next passes to the consideration of "A Treaty with Russia"; next to "Russia's Claims"; next to the "Authorities quoted", dealing actually with the authorities cited; then he deals with "Mr. Secretary Seward's views", which you will recollect my friend read at some length; and, finally on page 102, he sums up the matter, and gives his short answer to it very clearly, and, as I think, also very concisely. He says:

It also appears that the United States, in claiming sovereignty over the Behring Sea, is claiming something beyond the well recognized law of nations, and bases her claim upon the pretensions of Russia which was successfully repudiated by both Great Britain and the United States.

A Treaty is valid and binding between the parties to it, but it cannot affect others who are not parties to it. It is an agreement between nations, and would be construed by law as an agreement between individuals. Great Britain was no party to it, and therefore was not bound by its terms.

It is therefore contended that the proceedings taken against the present defendants are *ultra vires* and without jurisdiction. But in order to press the matter further, it may be necessary to discuss the act itself under which the alleged jurisdiction is assumed.

Thereupon he proceeds to point out, very much on the lines I have been submitting to the Court, that there is nothing in the words of the statutes which necessarily include foreigners, and that according to proper principles of construction they ought not to be construed as applying to foreigners outside the territorial limits. He then concludes in these words:

So here it is submitted that a decree of your Honour's Court will not give any validity to the seizures here made, and the defendants, in filing their demurrer and submitting this argument, do not thereby waive their rights, or submit to the jurisdiction of the Court.

Now finally I have to say that, as it has been so cited in the original Case, and set out at length in the documents which form part of the Appendix to the Case, it comes upon me a little by surprise, it is a little remarkable, that at this late stage of the controversy this contradiction should be suggested. I quite understand why my friends feel pinched by it, because the position is one absolutely impossible, if not ridiculous, for a great Power which has formulated its grounds of justification, and said: Upon these grounds I abide by the judgment of the Court, and by the judgment of that greater Court, the opinion of the civilized world: for it then to say: These are not the true grounds at all; the real grounds were something entirely different from these.

Although up to this moment the Tribunal will not have seen any trace of the affirmation of this simple ground, if it were present in the minds of any of the ingenious and well learned advisers of the United States, that all this reference to Statute law was wholly beside the question: We were but exercising our inherent rights of protection of property and property interests given to us by the consent of the civilized world—in other words, given to us by the law of nations.

Well, but let us see what was the ground upon which the judgments proceeded.

Senator MORGAN.—If both grounds had been stated in the libellant's case there would have been no repugnance between them.

Sir CHARLES RUSSELL.—Repugnance as to what?

Senator MORGAN.—To it being stated in the libel or information that the United States claimed a right under the laws of nations; and also, that it was possessed of a property right.

Sir CHARLES RUSSELL.—You mean to say if they had said we are complaining of a breach of the municipal Statute, and also complaining of a breach of law of property?

Senator MORGAN.—Yes.

Sir CHARLES RUSSELL.—Certainly there would have been a repugnance: I shall presently have to deal with that.

Lord HANNEN.—I suppose you are pointing to this: If it had been simply a seizure by virtue of this right of property, or protection of property, there would have been no right to fine.

Sir CHARLES RUSSELL.—Much more than that, my Lord: but to that, amongst other reasons. There would have been no right to fine; and the court that would have had the right to adjudicate upon a claim of that kind would not be sitting as a Municipal Court—a Court belonging to Alaska in the United States,—but would be sitting as a Prize Court representing the whole world. That is the real vital distinction; and the distinction that my learned friend Mr. Carter in his ingenious attempt to base the judgment, or justify the judgment, of this “Two penny-half penny” judge—as my friend in a moment of forgetfulness called him—is wholly futile. He has entirely forgotten that a Municipal Court, as such, does not administer International Law at all; it has to administer the law of the State, and the law of the State only.

Senator MORGAN.—That was a United States Court?

Sir CHARLES RUSSELL.—Yes. I intended, in a moment or two, to develop this idea, but as it is mentioned, let me just say a word upon it in passing. I am not concerned to dispute that the Sovereign Power at whose instance a capture is made upon the high seas may not constitute a Municipal Court, *pro hac vice*, a Prize Court; but accord-

845 ing to its original constitution and functions it is a Municipal

Court having no cognizance of any law except Municipal law, and International law so far as it enters into Municipal law, but no further. To enable it to adjudicate as a Prize Court, it must be brought to the apprehension of the Judge that he is no longer in a United States Court administering the municipal law—that he must shut his eyes to Municipal law, and that he is administering International law in the interests of all nations. The distinction is broad, clear, unmistakable and intelligible. But I am proceeding still on the theory that he did not affect to act, that he was not asked to act, in any other character than as a municipal Judge construing a municipal statute, and for that purpose of course it is necessary to examine the judgment itself. The judgment is to be found on page 113.

The PRESIDENT.—This is on your point of fact that you are arguing all this?

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—I understood that from the principles you laid down when you began this part of your argument?

Sir CHARLES RUSSELL.—Quite so. The judgment of Mr. Justice Dawson is to be found at page 113 of Volume I of the

Judgment of
Judge Dawson. Appendix to the American Case. I will not read this judgment because it goes over the same ground as the later judgment which I desire to have read more fully. It relates to the seizures effected in 1886. He is addressing the jury, and telling them that the information is preferred and filed by the District Attorney, based upon an affidavit charging the Defendants with having

killed a certain number of seals and other fur-bearing animals in the waters of Alaska, contrary to the provisions of section 1956 of the Revised Statutes. He then proceeds to say that it is the duty of the Court to instruct the jury as to the law applicable to the facts, and that it is their duty to find the facts. Then he proceeds to say:

For the purpose of aiding you in your deliberations, I will define to you the western boundary line of Alaska as designated and set forth in the treaty of March 30, 1867.

He refers to that Treaty, and then he proceeds.

All the waters within the boundary set forth in this Treaty to the western end of the Aleutian Archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur bearing animals must therefore attach against any violation of law within the limits before described.

If, therefore, the jury believe from the evidence that the defendants by themselves, or in conjunction with others, did, on or about the time charged in the information kill any otter, mink, marten, sable or fur-seal, or other fur bearing animal or animals on the shores of Alaska, or in Behring Sea, east of the one hundred and ninety third degree of west longitude, the jury should find defendants guilty.

Then I skip one passage, and proceed.

The jury are further instructed, as a matter of international law, that it makes no difference that one or both of the accused parties may be subjects of Great Britain.

Russia had claimed and exercised jurisdiction over all that portion of Behring Sea embraced within the boundary lines set forth in the Treaty, and that claim had been tacitly recognized and acquiesced in by the other maritime powers of the world for a long series of years prior to the Treaty of March 30th, 1867.

Then he proceeds to set out, a little more fully, the terms of that Treaty, and then goes on to say that thereby America acquired absolute control and dominion over all the rivers, and so forth; and finally,

And British vessels manned by British subjects had no right to navigate the waters before described for the purpose of killing any of the furbearing animals heretofore designated.

Then the Jury are further instructed that on the 3rd of August the Act of Congress of 1870 was passed, that the lease was made, and so forth; and then the question of fact which is left to the jury is one with which he might have hardly troubled them, whether or not they were engaged in sealing to the east of what has been, for brevity, called the line of demarcation. So much for the judgment of 1886. The judgment of 1887 is on page 115, and the material parts of it, at least, must be read, and I will, therefore, with your permission, ask my learned friend to read it.

Sir RICHARD WEBSTER.—I will read it shortly. It is in the case of four ships, the "Dolphin", the "Anna Beck", the "Grace", and the "Ada".

The libel of information in the case of the schooner "Dolphin" is similar to the informations filed against the other schooners named, and alleges that on the 12th day of July, 1887, the commanding officer of the United States revenue cutter "Rush" seized the schooner "Dolphin" in that portion of Behring Sea which was ceded to the United States by Russia in the Treaty of March, 1867. That said schooner was violating section 1956 of the Revised Statutes in relation to the protection of seal life in the waters of Alaska. To the libel of information the Queen's counsel of British Columbia filed a demurrer, alleging that the district court of Alaska had no jurisdiction over the subject matter of the action, for the reason that the schooner was more than one marine league from the shore when seized, and that the Act of Congress of July 27th, 1868, is unconstitutional, in that it restricts free navigation of the Behring Sea for sealing purposes. A stipulation, signed by the Queen's counsel Mr. M. W. T. Drake, upon the part of the British owners, and Mr. A. K. Delaney upon the part of the United States, was filed, in which it was agreed and conceded that the masters of the vessels named were taking fur-seals in that portion of Behring Sea which is claimed by the United States under the Treaty with Russia of March, 1867.

The issue as presented involves an examination of a most pertinent and critical question of international law. It will be necessary to ascertain, first, the right of the Imperial Government of Russia to the Behring Sea anterior to the Treaty of March, 1867, and for information upon this subject I am largely indebted to Mr. N. L. Jeffries for a collection and citation of authorities and historical events, and for the want of books at my command upon this question, I am compelled to rely for historical facts upon his carefully prepared brief. From this elaborate brief I glean the following facts.

Then he describes the Sea of Kamschatka. He describes how Peter the Great in the early part of the Eighteenth Century directed the exploring expedition; the Court will be able to follow the dates. He talks of the expedition of 1725, and the expedition of 1728; and the discovery of the Island of Saint Lawrence; and the expedition of 1741.

847 Sir CHARLES RUSSELL.—Those are the events mentioned in the brief, which we have not read in full, and which are referred to in the order that the Judgment refers to them.

Sir RICHARD WEBSTER.—The vessels were the "St. Paul" and the "St. Peter"; and, on the 18th of July 1741, Behring first saw the Continent of America. And he describes Behring's visit.

The enterprising spirit of Russian merchants and traders even in Siberia was awakened by the accounts given of the industries that might be created.

The PRESIDENT.—That brief was the practical foundation of both judgments of 1886 and 1887, was it not?

Sir RICHARD WEBSTER.—Yes. At page 117 he refers to the Ukase of the 27th December, 1799, and then reads from Mr. Chief Justice Marshall's judgment in *Johnson v. McIntosh* :

On the discovery of this immense continent the great nations of Europe were eager to appropriate to themselves so much of it as they could acquire.

Then he refers to Chancellor Kent.

All that can be reasonably asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety, and for some lawful end.

And then he refers to Vattel, and then, at the top of page 118, he proceeds.

The Queen's counsel lays much stress in his argument upon the fact that both the United States and Great Britain treated with Russia (the United States in 1824, and Great Britain in 1825) in relation to the free use of the waters in Behring Sea, and it is claimed that by these Treaties the sea was thrown open as the common property of mankind. But an examination of these Treaties and the objects in view by the three great Powers fails to warrant the conclusion reached in the argument. The principal parts of the Treaty between the United States and Russia, the treaty between Great Britain and Russia being similar, are thus set forth by Professor Wharton;

And he reads Articles 1, 2, 3, 4, and 5 of the Treaty of 1824. And at the bottom of the page he continues:

Nations, like individuals, have the right of contracts, and their treaties are subject to the same rules of interpretation and of morality which govern in municipal law.

"Estopped" in law is a term, the etymology of which implies the preclusion of a person from asserting a fact by previous conduct, inconsistent therewith, on his own part or on the part of those under whom he claims. It is in law a prohibition which denies a man the right of alleging or denying a fact in which he has with a full knowledge long acquiesced. Applying this rule the conclusion can not be escaped that in consequence of the acquiescence of Great Britain in the claim, jurisdiction, and dominion of Russia to what is now known as Behring Sea since the expiration of the Treaty of Russia and Great Britain in 1825, which was to exist ten years, Great Britain and her Dominion Government, of which British Columbia is a part, are estopped from any claim of right or privilege of taking fur bearing animals in Behring Sea, east of the line mentioned as our western boundary in the Treaty.

848 Then he mentions the western boundary, which is the line on the map, and then proceeds at the bottom :

The courts have the same right and power, when called upon to interpret a public Treaty, to derive aid from contemporaneous interpretation, and by ascertaining the intention of those whose duty it is, under the Constitution, to make Treaties, as they have in the interpretation of any other law. What then was the object in purchasing Alaska? Manifestly to extend our Northwest boundary line so as to include the whole group of the Aleutian Islands.

Then he refers to Senator Sumner's speech, and then :

Subdivision 2 of section 2 of the Constitution in defining the powers of the President says.

He shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

Then :

Judge Story, in considering this clause of the Constitution, says: It will be observed from this that the power to make treaties is by the Constitution general, and, of course, it embraces all sorts of treaties for peace or war, for commerce or territory.

Then :

It is argued that this question belongs to the political department of the Government, and that it should be there adjusted, but this position is, I think, wholly untenable, at least at this stage of the controversy.

Then the learned Judge cites Story on the question of making Treaties; and then I had better read at the bottom of page 120.

Congress recognized the right of the United States to the whole of the new acquisition by appropriating \$7,200,000 to pay for the new territory, and on the 27th day of July, 1868, extended the laws of the United States relating to customs, commerce, and navigation over all the mainland, islands and waters of the territory ceded to the United States by the Emperor of Russia. [See Revised Statutes, sec. 1954.]

Showing unmistakably the understanding of the Government at the time as to what had been acquired, and that our boundary line was located at the one hundred and ninety third degree of west longitude. The longitude of a place is the arc of the equator intercepted between the Meridian passing through that place and some assumed meridian to which all others are referred. Different nations have adopted different meridians. The English reckon from the Royal Observatory at Greenwich; the French from the Imperial Observatory at Paris, and the Germans from the Observatory at Berlin, or from the island of Ferro. In the United States we sometimes reckon longitude from Washington, and sometimes from Greenwich. But in establishing the western boundary line of Alaska the reckoning of longitude was from Greenwich, which reaches the line dividing the Continents of Asia and North America.

The purchase of Alaska was unquestionably made with a view to the revenues to be derived from the taking of fur-seal in the waters of Behring Sea, and especially on the Islands of St. Paul and St. George, both of which were, by Act of Congress of March 3rd, 1869, made "a special reservation for Government purposes".

Secretary Seward was a skilled diplomat, a learned man in statecraft, and he evidently foresaw the income to be derived by the Government from the seal industry on and adjacent to those islands. Hence, in the negotiation he insisted upon, 849 and Russia conceded, that our boundary line should be extended to the meridian named in the Treaty. The industry and consequent revenues would be hopeless without the residuary power of the United States to protect and regulate the taking of fur-bearing animals in that part of our domain. The effort of the United States to seize and drive out the illicit piratical craft that have been navigating those waters for years, indiscriminately slaughtering fur-bearing animals, the continuation of which can but result in the wanton destruction of the rookeries, the most valuable in the world, is a legitimate exercise of the powers of sovereignty under the law of nations, with which no nation can lawfully interfere.

The question of the constitutionality of the Act of Congress of July 27th 1868 (Revised Statutes, page 343), scarcely deserves notice, since it has been sustained by this court.

The conclusion I have reached is that the demurrer must be overruled, and it is so ordered; and that judgment of forfeiture to the United States be entered against each of the vessels separately, together with their tackle, apparel, furniture and cargoes, saving to the masters and mates their private property, such as nautical instruments and the like.

SIR CHARLES RUSSELL.—I think there can be little doubt, at least I submit there can be little doubt, that I am now warranted in assuming that the Tribunal, having followed this argument, cannot fail to have arrived at this clear conclusion: that these vessels were seized for a supposed breach of a municipal Statute, that the men were imprisoned by the judgment of the Court, and that the confiscation of the vessels seized was part of the penalty attached by the municipal law for this breach.

Now, I have a word to say, before I ask the Court's permission to sum up the general conclusions, about the character of the Court itself. It is a municipal Court administering the municipal law, part of which municipal law undoubtedly is, as far as it enters into municipal questions, international law. But a Prize Court is a distinct Court, with distinct functions; not acting upon municipal law but shutting its eyes to municipal law altogether as such; deriving its authority, no doubt, from the appointment of the Sovereign Power that has caused the marine capture

to be effected, but although deriving its authority from that creation, from the moment that it has created it it ceases to be a municipal Court. I should have thought these things were almost elementary in the subject, but as my learned friend, Mr. Carter, did not appear even to think it necessary to consider what must be the character of an international Court if its decree is to be regarded as a judgment of an international Court, I must call the attention of the Court briefly to some authority upon the subject.

I cite the work well-known in England and, I think, not unknown in America, Manning's "Commentaries on the Law of Nations"; and the edition from which I cite is the one published in 1875 by Mr. Sheldon Amos, himself a writer of distinction, a member of the Bar and Professor of Jurisprudence at University College, and Lecturer on International Law to the Council of Legal Education of the Inns of Court in London; and on page 472 he says:

Questions of maritime capture are adjudged by Courts specially constituted for that purpose. The form of these Courts is different in different countries, but in all they are distinct from the municipal tribunals of the country and are commissioned to decide according to the law of nations, including the engagements of treaties where any such exist.

I need not stop to point out that, as between two countries who have entered into a treaty which gives to the two Powers, parties to the treaty, rights, among others it may be rights of capture, those treaties constitute as between those Powers, and as binding upon them, a portion of international law. Ordinarily speaking, Prize Courts have to deal with a state of belligerency; as, for instance, where, in the struggle for mastery, one Power seeks to obtain possession of the property and the resources of another, or where one Power seeks to get hold of contraband of war, which, if obtained by its opponent, would be of importance to that opponent in the fight: or, again, questions of seizure for running a blockade—questions, which would arise when the ship was brought into the Prize Court, whether the blockade was effective, questions whether the blockade had been properly notified, and other questions of that description. Ordinarily, therefore, Prize Courts have to do with a state of belligerency, not exclusively, but the main exception—I will not undertake to say the sole exception, though I know no other—is cases of capture, where quasi-belligerent rights are exercised or exercisable under treaty as between particular Powers; thus, for instance, assuming there is a Slave Trade Treaty between the United States of America and Great Britain by which rights of search are conceded to

the respective Powers, and the right of seizure of vessels engaged in carrying on that trade, a seizure effected by one or other of the Powers brought into a Prize court, the question in that case would not be whether, according to the general international law, the seizure was justifiable and confiscation ought to follow, but whether by international law, plus the provisions of this treaty, the particular property had or had not been justifiably captured.

Mr. Justice HARLAN.—It may assist you in your argument, Sir Charles, for me to suggest that this Court in Alaska has jurisdiction which is defined by an Act of Congress, as it exercises only such jurisdiction as the Act creating it authorizes.

Sir CHARLES RUSSELL.—That is my point. I am obliged to you, Mr. Justice Harlan, for mentioning it.

Lord HANNEN.—Have you got the Act?

Sir CHARLES RUSSELL.—I have not, but my learned friends can place it at our disposition.

Mr. PHELPS.—They have prize jurisdiction under the general judiciary Act.

Sir CHARLES RUSSELL.—I should like to see it.

Mr. PHELPS.—We will bring it in.

Sir CHARLES RUSSELL.—I began, early in my observations, by saying I did not stop to consider the question whether or not a municipal Court might or might not be constituted a Prize Court. My point here is that it was *not invoked* as a Prize Court; that no proceedings of any kind which bear the faintest resemblance to proceedings in a prize suit were instituted. It cannot be at one and the same time performing the functions of a municipal Court and of an international Court. The two positions are repugnant and inconsistent the one with the other. In the one, the judge is administering the municipal law, and in the other he shuts his eyes to the municipal law and administers international law and international law alone.

Senator MORGAN.—You say that you could not embrace both grounds of forfeiture in the same Information.

Sir CHARLES RUSSELL.—Unquestionably that is my contention. That is made clear if the Tribunal will bear with me a little longer, in the same book, at page 479, where the point is further discussed.

For the history and true limits of the jurisdiction of the English High Court of Admiralty in prize cases, see Lord Mansfield's judgment in *Lindo v. Rodney and another*, cited in a note to *Le Caux v. Eden*, Douglas' Reports, volume II, page 594. His lordship distinguishes the functions of the judge of the court under his general commission and those under a special commission issued only in time of war. This distinction gives rise to the two aspects of the Court of Admiralty, that of an "instance" court and that of a "prize" court.

You will recollect I called attention yesterday to the language in relation to this particular Court which pointed to it being regarded as an "Instance" Court and a Court of original jurisdiction.

"The manner of proceeding", says Lord Mansfield, "is totally different. The whole system of litigation and jurisdiction in the prize court is peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall." By the Naval Prize Act of 1864, which recited that it was expedient to "enact permanently, with amendments, such provisions concerning naval prize and matters connected therewith as have heretofore been usually passed at the beginning of a war" the High Court of Admiralty has jurisdiction given it throughout Her Majesty's dominions as a prize court, and an appeal is given to the Judicial Committee of the Privy Council.

I point out that that is very much like the case my learned friend suggests; that this is a Court which has power to act as a Prize Court

under the Act of Congress, because under the Naval Prize Act of 1864 there is given to the Court of Admiralty powers to act as a Prize Court. Now he proceeds.

The true functions of a prize court are curtly expressed by Lord Mansfield in the course of the judgment above referred to. "The end of a prize Court is, to suspend the property till condemnation; to punish every sort of misbehaviour in the captives; to restore instantly, *velis levatis* (as the books express it, and as I have often heard Dr. Paul quote), if, upon the most summary examination, there don't appear sufficient ground; to condemn finally, if the goods really are prize, against everybody, giving everybody a fair opportunity of being heard. A captor may and must force every person interested may force him to proceed to condemn without delay".

And Lord Stowell says:

It is to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own; and what foreigners have a right to demand from it is
852 the administration of the Law of Nations, simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which it is well known they have at all times expressed no inconsiderable reluctance.

Let me repeat those words:

And what foreigners have a right to demand from it is the administration of the Law of Nations, simply and exclusively of the introduction of principles borrowed from our own municipal jurisprudence:

Then:

In forming my judgment, I trust that it has not for a moment escaped my anxious recollection what it is that the duty of my station calls from me, namely, not to deliver occasional and shifting opinions to serve present purposes of particular national interests, but to administer with indifference that justice which the Law of Nations holds out without distinction to independent States, some happening to be neutral and some belligerent; the seat of judicial authority is indeed locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality.

Now, I have further to point out that it is impossible—even if it had been before the learned Judge it would have been impossible—for him upon the grounds now advanced to have entered upon the question in any other light than that in which he did enter upon it, namely, the construction of this municipal Statute. Why? It is now said—and let there be no doubt about the clearness of my enunciation of what is now said—that the right of the United States is based upon the fact of property in seals; property in, and industry founded upon, seals; that that property right or interest carries with it further the right to do whatever in the judgment of the nation is reasonably necessary anywhere—everywhere—to protect that property and that property right. That is the allegation. Let me point out that nowhere was that ever suggested until the parties were preparing to come here to put this case before you; that their case has been from the first based upon a right restricted in a defined and local area. They say that this Statute is the equivalent of an international regulation for the protection of their own rights. It cannot be so treated. If it is a right that is incident to property, it must follow property wherever property is: but this international regulation embodied under this municipal Statute applies to a defined area, the part of the Behring Sea east of the line of demarcation.

I sum up therefore the whole of my argument on this point by inviting this Tribunal to find, first, the fact of these seizures; next, the fact that they were seized by the authority of the United States; next, that they were seized for breach of a municipal Act, and for that cause only; next that the judgment was claimed, and the judgment was

based, upon a breach of that municipal Statute only, and that that municipal Statute purported to prevail and to be effective in a defined area.

If these facts are found (and I have already undertaken to formulate them in a more precise way and to put them in writing for the Tribunal) the conclusions are inevitable that these seizures were unwarranted:

853 that they were an attack upon the equality of Great Britain on the high seas: that they were unwarranted by the law of nations, the ships of Great Britain on the high seas being part of the territory of Great Britain: and that an offence has been thereby committed against international law, and against the sovereignty of the Queen, for which we are entitled to demand adequate and just compensation.

Let me guard against a possible misapprehension. The Tribunal will understand that so far I am arguing upon the question, Were these measures justifiable or not. My argument has tended to show that they were not justifiable on the grounds that were then advanced. My argument has further tended to show that even if there were such a right in respect of property—such a right of protection as is now advanced—that that right cannot be invoked in justification of these seizures. The conduct of the United States, the whole tenour of their proceedings, prevents them from being entitled to raise any such question as a justification for such seizure.

But I wish the Court to understand that I do not thereby mean to say that they are shut out from the discussion or the claim of that right. When I come to the larger, the general question,—I have been confining myself, of course, to the question of seizure, as I hope the Tribunal understands,—when I come to the question in its proper order, I will discuss whether any such right exists, and what will be the sanction which by international law, if it existed, could be brought into use in support of that right.

Senator MORGAN.—I believe, Sir Charles, you do not claim that the United States is estopped by that decision from going fully into the question.

Sir CHARLES RUSSELL.—No; that is exactly what I want to convey. I say as regards the question of the justification for those seizures, the United States are not estopped from raising the general question which the Tribunal has to decide.

Senator MORGAN.—Then why are they estopped on the question of seizure, if you did not take an appeal?

Sir CHARLES RUSSELL.—Because they did not profess to act according to international law; because they did not act according to international law; because the Court was not an international Court; because it did not profess to be an international Court; because the case of the United States was put on a different ground, and the Judge acted on a different ground. But I do not suggest that they are estopped from arguing the general question when it comes in the order of these questions which the Tribunal has to decide.

The PRESIDENT.—I suppose you admit that in case the seizures were to be authorized or could be authorized, in your opinion, by other grounds than those indicated in the Judgment, you would not consider that we should be bound to declare the United States answerable?

854 Sir CHARLES RUSSELL.—I certainly do, Sir. As regards the seizures which have actually taken place I contend that the United States must rely upon the case they have themselves presented, and which they have themselves made the basis of the Judgment they invoked from the Court.

Senator MORGAN.—If there was an error in the Judgment of the Court, you had your right of appeal to correct it.

Sir CHARLES RUSSELL.—Except that, as a matter of fact, there was no right of appeal.

Senator MORGAN.—None?

Sir CHARLES RUSSELL.—No. If that be questioned, I can refer to the fact. We gave notice of appeal, and it turned out that the judicial arrangements were in a somewhat rude state in Alaska, and there was no Court to which it could be had at that time.

Senator MORGAN.—The case was not beyond the power of prohibition.

Sir CHARLES RUSSELL.—Now you are touching upon a thorny subject, on which men may well differ. I can only say it was thought by those advising the Government of Her Majesty, or the Canadian Government, that it was worth trying if there could be a prohibition. But Mr. Justice Harlan was of a different opinion.

Mr. Justice HARLAN.—In one of those cases, the appeal taken by the vessel—I think so, but the book will show—was dismissed by the pelagic sealers themselves.

Sir CHARLES RUSSELL.—On the ground, as I am informed, and as the papers show, that though they gave notice of appeal, it turned out, owing to the imperfection of judicial arrangements then existing—they have been set right since—there was no Court to go to.

Mr. Justice HARLAN.—Perhaps not the imperfection of judicial arrangements, but the want of proper preparation of the case for an appeal under the Statute.

Sir CHARLES RUSSELL.—I think not, with deference.

Mr. Justice HARLAN.—Well, I may be wrong.

Sir CHARLES RUSSELL.—At all events, if that is a matter that presses on the mind of the Court, I will take care to come furnished with the exact facts, but I think it is not important. It is not a case, as the members of the Court will recognize, of litigation as between subjects, and where the judgment of a Court may work a grievous wrong, which may give rise to the need for diplomatic intervention; in which case it is a diplomatic rule that all modes of possible redress furnished by the judicature of the country should be pursued before diplomacy will intervene. That is a clear rule, but it has never been held to apply to an Act of State, where the contention was, on one side, that the State was acting, or the authority of the State was being invoked, to bind another State outside the limitations of law. My learned friends have not made that point, and it is so bad a point that I do not expect it will be made.

EXAMINATION OF THE FIRST FOUR QUESTIONS OF ART. VI.

I come next—and I am very glad to feel I am making some little progress, not as much as I could wish—to the questions 1, 2, 3
855 and 4 in Article VI, upon which the Tribunal will remember that whatever position in argument is taken by the learned counsel on one side or the other as to suggesting a greater or less relative importance to those questions, yet that course does not affect the duty of this Tribunal, the obligation, I may respectfully say, of this Tribunal, to decide upon their meaning; because Article VI requires “that the award of the Arbitrators shall embrace a distinct decision upon each of the said five points”.

I group those four questions together for an obvious reason of convenience. They naturally hang together. The first deals with the

question of Russia's assertions of right; the next deals with the question of Great Britain's recognition of, concession of, those rights; the third deals with the question of whether the Behring Sea was included in the phrase "Pacific Ocean" in the Treaty of 1825; and the fourth deals with the transmission by cession of whatever rights Russia had to the United States.

They naturally, therefore, hang together. The first comment I have to make, Mr. President, is this: In view of the present state of this controversy, it must strike you as odd why these questions have been formulated at all; why you should be troubled with the decision of questions which the learned counsel for the United States tell us have no real importance or value at all. Why do I say that? Because they tell us that it does not matter what rights Russia exercised or what rights were conceded to Russia by Great Britain; the right they are standing upon is a right which they have inherent in their territorial dominion; attached to their rights of property interest in the fur-seals or in the industry founded upon the fur-seals; dependent upon no prior action, controlled by no prior action, but simply a right inherent.

But I have first to ask the Tribunal to determine whether that is the question of right at all; it obviously is not one which is referred to in the first of these questions. We are told by my learned friends now, that Russia was not exercising general rights of jurisdiction and sovereignty, but was only protecting by regulations her industry and her property rights. But that is not the question which is raised, and that was not the true character of the claim of Russia at all. Let me just examine that case, for it is necessary in order that the Tribunal should give the correct answer. What is the question? The question is, What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein Russia asserted and exercised. It is clear, for the reason that I have given, that it cannot be a right in respect of property or property interest which is adverted to, because, as I have more than once pointed out, such a right in relation to property or property interest as is claimed is not a right which has any legal circumscription at all. It is a right which exists wherever the property is. It is the right of defence of the possession of property against any man who attacks that property wherever that property is, and wherever, therefore, it needs to be defended.

856 That, therefore, is not the kind of right referred to as the "exclusive jurisdiction" of the United States. What then does it mean? It means, What sovereign authority, exclusive of all other Powers, and in a defined and definite area, was exercised by Russia.

In other words, what sovereign authority, exclusive of all other Powers was exercised by Russia in the Behring Sea? That is the character of the question contemplated and put in question one, the first question of Article VI. Exclusive jurisdiction in the Behring Sea: Territorial sovereignty which brooked no rival in that sea. Exclusive in the same sense that there is exclusive territorial dominion on the land. And I must refer to some documents which have not yet, I think, been adverted to, as showing that that was what was meant when this case was originally presented by the United States. I do not know whether any of you gentlemen have ever compared this original Case of the United States as regards the questions put, and the space devoted to the consideration of those questions relatively compared with the space they have assumed in the written argument

of counsel, and in the oral argument of counsel. Let me ask your attention to the matter. The whole of this Case on the part of the United States up to page 84 is conversant with what may be called their claim of title, and that claim of title is based wholly upon the rights exercised by Russia as they allege, recognized and conceded by Great Britain as they allege; and to which rights, so recognized and conceded, they in 1867 succeeded by the treaty of that year. It is only at page 85—I pray your attention to this, for it is important—that we find any reference to the claim which now takes so prominent a part in the discussion of the question. After having elaborated the Russian part of their Case, on page 85 is a paragraph which begins thus:

But in determining what right of protection or property this Government has in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside of the ordinary three-mile limit, it is not compelled, neither does it intend, to rest its case altogether upon the jurisdiction over Behring Sea established or exercised by Russia prior and up to the time of the cession of Alaska. It asserts that, quite independently of this jurisdiction, it has a right of protection and property in the fur-seals frequenting the Pribilof Islands when found outside the ordinary three-mile limit.

And here is the whole argument in support of that right, that novel right, as I think it is admitted to be:

And it bases this right upon the established principles of the common and the civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind.

I have here read every word of the argument in this Case of the United States in support of this claim of protection and property, which is now the great portion of their argument.

Mr. FOSTER.—The next paragraph will throw a little light upon it.

Sir CHARLES RUSSELL.—Oh, of course they go on to justify 857 that by the details of seal life; I am perfectly aware of that. I am talking of argument, Mr. Foster. That interruption is needless. I read the next paragraph:

In order that this claim of right of protection and property may be clearly presented, it will be necessary to enter in some detail upon an examination of fur-seal life at the Pribilof Islands and elsewhere, and of the various interests associated with it.

I am dealing with the argument, and not with the statement of facts. I have said from the beginning, and I shall not recede from it, that so far as the decision of the question of property in these animals, free swimming animals in the sea, breeding upon those islands, and spending a considerable part of their life there, is concerned, it depends in our view upon facts that are not in dispute at all. I am dealing with their argument, and here it is. They base this claim “upon the principles of common and civil law, upon the practice of nations, upon the laws of natural history, and upon the common interests of mankind.”

But it does not rest there. According to the information of the Russian documents. reliable information, they had got a most valuable body of testimony for the purpose of establishing that Russia had made these claims, and that the concession of these claims had been recognized by Great Britain; that Russia had asserted these and had acted upon the assertion without contradiction by Great Britain; and to show that that is so I am led to call attention to the performance of that very astute, but unscrupulous artist, Mr. Ivan Petroff. Will the Court favor me by turning to page 41 of the United States Case? I do not know whether that has been done for you which I have had done for

me, but which if done will enable the Tribunal to see at a glance how completely and absolutely the United States have changed front upon this question since the discovery of these forgeries upon which they had based their great case of derivative title from Russia. Cut out these forgeries, and you have no reference to the fur-seals, no assertions by Russia in respect to the waters of the Behring Sea, no acts of interference asserted or suggested by Russia in that sea at all.

Now let me just justify this, although it may take a little time, I am afraid.

On page 41 you will see what purports to be a quotation from the Board of Administration of the Russian-American Company, beginning with the words: "With this precious Act in your hand." Every word of that from those words: "With this precious Act", to the end of the page, is a forgery, an interpolation; and Mr. Ivan Petroff understood very well what he was about, because he makes this Ukase of 1821 speak in this language—this is the concluding sentence:

We can now stand upon our rights, and drive from our waters and ports the intruders who threaten to neutralize the benefits and gifts most graciously bestowed upon our Company by His Imperial Majesty.

858 Turning to the next page you will find a letter from the Board to the Chief Managers of the Colonies beginning "As to fur-seals", down to the word "future" at the end of that paragraph—it is all a forgery:

As to fur-seals, however, since our Gracious Sovereign has been pleased to strengthen our claims of jurisdiction and exclusive rights in these waters with his strong hand, we can well afford to reduce the number of seals killed annually, and to patiently await the natural increase resulting therefrom, which will yield us an abundant harvest in the future.

A complete interpolation; not a reference—I speak subject to correction, but I believe I am right—not a reference in any one document to fur-seals at all. In point of fact we know from the Report of the Committee of the House of Representatives of the United States in 1876, which I referred to before, that in the Russian time the existence of the fur-seal was considered a matter of very little importance; and it is stated in that Committee's Report that it had yielded no profit, or no considerable profit at all, during the time of the Russian Government.

Then again on the next page, 43, the Tribunal will observe about the bottom of the page, the words, "and on the islands and waters situated between them"—also a forgery; and a little further down the words, "The coast of Kamchatka, the Kurile Islands and the intervening waters"—also a forgery: an interpolation, for the purpose of building up the case, which he thought was the case—and was justified in thinking was the case—which the United States were making. He lends himself to the series of forgeries to build up that case.

Then take the text, which is very remarkable, on page 44. You will observe at the top of the page, the third line, the words, "And the intervening waters (Behring Sea)". Every one of those words is a forgery—interpolated. The original reads thus:

The other ship, however, (sailing from Petropavlovsk), having examined the eastern coast of the Kamchatka peninsula up to 62° of northern latitude, and the west coast of America from this latitude to the island of Unalaska, should proceed to Kadiak and from there to Sitka for the winter.

But this ingenious gentleman makes it read:

From this latitude to the Island of Ounalaska and the intervening waters (Behring Sea) should proceed to Kodiak.

Lord HANNEN.—Is that a part of the forgery, “Behring Sea”.

Sir CHARLES RUSSELL.—Yes; from the word “and” to the word “sea” inclusive.

I am most anxious that the Tribunal should realize that if these forgeries are cut out of this case of Russia’s assertion and of British concession, there is nothing left: that the whole question resolves itself into the action of the Powers, the United States of America and Great Britain, the assertion in the Ukase of 1821, and upon the consequences of the subsequent cession.

859 Then as to the next quotation on the same page, 44: it stands in the original thus:

The object of the cruising of two of our armed vessels is the protection of our colonies. . . .

Lord HANNEN.—Where is that comparison of parallel columns?

Sir CHARLES RUSSELL.—I will give it to you, my Lord. You will find it in the Appendix to the British Counter Case, Vol. I, page 11.

I will occupy one or two moments longer, with the permission of the Tribunal. If the Tribunal will take a note of the page they will see at a glance, because we have underlined the interpolations. But may I, before the Court rises, just call attention to two more. The way he has ingeniously altered the sentence I have just read is to make it run thus:

The object of the cruising of two of our armed vessels. . . . is the protection of our colonies, and the exclusion of foreign vessels engaged in traffic or industry injurious to the interests of the Russian Company as well as to those of the native inhabitants of those regions.

Then, on the next page, page 45, is a very neat little introduction. It ran originally thus:

By a strict observance of such rules, we may hope to make this industry a permanent and reliable source of income to the Company, without disturbing the price of these valuable skins in the market.

He has improved it, thus:

By a strict observance of such rules, *and a prohibition of all killing of fur-seals at sea or in the passes of the Aleutian Islands*, we may hope to make this industry a permanent and reliable source of income to the Company, without disturbing the price of these valuable skins in the market.

A most ingenious gentleman, this; but I need not say he understood what he was about. He understood the contention perfectly. He realized it most completely.

Then at the bottom of page 46. It originally ran:

and Okhotsk and prohibited them from engaging in trade.

And he has ingeniously altered it, and inserted these words:

and from hunting and fishing in all the waters of Eastern Siberia.

Then he adds boldly a full sentence. Again, this is all his concoction:

In conclusion, it is stated as the decision of His Majesty, the Emperor, in view of possible future complications of this nature, that no contracts involving the free admission or navigation for trade of foreign ships or foreign subjects in the waters adjoining or bounded by the coasts of Russian colonies will be approved by the Imperial Government.

I need not remind you of what is, I think, present in your minds, namely, that in Russian legislation, while Siberia and Kamchatka are spoken of as part of the realm of Russia, Alaska, on the other hand, is always spoken of as a colony of Russia.

860 Lord HANNEN.—How much of that last is interpolated?

Sir CHARLES RUSSELL.—The last sentence that I read, beginning with the words, "In conclusion", and ending with the words "Imperial Government".

Lord HANNEN.—You were giving the passages relied on in the United States Case?

Sir CHARLES RUSSELL.—Yes, that is my point; I am anxious to bring these passages on which the United States relied to the attention of the Court. I hope the Tribunal realizes the importance of this matter.

The PRESIDENT.—Sir Charles, I would suggest that yesterday you read us a despatch of Mr. Blaine, from which it appears that the suggestion of Mr. Blaine, and almost his very words, were the origin of these four or five questions put in the sixth Article of the Treaty. Well, I suppose, when Mr. Blaine framed these questions in his despatch, and asked that they should be incorporated into a treaty with England, I suppose he relied on some intrinsic arguments of value. Do you think he already had a knowledge of these interpolations of Ivan Petroff?

Sir CHARLES RUSSELL.—I am not in a position to inform the Tribunal upon that point.

The PRESIDENT.—I think he did know, as these interpolations have been withdrawn by the United States counsel.

Sir CHARLES RUSSELL.—Certainly, I should judge—it is a mere speculation, and of course my friends would know much better than I—I should judge he had these before him.

Lord HANNEN.—That is to say, he had these original translations?

Sir CHARLES RUSSELL.—Quite so.

Lord HANNEN.—And was deceived by them.

Sir CHARLES RUSSELL.—I should judge so; but I do not know.

Mr. FOSTER.—If it is not an unnecessary interruption, I would explain about that.

The PRESIDENT.—General Foster, will you kindly explain that.

Mr. FOSTER.—With the President's permission. I will say that Mr. Blaine had no knowledge whatever of the contents of these documents. They were not known to any person in the Department, or any official of the Government of the United States, until after we began to prepare this case, when this person named by Sir Charles was called upon as an expert in the Russian language to translate them.

The PRESIDENT.—It is a question of dates, I suppose, which it is easy to ascertain?

Mr. FOSTER.—As to the translation?

The PRESIDENT.—Of course you know when the translations were made, and when you first had to deal with this Ivan Petroff.

Mr. FOSTER.—As to the matter of dates, they were not known until after the ratification of the Treaty, April 9, 1892.

Mr. Justice HARLAN.—You mean the existence of the documents?

861 Mr. FOSTER.—No. The existence of these Russian documents was known. The contents of the documents were not known.

They had not been translated. The officials of the Department of State, of course, knew that we received from the Russian Government under the Treaty certain archives and documents of the Government of Alaska. These were sent to Washington and placed in the Department of State. Their contents had never been translated; and as there are very few persons in the United States, especially in Washington, who are acquainted with the Russian language, the contents were not known to the officials of the Department. But the existence of the documents was known, and when this case came to be prepared, it naturally sug-

gested itself to the persons having charge of it that it would be well to examine the contents of those documents, whereupon this man Petroff was employed to translate them.

The PRESIDENT.—But you do not suppose that Mr. Blaine, when he originated his suggestion, which had as a conclusion the insertion of the article in the Treaty, relied upon these.

Mr. FOSTER.—It is not a matter of supposition. It is a fact that Mr. Blaine did not know what were the contents of the documents now under discussion.

The PRESIDENT.—Sir Charles, do you not think that would be of some importance for your argument; because, as you are going on about these interpolated documents, and they are practically withdrawn, if they are in themselves quite independent, that is to say, if they are not material for the framing of Article 6—well, I leave that to you to judge, of course. You know best.

Sir CHARLES RUSSELL.—I am pursuing this—I did not intend to pursue it at great length—for two reasons: first, to show what was the real meaning of the “exclusive jurisdiction” and the “rights” mentioned in the first question of Article 6; to show that that meant an exclusive right of territorial sovereignty assumed by Russia, and conceded to Russia—that is my main point: and that at the time this Case was prepared it was the great strength of the case that the United States were prepared to put forward; that that is shown in the way in which it is elaborated here; and, lastly, that excluding these Russian interpolations or forgeries, nothing remains to support the claim based upon Russian assertions, excepting the Ukase and the Treaties in relation to the Ukase.

The PRESIDENT.—So you suppose that, as concerns Mr. Blaine, and when he originated these questions, you suppose he relied exclusively upon these documents, but not upon these interpolations.

Sir CHARLES RUSSELL.—I accept, of course, what Mr. Foster says, speaking from his own experience, that Mr. Blaine did not know of these documents at the time, and that therefore he was relying upon the view that he took of the Treaties. There are references in his correspondence which I will not now refer to, which I find a little difficulty in accounting for except by reference to some of these documents—I mean as to acts of assertion by Russia, which I do not find vouched for anywhere else except in these documents.

862 Mr. CARTER.—Can you point to anything in Mr. Blaine’s letter indicating that he knew of the contents of these documents?

Sir CHARLES RUSSELL.—No; I do not say these documents. I do not doubt Mr. Foster’s statement in the least upon the subject; but Mr. Blaine must have had some idea that there were in existence documents which would support the statements that there were acts of assertion by Russia which could be relied upon.

Mr. FOSTER.—Why did he not produce them at the time?

Sir CHARLES RUSSELL.—I think you will find, if you read his letter, that he speaks again and again of acts of authority by Russia, assented to by Great Britain.

May I be permitted to make one suggestion which would, I think, have the very desirable result of cutting short my argument upon this part of the case. You see, the United States have withdrawn the forged documents, and presented re-translations. They have not altered the Case as it was originally presented. I have had enclosed for me in red brackets the interpolated passages in the Case, and if it would be permissible I can get that done as regards each of the Cases of the Arbi-

trators, so that they can see at a glance the important part—I consider it is important—that these interpolated passages bear in the argument, and how bare it stands of authority if these interpolated passages are excluded.

Lord HANNEN.—That is what you are going to show next?

Sir CHARLES RUSSELL.—Yes.

Lord HANNEN.—Taking out the interpolated passages there does not remain the foundation for the claim of a derivative title from Russia?

Sir CHARLES RUSSELL.—That is it.

Mr. Justice HARLAN.—So much of the case as rested on those documents that contain the interpolations, has been formally withdrawn by the United States?

Sir CHARLES RUSSELL.—Oh, that goes without saying, of course.

Mr. Justice HARLAN.—I understood you to say otherwise; that is the reason I interposed. Somebody said the Case had not been modified by reason of that. I simply respond to that.

Sir CHARLES RUSSELL.—My friend merely meant that from the physical Case the passages had not been excised.

Mr. PHELPS.—The Case is re-stated in the Counter Case.

Sir CHARLES RUSSELL.—Yes.

The Tribunal here adjourned until Tuesday, May 16, 1893, at 11.30 o'clock A. M.

TWENTY-THIRD DAY, MAY 16TH, 1893.

Sir CHARLES RUSSELL.—Mr. President and Gentlemen, I resume my argument upon the construction of the first question in Article VI; and, before doing so, I wish for one brief moment to refer to a matter which I am afraid, and I am sorry to find, has caused some irritation to my learned friends on the other side; I mean the reference to the falsification of certain documents which appear in the original case. I wish our position in that regard to be made quite clear to the Tribunal. We do not in the least suggest, and never have suggested, that those who represent the interests of the United States were in any way blameworthy in that matter; they were simply deceived; and we accept, as I think I said before, implicitly the statement of General Foster, that when Mr. Blaine was conducting his diplomatic correspondence he was not aware of the contents of these Russian documents. But we thought it necessary, and we still think it necessary, to call attention to that fact in order to show that, according to our view, the case—the substantial case—originally presented on the part of the United States was a case of territorial jurisdiction in Behring Sea, territorial dominion in Behring Sea; and that once these falsified documents are expunged the whole of that question depends upon the construction of the Ukase of 1821, the action following on that Ukase, and upon the construction of the Treaties of 1824 and 1825. We feel it necessary to call attention to those falsifications and to suggest—we may be right or we may be wrong, but it is the view that we submit on this matter—that it is the discovery of these falsifications by which the representatives of the United States were deceived which has led to their change of front;—namely, the change, on which I have already dwelt at such length, by which the question of derivative title under Russia, the question of territorial dominion exercised by Russia, has receded into the background to make room for the different case now presented.

I called attention at the last sitting to the case of territorial dominion which was originally presented on the part of the United States. I showed that that case was consistent with the attitude which the United States had pursued: that it was consistent with the course which the Executive had pursued: that in invoking the aid of their municipal statute as they did they were proceeding on the notion of territorial dominion, and the application within that territorial dominion of their municipal statute, and of that municipal statute alone; and that there was no trace to be found in the proceedings of a sugges-

864 tion of the exercise of an inherent protective right of property or of property interest. I am not going to enlarge upon the subject again, but I observe in passing that I did call attention, in connection with those proceedings in the Alaska Court, to two circumstances which make our position still more apparent.

The first circumstance I called attention to was this. It was said that although this Alaska Court is a municipal Court, yet it had also Prize Court or International Court functions. I will not stop to question that; but what I desire to point out is this, that once it exercises or purports to exercise international functions, then the law which it

has to administer is something entirely different from the law it has to administer as a municipal Court. Let me explain that point, and pass on. Let me assume for a moment that the Counsel for the United States, in those proceedings, had said to the judge: "We are claiming that you, this Court, shall exercise functions as an international tribunal, as a Prize Court, and that you shall proceed to pass judgment upon the question whether this seizure for the cause that we allege was justified by International Law."

What would have been the first thing that the Judge must have done when that contention was put before him? The first thing he must have done would be to say this: "Then if I am sitting in an international Court, and exercising the functions of a Prize Court, municipal law is not my guide."

I will take the ground my learned friends put when they say they are entitled to do anything, within certain reasonable limits, necessary for the protection of their property and of their interests. Immediately the Judge would be obliged to consider—would necessarily be face to face with the consideration—whether international law, under such circumstances, justified the seizure at all; and, in the next place, whether international law annexed to the offence, alleged to have been committed against international law, the particular sanction of search and seizure of the vessel which the Government had adopted, to say nothing of the further sanctions of imprisonment of the men and confiscation of the vessels which that Government demanded. But there is not a trace of the suggestion in the whole of the judgment or in the brief to which I have already referred, that the Judge was asked to consider the question in any other aspect than that of municipal law.

Now since I am upon this, and it is also relevant to the character of the right—the exclusive jurisdiction and the exclusive rights referred to in question 1—I have followed up to the end these proceedings in the "Sayward" Case, and I have before me here—Mr. Justice Harlan will recognize it—the shorthand report of the argument of the Solicitor General of the United States, who appeared before the Supreme Court at Washington in answer to an application for a prohibition; and I beg the Tribunal to recollect that this brings us down to a period as late as 1892, last year, at the time when the Treaty was being discussed; and I will read to the Court the ground upon which that learned gentleman in a very able argument puts the case of the United States. I will hand this copy of the proceedings in the case, if

865 it is not already in the possession of the Tribunal, to any member who wishes it. I read from page 54; this is the Argument. "What we say from that"—(that is, after he has stated the municipal legislation and the derivative title under Russia)—"is that all the territorial jurisdiction of the United States acquired from Russia is included within the jurisdiction of the Alaska Court, and is equally within the limitation of section 1956, and that if rights were acquired in Behring Sea by the cession from Russia—and no rights were otherwise acquired—that section 1956 extends over all the territory or dominion which was acquired by that treaty of cession. We do not deny that the jurisdiction of the District Court of Alaska and that the venue of the offence were originally questions to be decided by that Court, and to be decided by this Court in a proper case when properly here raised. What we assert is that the jurisdiction of that Court, and the venue of the offence, by a single step is made inevitably to depend upon the national jurisdiction in the waters of Behring Sea: that that is a polit-

ical question, and that the decision of the Executive and of the Congress of the United States on that political question is conclusive, not only upon this Court but upon every citizen within the jurisdiction of the country, because in determining that political question the Executive is discharging his constitutional functions, and he, in the discharge of that duty, is not an inferior tribunal whose decision may be reversed by this Court."

The Court will see that it could not have been present to the mind of this learned gentleman that there was any ground put forward suggesting a defensibility of the judgment, except the ground of national territorial jurisdiction, on which he affirms are based the only rights put forward by the United States, and which he says were the only rights that were acquired from Russia by the United States. The Attorney-General follows, but follows briefly upon the same lines; and I turn to the judgment, and (Mr. Justice Harlan will correct me if I am wrong about this) I take the effect of the judgment ultimately to be this; that the Court thought that it was not a case in which a Prohibition lay; that they came to the conclusion that the Record had been so imperfectly made up that even if jurisdiction did not extend beyond 3 miles, yet *non constat*, as far as the Record as made up appeared, the offence may not have been committed within 3 miles.

Mr. Justice HARLAN.—I really do not recall enough of it to say whether you are correct or not. Have you the opinion of the Court?

Sir CHARLES RUSSELL.—Yes; I have it before me.

I do not know if the other Members of the Court appreciate what I am upon. Jurisdiction in prohibition is a peculiar thing. It is difficult to put prohibition in force after the judgment has passed. The point resolves itself into a question whether the Court had any jurisdiction; and, if it had any jurisdiction, then the remedy if the Court has gone wrong is not prohibition, but appeal. If it had jurisdiction, you cannot prohibit; and the Court came to the conclusion, from the Record
866 put before them, imperfectly and very badly made up it would appear, that it did not appear that the seizure might not have been within the 3-mile limit, and, therefore, properly within the jurisdiction, as internationally recognized, of the municipal Courts.

But that is not the point I am upon, which is the recognition by the Court of the argument of the Solicitor-General on the broad grounds on which the United States assumed to justify their action. The judgment is on page 16 of the Official Report—

Mr. Justice HARLAN.—That is the opinion of the Chief Justice?

Sir CHARLES RUSSELL.—Yes.

If we assume that the record shows the locality of the alleged offence and seizure as stated, it also shows that officers of the United States, acting under the orders of their Government, seized this vessel engaged in catching seal and took her into the nearest port, and that the law officers of the government libelled her and proceeded against her for the violation of the laws of the United States, in the District Court, resulting in her condemnation?

How did it happen that the officers received such orders? It must be admitted that they were given in the assertion on the part of this government of territorial jurisdiction over Behring Sea to an extent exceeding fifty-nine miles from the shores of Alaska; that this territorial jurisdiction, in the enforcement of the laws protecting seal fisheries, was asserted by actual seizures during the seasons of 1886, 1887, and 1889, of a number of British vessels; that the government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the government in them, but also upon the position that this jurisdiction was asserted by Russia for more than 90 years, and by that government transferred to the United States; and that negotiations are pending upon the subject.

Therefore, the Chief Justice appreciates it in the same sense; he could not do otherwise.

That the government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the government in them, but also upon the position that this jurisdiction was asserted by Russia for more than ninety years.

The PRESIDENT.—What does he mean by “extending 59 miles”, that is where the seizure was, I suppose?

Sir CHARLES RUSSELL.—Yes As regards the technical ground of the Judgment he says on page 28:

Upon the face of the libel and findings, if the jurisdiction did not extend beyond three miles from the shore, the legal inference is that the offence and seizure were within that limit.

That is the technical ground, but not the broader ground which I am at present upon.

Now if it were, as it is apparent it must be, the true meaning that the jurisdiction exercised by Russia was territorial dominion, then I have to show that the United States admit now at this stage of the controversy that the question must be answered in the sense for which

Great Britain contends. Now I proceed to justify that state-

867 ment, and for that purpose I refer to the Case of the United States. Now in order to bring this out, in order to contrast the different aspects of their contention, it is enough to say that in the original Case their propositions were these. I am reading now from the “Conclusions” at page 297:

That prior to the Treaty of 1825 between Great Britain and Russia, and from a date as early as 1799, down to the cession to the United States in 1867, Russia prohibited the killing of seals in any of the waters of Behring Sea, and exercised such control therein as was necessary to enforce such prohibition.

Fifth. That Behring Sea was not included in the phrase Pacific Ocean, as used in the Treaty of 1825, and that said Treaty recognized the rightfulness of the control exercised by Russia in Behring Sea for the protection of seals.

Sixth. That all the rights of Russia as to the protection of the Alaskan seal herd passed unimpaired to the United States by the Treaty of 1867—

and so on.

Then the final conclusions, at the bottom of page 301, are these:

In conclusion the United States invoke the judgment of this High Tribunal to the effect:

First. That prior and up to the time of the cession of Alaska to the United States, Russia asserted and exercised an exclusive right to the seal fisheries in the waters of Behring Sea, and also asserted and exercised throughout that sea the right to prevent, by the employment, when necessary, of reasonable force any invasion of such exclusive right.

That Great Britain, not having at any time resisted or objected to such assertions of exclusive right, or to such exercise of power, is to be deemed as having recognized and assented to the same.

Then in another form is repeated the Behring Sea and Pacific Ocean question; and then finally it is stated that the rights of Russia passed to the United States.

Now their present position is stated briefly on page 19 of their Counter-Case. The marginal note to that column is this: “No exclusive territorial jurisdiction claimed;” and the statement in the body is in these words:

The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation, on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or at sea, is so broad

as to require no further exposition. It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

Therefore, it follows from this statement that it is not a question of exclusive jurisdiction in the sea, because exclusive jurisdiction in the sea means, as I pointed out on a previous occasion, a jurisdiction exclusive of all other Powers—a right to say to all other Powers and persons “You shall not enter here if it is our will that you shall not enter here”. That is sovereign jurisdiction; it involves treating the area to which that assertion relates as if it were territory, because, as I pointed out on a previous occasion, such a right as the one which is now asserted, to defend a special property interest, is not a right exercisable in a defined area: it is a right which, if it exists—(whether it exists and what its true character is I will discuss hereafter)—would exist and be exercisable wherever the property to be defended existed and at the time was. It, therefore, would have no local area of circumscription at all.

But, further, let me draw the attention of the Arbitrators to the form of question 4:

Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

The Tribunal will notice those words “pass unimpaired”. That is clearly referring to a right of jurisdiction, a right of territorial jurisdiction; because how could it be suggested that if it is a right of protection of property, incident to property, there could be any question of that being impaired?

Such a right would come into existence when the right itself came into existence, and would exist as long as the right itself existed. There could be no question of a derivative title to protection in the property if it existed at all; or of its passing unimpaired. Therefore, that question again throws light on what the meaning of the first of these three questions is, namely, an assertion of territorial sovereignty by the United States. That it was exclusive jurisdiction in a limited area, and not a general right which follows property wherever it is, is further shown by the *modus vivendi*. The *modus vivendi* stipulates that if the result of the Arbitration be to affirm the right of British sealers to take seals in Behring Sea, then the United States is to compensate Great Britain; if, on the other hand, the result of the Arbitration should be that Great Britain has no right to take seals in Behring Sea, then that Great Britain is to compensate the United States for this loss; again showing jurisdiction in a limited area—jurisdiction in the eastern part of Behring Sea. Now it is important for us to follow this out, (although it is, in the view of my learned friends, no more than a subordinate question), because it shows that which I must again and again refer to and recur to—that the claim of the United States is essentially a territorial claim, and because it shows also that the whole area of dispute between these parties, (which is the limitation, as we contend, of the authority of this Tribunal), is limited to the area of Behring Sea.

There is one other general observation which I have to present, and then I pass on. It will be observed that the third question deals specifically with the point raised by Mr. Blaine in his celebrated letter of December 17, 1890, which he said, if decided in one way, was conclusive of the question: namely, whether Behring Sea was included in the phrase “Pacific Ocean”. I observe on that in passing, that if that

question is answered in the sense for which we contend, namely, that Behring Sea was included in the phrase "Pacific Ocean" in the treaties, then all the first four questions are answered in the sense favorable to Great Britain; because if, by the operation of the Treaties, Russia did in fact recognize, without qualification, rights of fishing in Behring Sea, then it cannot be said that she asserted and exercised exclusive rights, when by the Treaties she had disclaimed them. I hope the Tribunal follows this point. If the effect of the Treaties is to recognize the right of Great Britain and its nationals, as well indeed as of other Powers of the world, to navigate and fish without limitation in Behring Sea, then of course Russia cannot be said to have asserted and exercised a right which is inconsistent with that recognition.

Now with those observations I pass to the consideration of the matter a little more closely. In considering these questions I do not forget the observation "cutely" made, if I may respectfully say so, by Senator Morgan, a good many days ago, namely that it is not a question what rights Russia had in fact, but that it is what rights Russia asserted and exercised. That is quite true; but, of course, in considering what rights Russia did, in fact, assert and exercise, it is not unimportant to consider, in a very general way, what would have been the effect and the character of the assertion of any such right, and what was the extent of the locality, the extent of the area, in which those rights of an exclusive kind were said to have been exercised. Now upon this part of the case I can be very brief. I will not trouble the Tribunal to refer to the documents for the moment. It will not be found to be necessary even to supplement in any way the admirable, graphic, picturesque, introductory historical sketch which my friend, Mr. Carter, gave the Tribunal in his argument—a very interesting part indeed of his argument.

There were some statements in the course of that narration with which we do not agree, but there is nothing essential to the question between us. The Behring Sea is the north-^{Description of Behring Sea.}ern part of the Pacific Ocean; it washes the north-west portion of the coast of America and changes its name at the sea of Okhotsk. In the extreme west it washes the north-eastern part of Asia.

It is the sea that connects the broad Pacific Ocean with the Arctic Ocean by the Behring Straits, some 48 miles in width. From east to west that sea—it is before your eyes upon the map—has an extreme width of 1,260 miles. From north to south it extends over 14 degrees of latitude, exceeding 800 miles; and the area of that sea is stated in the United States Case (and I have no doubt quite correctly) to amount to nearly 900,000 square miles. That is the character of the sea. Prior to 1799 it is perfectly true to say that it was one of the vast and partially unexplored seas of the world. It had begun to be navigated by all nations, but not to a very large extent. There had been Russian, American, English and French travellers over various parts of the bordering country. The general description of these expeditions is to be found in the historical outline which is presented in the British Case from pages 14 to 21.

I do not stop to read them, because it is not important, but by the beginning of the 19th century undoubtedly, the regions in this neighbourhood, and the regions of land beyond—in the almost practically unknown Arctic ocean,—had excited the interest and the desire for exploration in the adventurous among men: *omne ignotum pro magnifico*. Eyes were turned on these undiscovered regions. The country both south and east of Behring Sea being very sparsely popu-

lated, and almost entirely by the aboriginal population, it had not assumed any great commercial value as a pathway of commerce. There had been no important settlements on the American coast, and the questions of what right Russia had acquired by discovery, or by possession, were of a largely indeterminate character. That, broadly stated, was the position of things when the Ukase of 1799 was promulgated by Russia.

THE UKASE OF 1799.

Upon this Ukase I must say a word, although again it is not necessary to trouble the Tribunal by referring to any particular document in relation to it. Legislation by Ukase I take to be the mode which the Constitution, or the system of Government I had perhaps better say, of Russia, employs for conveying its sovereign will. That Ukase of 1799 has, I think been a little misstated by my friends on the other side. Its history is given in the British Case; the Ukase itself is on page 25. I may dispose of it as far as I am concerned by very general observations. In truth this Ukase was aimed at consolidating the rival Russian interests concerned in the trade in the Russian possessions upon the American coast. It was not directed against foreigners—indeed there were very few foreigners against whom it could be directed at that time. It shows that it was aimed at consolidating local Russian interests in one powerful monopoly; which one powerful monopoly should, by its strength and its own inherent force be able to resist possible competition, signs of which were beginning to grow up. In that sense undoubtedly it was aimed at foreigners, but in that sense only.

Now it begins by a statement of the claim of Russia by right of discovery; and then it goes on, in clause 1, to say:

We most graciously permit the company to have the use of all hunting grounds and establishments now existing on the north-eastern—

that ought to be *north western*—

coast of America from the above-mentioned 55th degree to Behring Strait and on the same also on the Alentian, Kurile, and other islands situated in the north-eastern ocean.

Clause 2 relates to making new discoveries, which I need not read.

The remaining important clauses are as follows:

3. To use and profit by everything which has been or shall be discovered in those localities, on the surface and in the bosom of the earth, without any competition by others.

5. To extend their navigation to all adjoining nations and hold business intercourse with all surrounding powers under our highest protection to enable them to prosecute their enterprises with greater force and advantage.

871 6. To employ for navigation, hunting, and all other business, free and unsuspected people—

and so on.

8. For shooting animals, for marine signals, and on all unexpected emergencies on the mainland of America and on the islands, the Company is permitted to buy for cash at cost price, from the Government artillery magazine at Irkutsk, yearly so many pounds of powder—

and so on.

10. The exclusive right most graciously granted to the company for a period of 20 years, to use and enjoy, in the above described extent of county and islands, all profits and advantages derived from hunting, trade, industries, and discovery of new lands prohibiting the enjoyment of those profits and advantages not only to those who would wish to sail to those countries on their own account, but to all former hunters and trappers.

Now this is the chief passage which I desire to read in order to show what the purport of the article was; it is in the middle of article 10.

And other companies which may have been formed will not be allowed to continue their business unless they unite with the present company with their free consent; but such private companies or traders as have their vessels in those regions can either sell their property, or, with the company's consent remain, until they have obtained a cargo—

and so on. Then further on it says:

And after that nobody will have any privileges but this one Company, which will be protected in the enjoyment of all the advantages mentioned.

That therefore was the creation of a Russian Monopoly Company, which should have all rights of trade in the territories which Russia either possessed or was claiming to possess by its right of discovery. It applied to all other Russian subjects—excluded all other Russian subjects; but there is not a word about foreigners in it from beginning to end. But that is not the most important part. The Tribunal will observe that there is not one syllable about the sea in it, and not one word about exclusive rights of fishing in Behring Sea.

Mr. Justice HARLAN.—Sir Charles, will you let me remind you here that in the British Counter-Case it is said that the translation you have just read is incorrect, and you gave another translation of it which you say is the correct literal one. I want to ask you, is there any material difference.

Sir CHARLES RUSSELL.—None, sir, I believe.

Lord HANNEN.—Only in one phrase I think, in which the word “dominion” is used.

Mr. Justice HARLAN.—The differences are indicated in the Counter-Case by italics. I do not know whether there is any proof in the documents as to which is the correct translation.

Sir RICHARD WEBSTER.—It arose in this way. This translation 872 was simply taken from Bancroft's History of Alaska. The original Ukase had never been translated till after the British Case was deposited, and then it was translated for greater accuracy, and that more correct translation was printed. As the Attorney General said, there are no substantial differences which require any notice.

Sir CHARLES RUSSELL.—I think it will be found that is so. As I have already observed, it is domestic in its character, and indeed affirms a strong domestic monopoly which could successfully contend with other rivals, and in that sense undoubtedly with foreign rivals, if they appeared; and it relates solely to land. It has no reference to the question of sea rights, or of interference with sea rights. It is entirely domestic in its character, and there is no suggestion of a notification to any foreign Power.

It will be seen, at the bottom of page 28 of the Case, that the view I am suggesting is the view which prevailed in 1824 in the United States. Referring to the Ukase of 1799, Mr. Middleton, writing to Mr. John Quincy Adams, says:

The confusion prevailing in Europe in 1799 permitted Russia (who alone seems to have kept her attention fixed upon this interest during that period) to take a decided step towards the monopoly of this trade, by the Ukase of that date, which trespassed upon the acknowledged rights of Spain.

That is as regards territory, you will recollect.

But at that moment the Emperor Paul had declared war against that country as being an ally of France. This Ukase, which is, in its *form*, an act purely domestic, was never notified to any foreign State with injunction to respect its provisions,

Accordingly, it appears to have been passed over unobserved by foreign powers, and it remained without execution in so far as it militated against their rights.

That was the United States view of it.

THE UKASE OF 1821.

Now, I pass to the much more important document, the Ukase of 1821, and the Tribunal will observe that, at this period, the question of seal-fishing, either on Islands or in the open sea, had not assumed any importance. No doubt, the natives along the coast had been catching all they could for their clothing and for their sustenance, and no doubt barter had begun to spring up as early as that period, though it would be mainly south of the Aleutian Chain, but we have no record of any existing, to any extent, north of the Aleutians. Now comes this important document, the Ukase of 1821, which is set out in volume I of the Appendix to the United States Case, at page 16:

Edict of his Imperial Majesty, Autocrat of all the Russias.

The Directing Senate maketh known unto all men. Whereas in an Edict of his Imperial Majesty, issued to the Directing Senate on the 4th day of September, and signed by his Imperial Majesty's own hand, it is thus expressed:

873 Observing from reports submitted to us that the trade of our subjects on the Aleutian Islands and on the northwest coast of America appertaining into Russia, is subjected, because of secret and illicit traffic, to oppression and impediments; and finding that the principal cause of these difficulties is the want of rules establishing the boundaries for navigation along these coasts, and the order of naval communication as well in these places as on the whole of the eastern coast of Siberia and the Kurile Islands, we have deemed it necessary—

and so forth.

Now, before I proceed to read the operative parts of this document, may I invite the attention of the Tribunal seriously to my learned friend Mr. Carter's contention in relation to this Ukase, and the effect of that Ukase upon the Treaties of 1824 and 1825; because it will save me a good deal of repetition and argument if the Tribunal will bear in mind that the whole of the discussion in which I am now embarking will be addressed not merely to showing that the right of fishing was recognized in the Behring Sea, but also to showing that the phrase "northwest coast of America" had not the limited meaning in the Treaties and in the correspondence which my learned friend, Mr. Carter, assigned to it, but extended to the whole of the coast-line of the possessions claimed by Russia from Behring Strait down to its most southern boundary.

In order that the Tribunal may have this point more clearly before it, let me remind the Tribunal what my friend Mr. Carter's argument was. The argument was that north of the Aleutian Chain in Behring Sea, and north of Behring Sea, the rights of Russia never were questioned at all—that the debatable ground was not reached until you came south of the Aleutians.

MR. CARTER.—South and east.

SIR CHARLES RUSSELL.—Oh yes, of course.

MR. CARTER.—Not much south.

SIR CHARLES RUSSELL.—South and east of the Aleutians; but that south and east of the Aleutians Russian pretensions were met by certain more or less undefined claims on the part of Great Britain, and by certain more or less undefined claims to territory on the part of the United States: that all the dispute related to portions of sea and territory south of the Aleutian chain; and that the north west-coast—and this is the main point—in the sense in which it was used in the Ukase,

in the sense in which it was used in the Treaties, referred only and strictly to the *lisière*, as ultimately defined in the Treaty of 1825. Now having stated that correctly as my learned friend's contention, I do not stop to point out, though I may have to do it later, that my learned friend has given one of four different interpretations which have been advanced by the United States as to the meaning of that phrase "northwest coast". It will be convenient for me here to mention what those four interpretations were. I will not stop to justify this assertion now; but I think it will be apparent when I come to read the correspondence.

Mr. CARTER.—I referred to the limitation of the words "northwest coast" as used in the Ukase.

874 Sir CHARLES RUSSELL.—Very well; I am obliged to my learned friend for correcting me; as used in the Ukase, it was much more.

Mr. CARTER.—I did not say that.

Sir CHARLES RUSSELL.—If it was not confined to the *lisière*, it extended beyond it, and, therefore, meant more than the *lisière*.

Mr. CAARER.—I only spoke of what my argument was.

Sir CHARLES RUSSELL.—I now point out what these four constructions were. In the despatch to Sir Julian Pauncefote of the 30th of June, 1890, Mr. Blaine examined the Treaties of 1824 and 1825, and says it is plain that they both limited the "northwest coast" to the coast between the 50th and 60th degrees of North latitude.

[Sir Richard Webster then pointed it out on the map.]

On the 17th of December, 1890, he again writes, and discusses the meaning of "Pacific Ocean" and "the Northwest coast"; and he observes in that letter that the dispute as to the meaning of "Pacific Ocean" prominently involves the meaning of "the Northwest coast"; and, in that letter he contends that "the Northwest coast" means the coast from the 42nd to the 60th degrees of North latitude.

[Sir Richard Webster then pointed it out on the map.]

I observe, in passing, that neither of those contentions has been thought worth inserting in the United States Case or Counter-Case.

A third construction suggested is that it is identical with the *lisière*.

The fourth construction is put forward in the United States Case at page 26, where they say that the term "Northwest coast" is intended to designate the coast between Prince William's Sound and the mouth of the Columbia River.

[Sir Richard Webster then pointed it out on the map.]

Those four meanings have been given by the United States to that phrase "Northwest coast".

Now, I will ask the attention of the Tribunal to what it really means.

I agree fully with Mr. Blaine that the two phrases "Northwest coast" and "Pacific Ocean" have a very important bearing indeed on the question whether Behring Sea was not included in the phrase "Pacific Ocean". First of all, of course, it is important to see, inasmuch as the Treaties of 1824 and 1825 were the result of the protests, up to a certain point joint, and after that separate, of the United States and of Great Britain it is important, of course, to see what was the assertion, on the part of Russia, of jurisdiction against which these protests were jointly and severally made. I turn to the Ukase.

It is set out on page 16 of volume I of the Appendix to the United States Case.

Rules established for the limits of navigation and order of communication along the coast of Eastern Siberia, the Northwest Coast of America, and the Aleutian, Kurile and other islands.

If the Tribunal will follow this on the map, it will be seen 875 that that describes a circle. It is made still clearer in section I. "The pursuits of commerce, whaling and fishery",—you will observe that, though my friends say that this Ukase was for the protection of fur-seals, there is no reference in it to fur-seals at all; but there is a reference to other forms of fishing.

The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports and gulfs including the whole of the northwest coast of America, beginning from Behring's Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, namely, to the 45°50 northern latitude, is exclusively granted to Russian subjects.

Again, the Tribunal will see that the whole line of that coast is indicated by the general description of Russian assertion of dominion. On the western side of the Behring Sea, and on the coast of Siberia, from Behring Straits along the coast down to 45°50 of latitude; on the American side from Behring Straits to 51° of northern latitude, described as the "northwest coast of America". Now that is unmistakable.

It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation along with the whole cargo.

Now, let me point out, Mr. President, when my learned friends say the Treaties of 1824 and of 1825 left Behring Sea untouched, and that Behring Sea was not included in the phrase "Pacific Ocean," that if it was untouched, so far as Behring Sea is concerned, it must have been a closed sea, a *mare clausum*: because there is no opening into Behring Sea from the south or from the north that exceeds 200 miles. You will find, on page 47 of our Counter-Case, the exact width of all the passes is given, and the greatest pass is that between Attu Island and Copper Island, which is 190 miles only. If the jurisdiction is extended 100 miles from each of the Islands, the two zones, of course, meet, and the sea becomes a *mare clausum*.

I do not think there is a great deal to be said in calling attention to the details of the Rules issued with this Ukase, but there are two or three to which I must refer. Section 3 requires to be noticed.

Mr. Justice HARLAN.—The Cases of both Governments agree in the translation of section 1 which you have read; but I observe that in a letter of Mr. Blaine to Sir Julian Pauncefote, at page 226 of the United States Appendix, volume I, he gives sections 1 and 2 of the Ukase of 1821; and it differs from the one you have read. I do not know where he got his translation. There seems to be no reference to it anywhere.

Sir CHARLES RUSSELL.—Does it materially differ?

Mr. Justice HARLAN.—Well, there is some change of phraseology. Instead of the words "including the whole of the northwest coast of America", it reads "and in general, all along the north-western coast of America". The translation you have read contains the words 876 "from the Aleutian Islands to the eastern coast of Siberia", while Mr. Blaine's translation reads, "on the Aleutian Islands and along the eastern coast of Siberia."

Sir CHARLES RUSSELL.—I do not know where he got it from. It does not seem very important.

Mr. Justice HARLAN.—No; I do not know that it is.

Sir CHARLES RUSSELL.—It would seem to put it rather stronger: "And, in general, all along the north-western coast of America from Behring Strait." It is stronger, but not material; but I take the trans-

lation that the United States have put forward themselves. I am reminded by my learned friend that we have put forward one which agrees with it.

Mr. Justice HARLAN.—Exactly. Both Governments have presented the same translation in the present case.

Sir CHARLES RUSSELL.—So I understand.

I was calling attention to section 3, which shows there is no doubt about what was meant in section 1; namely, the power of excluding every body from the area in sections 1 and 2, because in section 3 an exception is made.

In favour of vessels carried thither by heavy gales or real want of provisions, and unable to make any other shore but such as belongs to Russia. In these cases they are obliged to produce convincing proofs of actual reason for such an exception. Ships of friendly governments merely on discoveries are likewise exempt from the foregoing rule.

Then section 14, on page 18:

It is likewise interdicted to foreign ships to carry on any traffic or barter with the natives of the islands, and of the northwest coast of America, in the whole extent hereabove mentioned. A ship convicted of this trade shall be confiscated.

Then, section 25 I do not know that that is very important to trouble you with; but it is:

In case a ship of the Russian Imperial Navy, or one belonging to the Russian American Company, meet a foreign vessel on the above-stated coasts, in harbours, or roads, within the before-mentioned limits, and the Commander find grounds by the present regulation that the ship be liable to seizure, he is to act as follows—

And then there are indications as to how he is to act. Then I pass over several pages, and in section 60 more or less elaborate provisions are made for dealing with the proceeds of confiscated property, vessels and cargo, as to which four-fifths are to go, after certain deductions, to the American Company. The President will recollect that the American Company was not an American Company with American citizens in it; it was so called from its trading partly in America; and so far from being an American Company, the papers state, and I think it is correct, that a number of distinguished persons in Russian political life, including members of the Royal Family, were interested in that Company.

There can be no question, Mr. President, between us as to what
877 that Ukase means. It means an assertion of exclusive territorial dominion in the territory mentioned to the extent mentioned and in the seas mentioned, so as to prohibit navigation within 100 miles from the coast. That is a very different thing from the charter of 1799, which was not communicated to any foreign Power. This Ukase was—

Mr. Justice HARLAN.—You say “to the extent mentioned.” Do you mean over the whole of Behring Sea, or for 100 miles?

Sir CHARLES RUSSELL.—So far as territorial jurisdiction is concerned, 100 miles from the land and the islands, of course. But as I have pointed out this would have closed the entrance to Behring Sea. The Charter of 1821 you will find on page 24. It is not necessary that I should trouble you with it beyond reading sections 1 and 2. The Ukase was an act of imperial legislation. The Charter is the act by which, upon the basis and under the protection of that imperial legislation, the rights are given to the chartered Company.

The Company established for carrying on industries and trade on the mainland of north-west America, on the Aleutian, and on the Kurile Islands, remains as heretofore under the highest protection of His Imperial Majesty.

It enjoys the privilege of hunting and fishing to the exclusion of all other Russian and foreign subjects throughout the territories long since in the possession of Russian, on the coasts of north-west America, beginning at the northern point of the island of Vancouver in latitude 51° north, and extending to Behring Strait and beyond, as well as on all islands adjoining this coast and all those situated between this coast and the eastern shore of Siberia, as well as on the Kurile Islands, where the Company has engaged in hunting down to the south cape of the Island Urupa, in latitude 45° 50'.

SIR RICHARD WEBSTER.—The translations there do not quite agree, but it is sufficiently accurate in the United States Case.

SIR CHARLES RUSSELL.—Now, still endeavouring not to distract the attention of the Tribunal by references to too many books, I would ask you to turn to page 132 in this same volume. How far have we got in the argument? We have got clearly to the point of a distinct assertion of territorial dominion of a very extended kind by Russia, and of territorial jurisdiction of an exclusive character, extending 100 miles from land and from the islands; which is of course a claim to exclude all persons from that extended area.

The PRESIDENT.—You seem to construe the last clause of the Ukase of 1821 as implying an extension by Russia of the territorial limit.

SIR CHARLES RUSSELL.—Yes and so it was.

The PRESIDENT.—Not of particular jurisdiction, but as an extension of general territorial right of Russia.

SIR CHARLES RUSSELL.—Certainly there is a distinct prohibition of any vessel going inside that line, with the penalty of being confiscated if it does go within: with the only exception in favour of a vessel blown within by accident or stress of weather. It is a claim to exclude all persons from coming within that limit. It is an extension to 100 miles of the now universally accepted 3 miles limit.

Lord HANNEN.—I understood you to say you thought the effect of it would be to prevent any vessel going into Behring Sea at all because they would infringe the 100 miles.

SIR CHARLES RUSSELL.—Yes I did. There is the permission given, which does not detract from the assertion of territorial dominion, to a ship on a voyage of discovery.

The PRESIDENT.—Yes and with passports.

SIR CHARLES RUSSELL.—And a further exception if a ship is blown in by stress of weather. Now that is a serious and grave assertion of rights of sovereignty of Russia; and if after having been notified to foreign Powers, including Great Britain and the United States, they had acquiesced in it, and had made no objection to it, then possibly a case of estoppel or acquiescence by them might have been made out.

Senator MORGAN.—Then, if I understand you, there seems to be no controversy between the parties here as to the fact that Russia asserted exclusive jurisdiction in Behring Sea.

SIR CHARLES RUSSELL.—Undoubtedly, and then withdrew it.

Senator MORGAN.—There is a question then as to the withdrawal?

SIR CHARLES RUSSELL.—Certainly: our position is that they asserted it on paper, never exercised it, and then withdrew it. Mr. Senator Morgan asked me whether he was to take it that both United States and Great Britain agreed that Russia asserted this territorial dominion in Behring Sea. I said, yes; I understood the other side also agreed in that.

Mr. CARTER.—No.

SIR CHARLES RUSSELL.—I thought it was so.

Mr. CARTER.—What may be the effect of the Ukase is one thing, but what Russia intended by it is another. She did not intend in our view to assert exclusive jurisdiction; that is disavowed.

Sir CHARLES RUSSELL.—At all events, I may repeat the remark which I just made—that Russia did assert territorial sovereignty, but that she asserted it only on paper; that she never exercised it; and, that, by the Treaty, she disclaimed it. That is the answer which I make to Senator Morgan. I may point out now that whereas we state the greatest distance between the islands at 190 miles, my friends put the distance at 205 miles.

Lord HANNEN.—Is that the difference between the Pribilof Islands and the Aleutian Chain?

Sir CHARLES RUSSELL.—No.

Lord HANNEN. I thought it was.

Sir CHARLES RUSSELL.—It is between “Attu Island,” and the “Commander Islands”. At the same time I may point out that that does not make any difference, because they say at the beginning of their Case, that unless otherwise stated all measurements are given in English statute miles. The English statute mile is 1,760 yards; but the Italian mile of the Ukase is the same as a geographical mile, which is about 2,000 yards; so that practically there is no importance in the difference of measurements.

879 Lord HANNEN.—At page 16 the United States Case speaks of the Pribilof Islands. It says:

It is of volcanic origin and far removed from other land, the nearest adjacent points being Unalaska Island, at a distance of two hundred and fourteen miles to the southward.

That is the distance of the Pribilof Island group.

Sir CHARLES RUSSELL.—That is quite right my Lord; that is another passage.

Lord HANNEN.—It would be a curious coincidence if that should be stated to be 214 miles in both of the cases.

Sir CHARLES RUSSELL.—The other is 205.

Lord HANNEN.—Yes, I beg your pardon.

Sir CHARLES RUSSELL.—The distance from Attu to the Commander Islands is stated to be 205 statute miles.

Lord HANNEN.—As a matter of fact, I took some steps to ascertain the exact distance and I believe it is 175 miles from Attu Island to the Commander Islands.

Sir RICHARD WEBSTER.—We put it at 195 miles, and they say it is 205. It is not a matter of any importance.

[Sir Richard Webster indicated the position on the map.]

Sir CHARLES RUSSELL.—I have said, here is a broad and bold assertion of sovereignty by Russia. If Great Britain and the United States had acquiesced in that assertion, then there might have been possible grounds for putting forward a claim grounded upon acquiescence, or, as lawyers would call it, upon estoppel against the acquiescing or consenting Powers. How did they act? First of all, how did the United States Government act? I have referred you to page 132 of the Protest of United States. correspondence, in Appendix to the United States Case, Volume I and on that page is to be found Mr. Quincy Adams's letter of the 25th of February, 1822, in which he says:

I am directed by the President of the United States to inform you that he has seen with surprise in this edict the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on this continent, and a regulation

interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply.

There is nothing more in that letter which I need read, except at the top of page 133, where you will find this sentence:

To exclude the vessels of our citizens from the shore beyond the ordinary distance to which the territorial jurisdiction extends has excited still greater surprise. This ordinance affects so deeply the rights of the United States.—

And so on. Now M. de Poletica does not shrink from the assertion of what his case is, and at page 133 of volume I of the Appendix to the Case of the United States is his letter in which he says boldly.

I shall be more succinct, Sir, in the exposition of the motives which determined the Imperial Government to prohibit foreign vessels from approaching the north west coast of America—

880 You will observe the use of this phrase:

belonging to Russia within the distance of at least 100 Italian miles. This measure, however severe it may at first appear, is after all but a measure of prevention. It is exclusively directed against the culpable enterprises of foreign adventurers who, not content with exercising, upon the coasts above mentioned, an illicit trade, very prejudicial to the rights reserved entirely to the Russian-American Company, take upon them besides to furnish arms and ammunition to the natives in the Russian possessions in America, exciting them likewise in every manner to resist and revolt against the authorities there established.

I pause for one moment. You will observe that he speaks there of "the exposition of the motives" which have prompted this. I want to point out that my learned friend, in treating of what was the effect of this legislation of Russia, has confounded motive with effect. It may well be that my friend is quite right in saying that the motive which the Russian Government had was to protect this trade and commerce, and these interests, on the coasts. That might have been its motive; but its legislation took the form of an assertion of territorial sovereignty to the extent which I have mentioned. Then M. de Poletica goes on to say:

The American Government doubtless recollects that the irregular conduct of these adventurers, the majority of whom was composed of American citizens, has been the object of the most pressing remonstrances on the part of Russia to the Federal Government from the time that diplomatic missions were organized between the two countries.

Then a little lower down he says:

Pacific means not having brought any alleviation to the just grievances of the Russian American Company against foreign navigators in the waters which environ their establishments on the north-west coast of America, the Imperial Government saw itself under the necessity of having recourse to the means of coercion, and of measuring the rigour according to the inveterate character of the evil to which it wished to put a stop.

He then proceeds:

I ought in the last place to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend on the North-west coast of America from Behring Sea to the 51st degree of north latitude, and on the opposite side of Asia, and the islands adjacent, from the same strait to the 45th degree.

The Tribunal will remember that in the Ukase of 1799 the claim was only made to the 55th degree.

Then M. de Poletica proceeds:

The extent of sea of which these possessions form the limits, comprehends all the conditions which are ordinarily attached to *shut seas* (mers fermées) and the Russian Government might consequently judge itself authorized to exercise upon this sea

the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities.

That is he says in effect:—This is a shut sea: We are entitled to treat it as a shut sea: We are entitled to treat the whole expanse of Behring Sea as a territory in the sense of excluding from that
881 every person whom we choose not to admit; but we limit our practical assertion to 100 Italian miles from the coast”.

Now how is this met?

Mr. Justice HARLAN.—Does he mean to apply the phrase “shut seas” only to Behring Sea?

Sir CHARLES RUSSELL.—I do not affirm that he does.

Mr. Justice HARLAN.—I thought you said Behring Sea just now. That was the reason I asked you.

Sir CHARLES RUSSELL.—I think he extends it even more widely than to Behring Sea. That makes my position, of course a stronger one. I think you are right, Sir.

How does Mr. Adams meet this? I turn to page 134, at the third paragraph, after stating the nature of the pretension he says:

This pretension is to be considered not only with reference to the question of territorial right, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. From the period of the existence of the United States as an independent nation, their vessels have freely navigated those seas, and the right to navigate them is a part of that independence.

With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles.

There, no doubt, Mr. Adams was speaking of a wider expanse of the ocean.

As little can the United States accede to the justice of the reason assigned for the prohibition above mentioned. The right of the citizens of the United States to hold commerce with the aboriginal natives of the northwest coast of America—

I beg attention to this adoption of this phrase “northwest coast”.

We have seen how the phrase was used by M. de Poletica. Mr. Adams is adopting it, and he says:

The right of the citizens of the United States to hold commerce with the aboriginal natives of the Northwest Coast of America without the territorial jurisdiction of other nations—

That means outside the territorial jurisdiction—

even in arms and munitions of war, is as clear and indisputable as that of navigating the seas, etc.

That right has never been exercised in a spirit unfriendly to Russia, etc.

On the next page, M. de Poletica replies:

In the same manner the great extent of the Pacific Ocean at the fifty-first degree of latitude can not invalidate the right which Russia may have of considering that part of the ocean as close. But as the Imperial Government has not thought fit to take advantage of that right, all further discussion on this subject would be idle.

Then I do not think I need trouble you with that. But after that comes a very important communication from Mr. Middleton, who
882 was the Minister of the United States at St. Petersburg, to Mr.

Adams, Secretary of State at Washington; and it will be seen that once this bold assertion on the part of Russia was met face to face, the operation—if I may use it in relation to a great Power of whom I

desire to speak with all possible respect—the operation known as “climbing down” began, as you will see, from this very letter. He says on page 136:

To Mr. Speransky, Governor General of Siberia, who had been one of the committee originating this measure, I stated my objections at length. He informed me that the first intention had been (as Mr. Poletica afterwards wrote you) to declare the northern portion of the Pacific Ocean as *mare clausum*—

I ask my friends, can there be any doubt what the “northern portion of the Pacific Ocean” there meant, can there be any doubt that it included Behring Sea?—

but that idea being abandoned, probably on account of its extravagance, they determined to adopt the more moderate measure of establishing limits to the maritime jurisdiction on their coasts, such as should secure to the Russian American Fur Company the monopoly of the very lucrative traffic they carry on. In order to do this they sought a precedent, and found the distance of 30 leagues, named in treaty of Utrecht, and which may be calculated at about 100 Italian miles, sufficient for all purposes.

I need not say that what was once done by Treaty is no justification for what has been done without Treaty.

I replied ironically that a still better precedent might have been pointed out to them in the papal bull, of 1493, which established as a line of demarcation between the Spaniards and Portuguese a meridian to be drawn at the distance of 100 miles west of the Azores, and that the expression “Italian miles” used in the ukase very naturally might lead to the conclusion that this was actually the precedent looked to. He took my remarks in good part, and I am disposed to think that this conversation led him to make reflections which did not tend to confirm his first impressions. For I found him afterwards at different times speaking confidentially upon the subject.

For some time past I began to perceive that the provisions of the ukase would not be persisted in. It appears to have been signed by the Emperor without sufficient examination, and may be fairly considered to have been surreptitiously obtained. There can be little doubt, therefore, that with a little patience and management it will be molded into a less objectionable shape. But in this, as in other matters, the *revocare gradum* is most difficult. Since the receipt of your dispatch No. 12, I have had several conferences with the secretaries of state, and we have discussed fully and freely the state of the question as left by Mr. Poletica with your letter unanswered in his pocket.

I informed him that I intended to ask a formal interview with Count Nesselrode before his departure, for the purpose of taking up this subject and urging some decision upon it, as I never had been able to ascertain officially whether the offensive provisions of the ukase would be revoked. I felt the more anxious, too, because I had learned that a Russian Frigate was shortly to sail for the N. W. Coast. I informed him further that I had prepared a *note verbale* to leave with Count Nesselrode, which I begged to be permitted to read to him (Count Capodistrias), as I was well assured of his anxious desire that all things should go on smoothly between us. (See paper No. 1.)

After hearing this paper with attention he said to me: “Puisque vous me faites l'honneur de me consulter, je vous dirai franchement mon avis. Si vous voulez que la chose s'arrange, ne donnez point votre note—L'Empereur a déjà eu le bon esprit de voir que cette affaire ne devrait pas être poussée plus loin. Nous sommes disposés à ne pas y donner de suite. Les ordres pour nos vaisseaux de guerre seront bornés à empêcher la contrebande dans les limites reconnues par les autres puissances, en prenant nos établissements actuels pour base de ces opérations. De cette manière, il n'y aura pas de complication pour entraver la négociation que pourra entamer M. le Baron de Tnyll dès son arrivée à Washington. Si vous dites que vous faites protestation, vous ferez du tort à la négociation; il ne faut pas non plus faire l'insinuation que nous ayons avancé une injuste prétention, même en nous complimentant sur notre politique passée; il ne faut pas nous sommer de révoquer des ordres donnés; nous ne révoquons pas; nous ne rétractons pas. Mais dans le fait il n'y a pas d'ordres donnés qui autorisent ce que vous craignez”.

Therefore, even at that stage, in 1822, the year after the Ukase was promulgated, and when the matter is being discussed between politicians, we find the Emperor's representatives saying that the jurisdiction will not be exercised.

Then the letter goes on:

At that conference I talked over the matter with the two secretaries of state, and brought fully to their view the substance of the instructions upon the ukase of 4th September last, insisting upon the necessity of this Government suspending the execution of those regulations, which violate the general right of navigating within the common jurisdiction of all nations, and declaring that the territorial pretension advanced by Russia must be considered as entirely inadmissible by the United States.—

Then follows the *note verbale*, which I need not trouble you with, because the effect of it has already been disclosed in that discussion.

We may now proceed further. On page 141 is an important despatch from Mr. Adams to Mr. Middleton of the 22nd of July, 1823?

WASHINGTON, July 22, 1823.

SIR: I have the honor of inclosing herewith copies of a note from Baron de Tuyl, the Russian minister, recently arrived, proposing, on the part of His Majesty the Emperor of Russia, that a power should be transmitted to you to enter upon a negotiation with the ministers of his Government concerning the differences which have arisen from the Imperial ukase of 4th (16th) September, 1821, relative to the north-west coast of America, and of the answer from this Department acceding to this proposal. A full power is accordingly inclosed, and you will consider this letter as communicating to you the President's instructions for the conduct of the negotiation.

From the tenor of the ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude, on the Asiatic coast, to the latitude of fifty-one north on the western coast of the American continent—

You see that is describing the circle I have mentioned—

and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

The United States can admit no part of these claims.

I pause simply to put one question. Can any document be referred to in which the United States ever receded from that position? There is the distinct statement of the Secretary of State to the Minister at St. Petersburg—

884 The United States can admit no part of these claims.

Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times, after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the continent of America.

The correspondence between Mr. Poletica and this Department contained no discussion of the principles or of the facts upon which he attempted the justification of the Imperial ukase. This was purposely avoided on our part, under the expectation that the Imperial Government could not fail, upon a review of the measure, to revoke it altogether. It did, however, excite much public animadversion in this country, as the ukase itself had already done in England. I inclose herewith the North American Review for October, 1822, No. 37, which contains an article (p. 370) written by a person fully master of the subject; and for the view of it taken in England I refer you to the fifty-second number of the Quarterly Review, the article upon Lieutenant Kotzebue's voyages. From the article in the North American Review it will be seen that the rights of discovery, of occupancy, and of uncontested possession, alleged by Mr. Poletica, are all without foundation in fact.

I have next to call your attention to page 142, on which will be found an able argument by Mr. Adams directed mainly to the question of the territorial limits claimed as regards the Southern boundary, etc.

Next follows a justification of the traffic that was carried on by United States citizens: a defence of that traffic as not being clandestine, etc.

Then, on page 143, the last paragraph but two, after referring to

the statement that the traffic was unlawful and irregular, Mr. Adams continues:

It is necessary now to say that this impression was erroneous; that the traffic of the citizens of the United States with the natives of the north west coast was neither *clandestine*, nor unlawful, nor irregular; that it had been enjoyed many years before the Russian American Company existed, and that it interfered with no lawful right or claim of Russia.

This trade has been shared also by the English, French, and Portuguese. In the prosecution of it the English settlement of Nootka Sound was made, which occasioned the differences between Great Britain and Spain.—

Of course it is quite right to say that that trade was mainly a trade to the south of the Aleutian Chain, and in that great bight south of the Aleutian Chain.

Then he proceeds, at the top of page 144, to justify the claim of the United States from the 42nd to the 49th parallel of latitude on the Pacific Ocean. I do not think it is important that I should trouble you with that. But enclosed in that letter was a suggestion for an agreement that would meet the difficulty:

ARTICLE I.

In order to strengthen the bonds of friendship and to preserve in future a perfect harmony and good understanding between the contracting parties it is agreed that their respective citizens and subjects shall not be disturbed or molested, either in navigating or in carrying on their fisheries in the Pacific Ocean or in the South Seas, or in landing on the coast of those seas, in places not already occupied, for the purpose of carrying on their commerce with the natives of the country; subject, nevertheless to the restrictions and provisions specified in the two following articles.

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ART. II.

To the end that the navigation and fishery of the citizens and subjects of the contracting parties, respectively, in the Pacific Ocean or in the South Seas, may not be made a pretext for illicit trade with their respective settlements, it is agreed that the citizens of the United States shall not land on any part of the coast actually occupied by Russian settlements, unless by permission of the governor or commander thereof, and that Russian subjects shall, in like manner, be interdicted from landing without permission at any settlement of the United States on the said northwest coast.

ART. III.

It is agreed that no settlement shall be made hereafter on the northwest coast of America by citizens of the United States or under their authority, north, nor by Russian subjects, or under the authority of Russia, south of the fifty-fifth degree of north latitude.

Is it not absurd—I am not putting it too strongly—to suggest even that the Behring Sea was excluded from that: that when we speak of the “Northwest Coast”, which has been again and again referred to, which is used in the original Ukase, which is used in the Charter, which is used in the correspondence without limitation, to say that that northwest coast, forsooth, is a bit of the coast south of the Aleutian Chain, and stops there? Of course one may take too sanguine a view of these matters, but I do submit that that narrower contention is absurd, and quite inconsistent with the tenor of these documents and this correspondence.

Mr. Justice HARLAN.—Sir Charles, what effect on that view would the words near the top of page 144 have, in the letter which enclosed the memorandum, which are: “The right of the United States from the forty-second to the forty-ninth parallel of latitude on the Pacific

Ocean we consider as unquestionable"? Was not that strip of land in the mind of Mr. Adams?

Sir CHARLES RUSSELL.—I do not myself see, Sir, that in this connection it would have any effect at all.

Sir RICHARD WEBSTER.—The area from latitude 42° to 49°, is that enclosed piece (indicating it on the map).

Mr. Justice HARLAN.—He was contending that the United States had the right unquestionably to go to 49°?

Sir CHARLES RUSSELL.—Yes.

Mr. Justice HARLAN.—When he submitted along with that letter this draft of a Treaty; the question I was directing the attention of counsel to was whether, when speaking of the Northwest Coast of America, he is not referring to the part which the United States claimed.

Sir CHARLES RUSSELL.—No Sir. Why should he be referring to that? He is stating, so far as that part is concerned, what is the territorial limit of the coast claimed by the United States. So far as the United States were concerned, as between them and Great Britain, the northern boundary of their possessions on that northwest coast had not been fixed. You, of course, Sir, are aware of that. It was a matter in dispute how far, in succession to the rights of Spain, the American title went along that northwest coast. That was a bit of the northwest coast, I admit. All that coast right up to the Behring Straits is a part of the northwest coast of the continent of America; but there is no limitation; and that meaning I think is made clear by the Article 2. It is in effect saying, "So far as there are Russian possessions, the Americans shall not land where there are establishments; and so far as there are American possessions on that northwest coast, Russians shall not land where there are American establishments." That is what the effect of it is, evidently.

Mr. Justice HARLAN.—Do you remember what the evidence says—I have forgotten—upon the question as to what country had possessions on the eastern shore of Behring Sea at that time and in what is now Alaska?

Sir CHARLES RUSSELL.—Undoubtedly, only some Russian settlements.

Lord HANNEN.—Only one Russian settlement, where there were three men and four women, or something of that kind.

Sir CHARLES RUSSELL.—Yes.

Mr. Justice HARLAN.—There were no settlements, then, practically, by any country on that shore.

Sir CHARLES RUSSELL.—No.

Senator MORGAN.—How many settlements on the Siberian coast were there at that time?

Sir CHARLES RUSSELL.—We have no evidence, of course, as to that. Siberia, as I pointed out the other day, stood in a different position to Russia from Alaska. Siberia was part of the realm of Russia. The persons who were there were Russians. There may have been an aboriginal population there, so far as I know. I do not know. So far as Alaska was concerned, it was treated as a colony of Russia.

The Tribunal here adjourned for a short while.

Sir CHARLES RUSSELL.—In reference to the question of Russian settlements north of the Aleutians, I would refer the Tribunal to page 42 of vol. I of the Appendix to the British Case. I do not think it is necessary to trouble the Tribunal now to do more than take a note of it. I simply make this observation. It will be there found that the only

Russian settlement north of the Aleutian chain was at a place called Nushagak. The population was not considerable. There were three Russian males and two Russian females. Nushagak is in Bristol Bay, which is an indentation in the coast-line north of the Aleutian peninsula. That is where the only settlement was.

THE UNITED STATES TREATY OF 1824.

I now proceed with the correspondence, which is rapidly drawing to a close. I pointed out the suggestion made by Mr. Quincy Adams 887 in that important despatch of the 22nd July 1823, and I may pass over the intervening correspondence and come to the question of the Treaty itself. The Treaty itself, Mr. President, will be found on page 35 of the same Volume with which I have been dealing. I do not stop to do more than to recall the broad assertion of sovereign jurisdiction made by Russia in the Ukase of 1821, and in the Charter of 1821, and now side by side with that we have the Treaty:

It is agreed that in any part of the great Ocean commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

I do no more than ask this question. Is it possible, in view of the assertions made by Russia, in view of the statements of Mr. Quincy Adams that no part of that claim can be admitted by the United States, in view of the fact that from that position the United States never departed, to contend that from this Treaty is to be excluded the whole of Behring Sea and the coasts of the territory abutting upon Behring Sea? We submit with all deference that that is an impossible and absurd contention.

ARTICLE II. With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the high contracting Powers from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort without permission, to any establishment of the United States upon the Northwest coast.

ARTICLE III. It is moreover agreed that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the northwest coast of America, nor in any of the islands adjacent, to the north of 54 degrees and 40 minutes of north latitude; and that in the same manner there shall be none formed by Russian subjects, or under the authority of Russia south of the same parallel.

Can it be suggested that that was restricted; and that when the phrase "Northwest coast" is mentioned there, it did not mean that no establishment along any part of that northwest coast should be made north of 54° 40': and, in the same way as regards American territory, none should be made by Russian subjects south of that point?

Then comes Article IV:

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas—

we are dealing here with territorial waters, entrance to which is limited to the ten years—

gulfs, harbours, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.

888 What is the ground for restricting that to a portion only of this north-west coast?

Article III has dealt with the formation of establishments, and has said that one Power shall not form a fresh establishment north of a particular point in Russian territory, and that the other Power shall not form a fresh establishment south of a particular point on the United States territory. And then Article IV, passing away from the subject of establishments, deals with the question of fishing and trading with the natives of the country, and provides that there shall be a reciprocal right: to the citizens of the United States along the whole coast which belongs to Russia, and reciprocally there shall be the right of the Russian people along the whole coast which belongs to the United States.

The PRESIDENT.—Is there evidence that the United States took advantage of this article to trade with the natives of the coast?

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—Inside Behring Sea?

Sir CHARLES RUSSELL.—No, apparently at that time there was no inducement to go inside Behring Sea.

Senator MORGAN.—I suppose the fur-seals were in there then, were they not?

Sir CHARLES RUSSELL.—Yes, fur-seals were in Behring Sea, I presume, from time immemorial. I do not know, but they probably were, so far as we know. Up to this time the fur-seals had not assumed any position of importance, either as regards Russian enterprise or the enterprise of any other people.

General FOSTER.—They had taken over 3,000,000 of skins.

Sir CHARLES RUSSELL.—I will deal with that in a moment. The observation is a little irregular, and I must ask you to restrain your impatience. Mr. Foster has made an interjection, Sir, which it is perhaps irregular to notice, in which he says that there were a large number of skins got. I do not know the evidence he refers to, but I have no difficulty in saying that, as regards the fur-seals on the Pribilof Islands, they had not assumed any importance as regards the supply of skins. The islands were discovered in 1786, I think, and in Japan and on the Commander Islands we know there was trading, but I do not recollect that there was any such extent of dealing with fur-seals on the Pribilof Islands. I will not refer to the interruption further, but if my learned friend will give me the reference, I will deal with it at a later stage. As a matter of fact, it stands thus. There were no settlements at the time of this Treaty north of the Aleutians, except the one I have mentioned at Nushagak. Obviously, therefore there would be very little interest—motive of interest is perhaps the best way of putting it—to go trading in the Behring Sea; but the point is not, with very great deference, whether the United States used the power—they did at a later period use it for whaling and to a considerable extent in Behring Sea after this; the question of the President was addressed only to dealings with natives.

889 The PRESIDENT.—Yes, under Article IV.

Sir CHARLES RUSSELL.—Yes: there was, in fact, as I have said, only one settlement, and there would be comparatively little interest or motive to attempt such trading at that time; but as regards the free navigation of Behring Sea for the purposes of whaling, which was then considered a profitable industry, the United States did undoubtedly pursue that industry in the Behring Sea.

The difficulty that my learned friends have to meet is this. Article III specifies the northwest coast of America to the north of $54^{\circ} 40'$, which is the southern limit of Russian possessions, and extends without any limitation whatever to the north; and when Article IV is framed it refers to the coast mentioned in the preceding Article without any limitation. Therefore in the later article (to the limit and extent of the northwest coast in the preceding article) it obviously extends to the whole of the north-west coast right up to the Behring Straits. I think that is all I have to say upon the subject of the Treaty: except to read, from page 30, Volume I of the Appendix to the British Counter-Case, a passage in a communication made by Count Nesselrode in a letter dated the 11th of April, 1824, only six days after the date of the Treaty. It is a considerable communication, and I may tell the Tribunal that this was written apparently with the object of allaying the apprehensions and toning down the objections of the Commercial Company, as to the view that they should take of the effect of this Treaty of 1824 upon their interests. The revised translation is in the right hand column.

In Article III—that is of this Treaty—the United States recognize the sovereign power of Russia over the western coast of America, from the Polar Seas to $54^{\circ} 40'$ of north latitude; while we on our part promise not to found Settlements below this parallel, as a matter of course only in those places, and without extending this provision to the Colony of Ross, far distant to the south.

Then at the bottom of the page:

In Article IV we allow the American States, though for no longer than ten years, to trade and fish in places within our dominions.

There it is stated without any qualification whatever; and this is written, as I say, six days after the Treaty; it extends without any qualification the whole way up; and the importance of Article IV is that it gives a temporary advantage to the United States—that is to say, it gives to United States subjects rights of access to interior seas, to gulfs, to harbours, and to creeks, all of which, or the greater part of which, would be in strictly territorial waters; and, therefore, to which, upon the general rule of international law, the United States would not have any right of access at all.

The PRESIDENT.—Was this diplomatically communicated to other Powers? Did it come from the United States Minister, or where is it taken from?

Sir CHARLES RUSSELL.—The explanation is given on page 28. It is a letter from Count Nesselrode to Nicholas Semenovitch, and I gather from the communication that this gentleman was interested in the American Commercial Company, and that it was written with a view of allaying the apprehension of, or justifying the Treaty to, that gentlemen: that is the object of it.

The PRESIDENT.—You are not aware how the British Government came into possession of that document.

Sir CHARLES RUSSELL.—Not at the moment.

The PRESIDENT.—It is not of much importance, but I should to know if it had any international value.

Sir RICHARD WEBSTER.—I think it is one of the documents which came to light when the annexation to the United States took place. This is the correct translation by the United States of that document.

The PRESIDENT.—The purport of my question was, whether the United States were officially apprised of the existence of this document and of this interpretation. That is the point of my question.

Sir CHARLES RUSSELL.—I am not able to say that they had it officially.

The PRESIDENT.—At all events they had the document in their hands.

Sir CHARLES RUSSELL.—Yes, they had the document in their hands.

Senator MORGAN.—Those documents came over to the United States, I take it, to be deposited among the archives with reference to the Alaskan regions.

Sir CHARLES RUSSELL.—I should judge the case to be this: that when the cession of 1867 was effected all the documents that related to the Alaskan territory were handed over as being necessary for the archives; and I should say that that was the probable explanation.

The PRESIDENT.—Yes.

Sir CHARLES RUSSELL.—Now let me make one other comment before I pass from this Treaty.

The Tribunal will observe that neither in the Ukase, nor in the Charter under the Ukase, is any special reference made to any particular kind of fishing beyond the statement as to *whaling*, which word is used in Section I of the Ukase: "pursuits of commerce, whaling and fishery and of all other industry in all islands", and so forth. There is no indication therefore of any special kind of fishing.

There is nothing for instance about sea-otters or fur-seals, nor any other kind of animal or any special kind of fish. The only one is whaling, which I presume was a matter of more or less importance. And therefore, when in Article I of the Treaty it is said in express terms that the subjects of neither Contracting Party shall be disturbed or restrained in navigation or in fishing or in resorting to the coast, and so on, I need not say that that is a recognition of the mutual rights as to fishing, without any limitation of any kind or character either as to the mode of fishing or the objects to which that fishing is addressed. It is absolute and unqualified.

Now one other word: A distinction of course is to be drawn between different parts of this Treaty. The United States will not say, 891 they have not said, they cannot correctly say, that Article I gave them a right. That is not the position so far as the general rights of navigation and fishing in the open sea are concerned.

The Treaty of 1824 did not confer that right on the United States. It recognized a right. The position of the United States in the language of Mr. Quincy Adams was this:—We can admit *no part* of the claim of Russia, and therefore the true position is this, that Article I of the Treaty of 1824, just as in the Treaty of 1825, at which I have not yet arrived, does not confer the right, but is merely the *recognition* of the right; and therefore withdraws all the pretensions inconsistent with that right which were advanced in the Ukase and by the Charter.

When we come to Article IV, the case is different; because as regards Article IV something is given which is not a right, apart from Treaty, either of the United States on the one hand or of Russia on the other, because it gives the right of frequenting the interior seas, gulfs, harbours, and creeks on the coasts mentioned, all those pointing to territorial waters which neither Russia nor America could frequent in the territories of the other as of right.

Now, I leave that Treaty altogether, with one small exception, namely the argument which my learned friend, Mr. Carter, greatly to my surprise, based upon the conversation between Baron de Tuyl and ^{The Baron de} Mr. Adams on the eve of the signature of the Treaty. I ^{Tuyl incident.} say which my learned friend advanced greatly to my surprise; I sup-

pose he advanced it because it had already been advanced in the argument of Mr. Blaine in one of his letters; but my surprise at my learned friend advancing it is because, when looked at, it is the strongest confirmation of the construction of the Treaty of 1824 on which we are insisting. What had happened? The Trading Company was, apparently, alarmed that there might be some restriction of those rights, as indeed there were. The Company was composed of influential persons. It had construed the Treaty in the sense in which we are construing it, and they wanted to see whether, before it was actually signed, there might not be something which, as regards the effect upon them and their rights under the Charter, might not be mitigated. Accordingly, we have that very interesting record at page 263 of Volume I of the Appendix to the United States Case, the passage in question being at page 276. This is the long letter of the 17th of December, 1890, from Mr. Blaine to Sir Julian Pauncefote.

Baron Tuyl, the Russian Minister, wrote me a note yesterday requesting an immediate interview, in consequence of instructions received yesterday from his Court. He came, and after intimating that he was under some embarrassment, [very naturally] in executing his instructions, said that the Russian-American Company, upon learning the purport of the Northwest Coast Convention concluded last June by Mr. Middleton, were extremely dissatisfied (*a jeté de hauts cris*), and, by means of their influence, had prevailed upon his Government to send him these instructions upon two points. One was that he should deliver, upon the exchange of the

892 ratifications of the Convention, an explanatory note purporting that the Russian Government did not understand that the Convention would give liberty to the citizens of the United States to trade [where?] on the coast of Siberia and the Aleutian Islands. The other was to propose a modification of the Convention by which our vessels should be prohibited from trading on the northwest coast north of latitude 57°.

You observe, therefore, that he was to explain the Russian meaning as to the liberty of the citizens of the United States to trade on the coast of Siberia and the Aleutian Islands. What was the other point?

To propose a modification of the Convention, by which our vessels should be prohibited from trading on the northwest coast North of latitude 57° [you see, a modification.] With regard to the former of these points he left with me a minute in writing.

With this preliminary statement, Baron Tuyl, in accordance with instructions from his Government, submitted to Mr. Adams the following note:

EXPLANATORY NOTE FROM RUSSIA.

Explanatory note to be presented to the Government of the United States at the time of the exchange of ratifications, with a view to removing with more certainty all occasions for future discussions; by means of which note it will be seen that the *Aleutian Islands, the coasts of Siberia, and the Russian Possessions in general on the Northwest Coast of America to 59° 30' of north latitude* are positively excepted from the liberty of hunting, fishing, and commerce stipulated in favour of citizens of the United States for ten years.

Therefore, you observe that Baron de Tuyl and his friends, the American Company behind him, read the Treaty as we have been contending that Treaty can only be read, as giving the liberty of visit for ten years to the whole of the northwest coast; and this is his argument. He says:

This seems to be only a natural consequence of the stipulations agreed upon, for *the coasts of Siberia* are washed by the Sea of Okhotsk, the Sea of Kamschatka, and the Icy Sea, and not by the South Sea mentioned in the first article of the Convention of April 5-17 (1824). *The Aleutian Islands* are also washed by the Sea of Kamschatka, or Northern Ocean.

It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized, as well understood and placed beyond all manner of doubt—

My learned friend did not read this; probably he accidentally overlooked it—

the principle that beyond 59° 30' no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues.

My learned friend did not read that passage.

MR. CARTER.—I think I did.

SIR CHARLES RUSSELL.—No, I think not; indeed, I am sure not, because I noted it at the time. The assertion amounts to this:

The interpretation we put upon it is the interpretation the Commercial Company have been putting upon it, and we propose this alteration; not to insist on the 100 miles, but we shall be content with two marine leagues, that is to say, keep outside the territorial waters, only let us extend the territorial waters not to one but to two marine leagues.

893 SENATOR MORGAN.—That is the first time I think I have heard in any paper of the distinction drawn between fishing and hunting, that is, two marine leagues from land; what could they hunt two marine leagues from land?

SIR CHARLES RUSSELL.—I suppose, though I do not defend the accuracy of the language of Baron Tuyl—I suppose that you might say, not improperly, that you hunted a whale, that you hunted a sea-otter, or that you hunted a fur-seal.

SENATOR MORGAN.—I mean, you would not say that you hunted for halibut or codfish.

SIR CHARLES RUSSELL.—No; I should say you fish for them, but you, sir, are quite as good a judge of language in that respect as I or anybody else.

SENATOR MORGAN.—I mean, it is a point on the construction of the Treaty, that there was a distinction made between hunting and fishing, and that the right reserved by Russia, or rather, the United States, of whaling and other fisheries did not include perhaps the right to hunt seals, or to hunt sea-otters.

SIR CHARLES RUSSELL.—My respectful answer to that would be, Sir, Where is there a trace of such a reservation?

SENATOR MORGAN.—I mean, if there is such a thing.

SIR CHARLES RUSSELL.—There is nothing. Let me call the attention of the learned Arbitrator to the fact that in the Ukase or in the Charter under the Ukase, which refers to any special kind of fishing or of hunting, the expression is: "The pursuits of commerce, whaling, and fishery, and of all other industry", and so on,—that is what is asserted. I would submit this point to the learned Senator: if the Company were to get the right of hunting fur-seals exclusively within 100 miles of the coast, it was to get it under this Ukase, or under the Charter, or not at all. Under the Charter it enjoys the privilege of hunting and fishing to the exclusion of all other Russian or foreign subjects throughout the territories long since in the possession of Russia.

SENATOR MORGAN.—Will you allow me for one moment? They have the privilege of hunting and fishing mentioned; but the question is whether they gave up in the Treaty of 1824 and of 1825 the right of hunting and fishing, or only the fishing?

SIR CHARLES RUSSELL.—With great deference, I think the fallacy, if I may say so, is that the word is primarily applied to the hunting of animals of land, and the Company, under this Charter, had great privileges, admittedly within the power of the Russian Emperor to grant, of hunting on that land and over large tracts of land. That is not touched, and the Treaty is silent upon any question of grant of Russian terri-

tory, because nobody can affect or control or limit the disposition of the Russian Government, or Legislature if there be one, as regards all within the territorial sovereignty; but, when you come to the question of the sea, the Treaty says the subjects of both Powers shall have 894 unrestricted rights of fishing in the South Sea, without any restriction or limitation, and, though I listen with the greatest deference to any suggestion coming from the Arbitrators, I fail to see what the difficulty is that really presses on the learned Senator's mind. We never contended that that Treaty gave the right of fishing in the open sea; we never contended that it conferred a right, but merely, by the recognition of the right, withdrew an unjust pretension which would have limited the right of the public to fish in the Sea.

It is clear that Baron Tuyl's objection went only to the extent of a limitation of the right of hunting and fishing within the distance of two marine leagues; and the use of the word "hunting" in that connexion clearly shows that he, at all events, was using "hunting" in a sense applicable to the sea, because "within two marine leagues of the shore" could of course, only be upon the sea; and all he was saying was: "You must not come and hunt or fish"—whatever the right phrase may be—"within two marine leagues". But that was not quite all. Mr. Adams, as one would expect from a statesman of his known ability, said "You need not be uneasy"—(and I think that answers the question which the learned President was good enough to put a minute or two ago)—"If you talk of these northern regions, you will be drawing the attention of our people to it. There is no great interest for them to go at present—it is not worth while making a point of it." But he says: "The Senate will agree to this Treaty. We have no power to depart from the Treaty. The Treaty must speak according to its natural effect, and therefore, to put it plainly and tersely, you must take it or leave it".

The Russian Government was anxious to take it, because they were then securing for the first time a recognition on the part of Great Britain and the United States of a distinct territorial sovereignty over a previously disputed territory, and therefore the Treaty passed, and is to be interpreted according to its meaning and the natural import of the words which are used in the Treaty itself.

I say therefore that so far from that Baron de Tuyl incident furnishing an argument against our contention, it is a circumstance most strongly significant of the fact that the American Company were taking the very view of the construction of the Treaty of 1824 which is the construction which we are now saying is the clear and indubitable one.

THE BRITISH TREATY OF 1825.

I pass now to the Treaty of 1825, and with regard to that Treaty I must begin by observing that if I have made my ground good as regards the Treaty of 1824, I stand in a position certainly as strong, probably stronger, when I come to consider the Treaty of 1825; because from beginning to end of the correspondence it will be found that that part of the 895 assertion of Russia to which Great Britain most strongly objected was the right of affecting and controlling free navigation and free rights in the open sea; and as will appear in the correspondence to which I will now call attention, the Government of Great Britain was not concerned about pressing the question of delimitation of territory upon the coast nearly so much as in pressing a settlement of the pretensions as regards maritime jurisdiction.

I ought indeed to have said in connection with the other subject, particularly the meaning of the north-west coast, that the position of

America in this regard was a little singular. The boundaries, as I said, between Russian territory on the coast and British territory, and United States territory, were to a large extent undefined. It was pretty clear—I do not think the United States ever suggested the contrary—that to some extent, at least, there would come in as a wedge between Russian territory on the north and United States territory on the south, some portion of British territory on the coast. The exact point was not defined or limited.

As I have said, the limit of the Russian claim to the south had been variously advanced by Russia. In the Ukase of 1799, they had only claimed to go down to 55°. In the Ukase of 1821, they had claimed to go down to 51°. The Arbitrators will recollect that. On the other hand, the exact point north to which the United States were prepared to press its just claims to territory had been left more or less undefined, and it was a matter of only indirect interest to the United States of what was to be the southern boundary of the Russian possessions. The more they could squeeze the Russian assertions of sovereignty on the coast further north, the greater chance it would give them of squeezing British territory further north, and so extend their own claims. It was only in that sense a matter of comparative importance to the United States what should be the southern boundary of the Russian possessions.

Now the correspondence, so far as Great Britain is concerned, is most conveniently set out in the 2nd volume of the Appendix to the British Case, and it is all collected there as far as I desire to use it. It begins with a letter from Baron Nicolay to the Marquess of Londonderry. This is a long letter and I do not think it is necessary I should trouble you by reading it in full. The fourth sentence begins:

Le nouveau règlement n'interdit point aux bâtimens étrangers la navigation dans les mers qui baignent les possessions Russes sur les côtes nord-ouest de l'Amérique et nord-est de l'Asie.

I merely read that to shew the extent to which it extends. Then it goes on:

D'un autre côté, en considérant les possessions Russes qui s'étendent, tant sur la côte nord-ouest de l'Amérique depuis le détroit de Behring jusqu'au 51° de latitude septentrionale—

It then proceeds to give the boundaries very much as in the correspondence of M. de Poletica with the United States which I have already read. He then goes on to claim that it would entitle Russia to treat the sea as a closed sea and then he finally says.

Il s'est borné, au contraire, comme on a lieu de s'en convaincre par le règlement nouvellement publié, à défendre à tout bâtiment étranger, non seulement d'aborder dans les établissemens de la Campagne Américaine, comme dans la presqu'île du Kamchatka et les côtes de la mer d'Okhotsk, mais aussi de naviguer le long de ces possessions et en général d'en approcher à une distance de 100 milles d'Italie.

On the top of the next page occurs another sentence which shews his apprehension of the meaning of the Pacific Ocean.

Car, s'il est démontré que le Gouvernement Impérial eût eu à la rigueur la faculté de fermer entièrement aux étrangers cette partie de l'Océan Pacifique qui bordent nos possessions en Amérique et en Asie—

unmistakeably referring to Behring Sea as part of the Pacific Ocean.

Now the Government of the King immediately took advice upon the matter, and Mr. Christopher Robinson, the then King's Advocate, was asked to express his opinion:

In obedience to your Lordship's directions I have the honour to report that it appears to be the object of this communication to obtain indirectly from his Maj-

esty's Government an acknowledgment of territorial rights which are assumed by Russia over a portion of sea that may become of great importance with reference to the trade of that part of the world, and the discoveries which are now directed to that quarter.

It is important to observe that he, a lawyer, at once sees that the assertion of the claim to exclude others from a definite area of the sea from the coasts, is an assertion of territorial sovereignty, and accordingly he, at once, so describes it. You will see he says on page 2 of the volume II of the Appendix to the Case of the British Government:

The communication indirectly asserts an exclusive right in the sovereignty "d'une mer fermée sur l'espace de mer, dont les possessions" (from Behring's Straits to 51° north, on the west coast of America, and 45° north on the coast of Asia) "forment les limites", and it proceeds to announce as a qualified exercise of that right the exclusion of all foreign ships, under pain of confiscation, from approaching within 100 miles of those coasts.

The extent of territory so assumed is much greater than is ordinarily recognized by the principles of the law of nations.

and so on.

Now the letter from Count Nesselrode to Count Lieven, on the next page, is practically the same. I think in every important respect it is the same as Baron de Nicolay's letter which I have already read, and therefore I forbear to trouble the Tribunal with it. Sir Charles Bagot was, at this time, the British Minister at St. Petersburg, and he writes a letter on the 17th of November, beginning on the bottom of page 4, referring to his dispatch in which he transmitted the heads of the Ukase. I will not trouble the Tribunal with reading the whole of the letter, but the last passage but one is important:

When I found that the Ukase had been already communicated to your Lordship I abstained from entering with Count Nesselrode into any further discussion 897 of it, or inquiring of him, upon what grounds the 51st degree of north latitude (which, after the last Treaty between Spain and the United States, reduces the possessions of Great Britain to two degrees of latitude) had been now declared,—

that is to say, Great Britain was being squeezed between those two claims.

I believe for the first time, to be the boundary of the Russian dominion upon those coasts, but I have adverted to the novel principle involved in that Regulation of the Decree which dooms to confiscation all foreign vessels which may approach within 100 Italian miles of the Russian coasts, and I find that this extraordinary pretension has been adopted from, and is supposed to be justified by the XIIth Article of the Treaty of Utrecht.

Now I pass over a good many pages of the correspondence and come to page 12, where there is an important letter, from Lord Stowell, which my friend Mr. Carter read; and you will see that Lord Stowell regarded, as every lawyer must regard, the assertion of exclusive control over an area as an assertion of exclusive dominion, territorial dominion, over that area.

Now Lord Stowell begins by saying:

I have perused these papers and it appears to me to be unsafe to proceed to any controversial discussion of the proposed Regulations till it is shown that they issue from a competent authority founded upon an acknowledged title of territorial and exclusive possession of the portions of the globe to which they relate.

and so on. Then he proceeds in the 2nd paragraph to say:

The territories claimed are of different species—*islands—portions of the continent—and large portions of the sea adjoining.*

He was a lawyer of great learning, ability and authority; and he treats it as a claim of territorial dominion. Then he proceeds:

I know too little of the history of their connection with either islands or continents to say with confidence that such a possession has in this case been acquired.— and so forth.

He then proceeds to discuss the question, which has merely an academic interest at the present stage of the controversy, as to how far the mere right of discovery without actual possession would give the right to territory, with which we need not now trouble; and he finally winds up by saying:

I content myself with observing upon the Regulations themselves that they are carried to an extent that appears very unmeasured and insupportable.

Then on page 13 there is a communication to the Board of Trade, from which I read a short extract, in order to point out that it refers to the fact of there being some trade with Great Britain in the Behring Sea.

Two British ships nearly about the same time that the above ship sailed for the coast of Japan sailed for the whale fishery on the northwest coast of America, we believe into Behring Straits.

We have no doubt if we are protected in a *fair* trade (not with China) and fishery in the North Pacific Ocean, that British enterprise will find some islands in that great ocean which may have been overlooked by the Russians and Americans,

and so forth.

Then at page 14 there is an important letter from Lord Londonderry who was then Foreign Secretary of Great Britain. It is dated the 18th January 1822. This letter refers to the north western coast of America. The second paragraph begins thus:

This document, containing Regulations of great extent and importance, both in its territorial and maritime bearings, has been considered with the utmost attention, and with those favourable sentiments which His Majesty's Government always bear towards the acts of a State which His Majesty has the satisfaction to feel himself connected, by the most intimate ties of friendship and alliance; and having been referred for the report of those high legal authorities, whose duty it is to advise His Majesty on such matters.

The undersigned is directed, till such friendly explanations can take place between the two Governments as may obviate misunderstanding upon so delicate and important a point, to make such provisional protest against the enactments of the said Ukase as may fully serve to save the rights of His Majesty's Crown, and may protect the persons and properties of His Majesty's subjects from molestation in the exercise of their lawful callings in that quarter of the globe.

The undersigned is commanded to acquaint Count Lieven that it being the King's constant desire to respect, and cause to be respected by his subjects in the inillest manner, the Emperor of Russia's just rights, His Majesty will be ready to enter into amicable explanations upon the interests affected by this instrument, in such manner as may be most acceptable to His Imperial Majesty.

In the meantime, upon the subject of this Ukase generally, and especially upon the two main principles of claim laid down therein, viz, an exclusive sovereignty alleged to belong to Russia over the territories therein described, as also the exclusive right of navigating and trading within the maritime limits therein set forth, his Britannic Majesty must be understood as hereby reserving all his rights, not being prepared to admit that the intercourse which is allowed on the face of this instrument to have hitherto subsisted on those coasts, and in those seas, can be deemed to be illicit, or that the ships of friendly Powers, even supposing an unqualified sovereignty was proved to appertain to the Imperial Crown in these vast and very imperfectly occupied territories, could, by the acknowledged law of nations, be excluded from navigating within the distance of 100 Italian miles as therein laid down from the coast, the exclusive dominion of which is assumed (but, as His Majesty's Government conceive, in error) to belong to His Imperial Majesty the Emperor of All the Russias.

I have already pointed out the position which Mr. Quincy Adams took up: that the United States can admit no part of this claim. I

now call attention to the position which Lord Londonderry, representing Great Britain, took up; and I say, as I said in reference to the other assertion of the United States, that Great Britain never departed from that position.

Now on the next page, page 15, is a communication dated 19th February, 1822, from Mr. Stratford Canning who was then in Washington. Referring to an interview with Mr. Adams, he says:

Mr. Adams gave me to understand that it was not the intention of the American Cabinet to admit the claim thus notified on the part of Russia. His objection appears to lie more particularly against the exclusion of foreign vessels to so great a distance from the shore.

I have to point out that so far the southern boundary of Russian possessions is concerned, it had only the indirect interest for the United States that I have mentioned.

899 Then the attention of the Foreign Office is further drawn to the matter by the Hudson's Bay Company, on page 15. I need not read that.

On page 17 is an important memorandum by the Duke of Wellington, in these terms:

In the course of a conversation which I had yesterday with Count Lieven, he informed me that he had been directed to give verbal explanations of the Ukase respecting—

I ask the attention of the Tribunal to the language used—
the north-west coast of America.

Where is there any limitation to be found that the withdrawal of the Ukase was confined to the Ocean south of the Aleutians?

These explanations went, he said, to this, that the Emperor did not propose to carry into execution the Ukase in its extended sense. That His Imperial Majesty's ships had been directed to cruize at the shortest possible distance from the shore in order to supply the natives with arms and ammunition, and in order to warn all vessels that that was His Imperial Majesty's dominion; and that His Imperial Majesty had besides given directions to his Minister in the United States to agree upon a Treaty of Limits with the United States.

You see, Mr. President, this is very like the echo of the communication which Mr. Middleton records, not with Count Lieven, but with another Russian Minister, when he is informed that Russia cannot withdraw what has been done in the way of giving orders, but that he may rest assured that those orders will not be acted upon, and that the orders sent out will be only to exercise control within the limits recognized by international law.

The Duke of Wellington proceeds to say:

It appears here that this explanation when given will be very little satisfactory; and that at best it is only a verbal explanation of a written and published Ukase, the terms of which, however contrary to the law of Nations and protested against by us, must be the rule for our merchants and traders till we can obtain some document in writing which will alter it. This is the sense in which I propose to act at Vienna upon this part of the instructions, and it is desirable that I should be informed whether we have any claim to territory on the north-west coast of America, and what are the opinions and reasonings of the civilians upon the question of *dominion on the sea*.

This letter is clear and businesslike as one would have expected from the Duke of Wellington; and I need not remind the Tribunal that at this time, although the marine league limit had been pretty generally recognized, it certainly had not been so universally fixed and recognized as in later years.

Then he goes on:

The Russian Ministers will very probably assimilate their claim of dominion as thus verbally explained to the claim which we are supposed to have of dominion in the Narrow Seas, which it was attempted to bring into discussion at the Congress at Vienna in 1815. We avoided the discussion, and explained the practice of giving and receiving salutes prevailing in the British Navy in a manner satisfactory to all parties. But we never relinquished the claim of the dominion.

On the other hand, we have not recently claimed the dominion in a proclamation, and warned others not to approach it.

900 I now pass on to the letter from Mr. George Canning to the Duke of Wellington, which will be found at page 21. He says:

Your Grace is already in possession of all that has passed both here and at St. Petersburg on the subject of the issue in September of last year, by the Emperor of Russia, of an Ukase indirectly asserting an exclusive right of sovereignty from Behring's Straits to the 51st degree of north latitude on the west coast of America, and to the 45th degree North on the opposite coast of Asia, and (as a qualified exercise of that right) prohibiting all foreign ships, under pain of confiscation, from approaching within 100 Italian Miles of those coasts.

He then alludes to the opinions of Lord Stowell, and of the Advocate General, and refers to the question of title founded on mere discovery and the point whether possession was necessary. I need not trouble you with that. Then follow some sentences which are important.

With respect to the other points in the Ukase which have the effect of extending the territorial rights of Russia over the adjacent seas to the unprecedented distance of 100 miles from the line of coast, and of closing a hitherto unobstructed passage, at the present moment the object of important discoveries for the promotion of general commerce and navigation, these pretensions are considered by the best legal authorities as positive innovations on the right of navigation. As such, they can receive no explanation from further discussion, nor can by possibility be justified. Common usage, which has obtained the force of law, has indeed assigned to coasts and shores an accessorial boundary to a short limited distance for purposes of protection and general convenience, in no manner interfering with the rights of others, and not obstructing the freedom of general commerce and navigation.

But this important qualification the extent of the present claim entirely excludes, and when such a prohibition is, as in the present case, applied to a long line of coasts, and also to intermediate islands in remote seas where navigation is beset with innumerable and unforeseen difficulties, and where the principal employment of the fisheries must be pursued under circumstances which are incompatible with the prescribed courses, all particular considerations concur, in an especial manner, with the general principle, in repelling such a pretension as an encroachment on the freedom of navigation, and the unalienable rights of all nations.

I have indeed the satisfaction to believe, from a conference which I have had with Count Lieven on this matter,—that upon these two points,—the attempt to shut up the passage altogether, and the claim of exclusive dominion to so enormous a distance from the Coast,—the Russian Government are prepared entirely to waive their pretensions. The only effort that has been made to justify the latter claim was by reference to an Article in the Treaty of Utrecht, which assigns 30 leagues from the Coast as the distance of prohibition. But to this argument it is sufficient to answer that the assumption of such a space was, in the instance quoted, by stipulation in a Treaty, and one to which, therefore, the party to be affected by it had (whether wisely or not) given its deliberate consent. No inference could be drawn from that transaction in favour of a claim by authority against all the world.

I have little doubt, therefore, but that the public notification of the claim to consider the portions of the ocean included between the adjoining coast of America and the Russian empire as a *mare clausum*, and to extend the exclusive territorial jurisdiction of Russia to 100 Italian miles from the coast, will be publicly recalled, and I have the King's commands to instruct your Grace further to require of the Russian Minister (on the ground of the facts and reasonings furnished in their despatch and its inclosures) that such a portion of territory alone shall be defined as belonging to Russia as shall not interfere with the rights and actual possessions of His Majesty's subjects in North America.

That is a statement which is I think accurate in point of law, and you will see that while it is emphatic and distinct in its opposition
901 tion to the claim of exclusive dominion 100 miles from the coast,

it professes the willingness of the Government to enter into negotiations for the delimitation of the disputed territory.

On page 24 is a Confidential Memoir, which I need not read; I may say that it re-states the case in defence of the Ukase; claims that they might have treated the Northern part of the Pacific as a shut sea, and so forth; but that there are overtures for the settlement of the subject, and that the Russian Government does not desire to press the matter to the full extent.

The Duke of Wellington, having received that letter which I have read from Mr. Canning, writes to Count Lieven in these terms. I am reading from page 25:

We object to the ukase on the grounds:

1. That his imperial Majesty assumes thereby an exclusive sovereignty in North America of which we are not prepared to acknowledge the existence or the extent. Upon this point, however the Memorandum of Count Nesselrode does afford the means of negotiation, and my Government will be ready to discuss it either in London or St. Petersburg whenever the state of the discussions on the other question arising out of the ukase will allow of the discussion.

The second ground on which we object to the Ukase is that His Imperial Majesty thereby excludes from a certain considerable extent of the open sea vessels of other nations.

We contend that the assumption of this power is contrary to the law of nations, and we cannot found a negotiation upon a paper,

That is the Confidential Memoir which I have just referred to.—

in which it is again broadly asserted. We contend that no Power whatever can exclude another from the use of the open sea. A Power can exclude itself from the navigation of a certain coast, sea, etc., by its own act or engagement, but it cannot by right be excluded by another. This we consider as the law of nations, and we cannot negotiate upon a paper in which a right is asserted inconsistent with this principle.

Nothing could be stronger than that. Then follows an incident in the process which I took the liberty of describing a little time ago—the process of climbing down; and I call attention expressly to the note from the Duke of Wellington. It is dated November 29th, 1822.

Since I wrote to you yesterday I have had another conversation with the Russian Ministers regarding the Ukase.

It is now settled that both the memorandums which I inclosed to you should be considered as *non avenues*, and the Russian Ambassador in London is to address you a note in answer to that of the late Lord Londonderry, assuring you of the desire of the Emperor to negotiate with you upon the whole question of the Emperor's claims in North America, reserving them all if the result of the negotiation should not be satisfactory to both parties.

Therefore the position was that the Confidential Memoir that I mentioned was considered as *non avenue*, and the matter was at large for negotiation.

Now on page 31 is an important memorandum to Mr. Canning from Count Lieven, who was then in London. It is the second passage I refer to,—it is in these words:

902 Avant de quitter Vérone, le Sonssigné a reçu l'ordre de donner au Gouvernement de Sa Majesté britannique une nouvelle preuve des dispositions connues de l'Empereur, en proposant à son Excellence Mr. Canning, principal secrétaire d'État de Sa Majesté Britannique pour les Affaires étrangères (sans que cette proposition puisse porter atteinte aux droits de Sa Majesté Impériale, si elle n'est pas acceptée), que de part et d'autre la question de droit strict soit provisoirement écartée, et que tous les différends auxquels a donné lieu le Règlement dont il s'agit, s'aplanissent par un arrangement amical fondé sur le seul principe des convenances mutuelles et qui seroit négocié à Saint-Petersbourg.

Then follows a long dispatch from Count Nesselrode to Count Lieven, which is to a large extent, indeed I think it is entirely conversant with

the question of the territorial claim. I think I am right in saying that there is nothing about the maritime jurisdiction portion of the claim.

I now may pass over a good many of these letters until I come to page 38, a despatch from Mr. George Canning, to Sir Charles Bagot:

SIR: I have the honour to inclose for your Excellency's information, the copy of a despatch received from His Majesty's Minister in America upon the subject of the Russian Ukase relating to the north-west coast of America, also of a letter from the Ship-owners' Society upon the same subject, and of a Memorandum of my reply to that letter.

Your Excellency will observe from Mr. Stratford Canning's despatch that the Government of the United States are desirous to join with that of His Majesty in bringing forward some proposition for the definitive settlement of this question with Russia.

We have no precise information as to the views of the American Government, Mr. Rush not having yet received any instructions upon the subject. It seems probable, however, that the part of the question in which the American Government is peculiarly desirous of establishing a concert with this country is that which concerns the extravagant assumption of maritime jurisdiction. Upon this point, it being now distinctly understood that Russia waives all her pretensions to the practical exercise of the rights so unadvisedly claimed, the only question will be as to the mode and degree of disavowal with which Great Britain and the United States might be respectively satisfied.

Upon this point, therefore, such a concert as the United States are understood to desire will be peculiarly advantageous; because, supposing the disavowal made, there is no disposition on the part of His Majesty to press hard upon the feelings of the Emperor of Russia, and it would certainly be more easy for His Majesty to insist lightly upon what may be considered as a point of national dignity, if he acted in this respect in concert with another Maritime Power, than to exact any less degree, either of excuse for the past or of security for the future, than that other Power might think necessary.

Great Britain and the United States may be satisfied jointly with smaller concessions than either Power could accept singly, if the demands of the other were likely to be higher than its own.

I therefore think it best to defer giving any precise instructions to your Excellency on this point until I shall have been informed of the views of the American Government upon it.

In the meantime, however, you will endeavour to draw from the Russian Government a proposal of their terms, as we should undoubtedly come much more conveniently to the discussion, and be much more likely to concert an agreement upon moderate terms with the American Government if a proposal is made to us, than to agree in originating one which would be satisfactory at once to both Governments and to Russia.

The other part of this question, which relates to territorial claim and boundary, is perhaps susceptible of a separate settlement; of the two principles on which the settlement could be made, viz., joint occupancy or territorial demarcation, the latter is clearly preferable.

903 I do not think I need trouble you with that. Then they suggest drawing a line at 57°. You see from that, Mr. President, that, in private communication at all events, the Russian Ministers were receding from the assertion of this exclusive maritime jurisdiction; that is very clearly shown in the next memorandum from Count Nesselrode to Count Lieven, on page 39. The first clause of the instructions to the Russian cruisers I translate thus:

That the commanders of our ships of war ought to exercise their surveillance as near as possible to the continent, that is to say, over an extent of sea which reaches a cannon shot from the coast—

In other words, the marine league—

and that they ought not to extend this surveillance beyond latitudes in which the American Company has effectively exercised its right of hunting and fishing since the epoch of its creation,

Clause 2. That this surveillance ought to have for its object to repress all fraudulent commerce and all attempts to injure the Company in troubling the coasts frequented by its hunters and fishers, preventing all enterprises having for their object to furnish to the aboriginal inhabitants of the country without the consent of the authorities fire-arms, munitions of war and swords.

So there you see, still further bearing out the communications between the English Ministers, the Russian instructions to their own officers, that they are to exercise their surveillance over an extent of ocean reaching only to the extent of a cannon shot from the shore; and this we know is now treated as three miles.

Now we come to a point at which this 100 mile claim absolutely disappears from the controversy. On page 45 Mr. Lyall, the Chairman of a Committee of ship-owners who were interested in this matter, writes to Mr. George Canning, on the 19th of November 1823; and he refers to a previous communication.

When you had the goodness to inform me that a representation had been made to that Government, and that you had reason to believe that the Ukase would not be acted upon; and very shortly after this communication I was informed, on what I considered undoubted authority, that the Russian Government had consented to withdraw that unfounded pretension.

Then he says:

The Committee of this Society being about to make their Annual Report to the ship-owners at large, it would be satisfactory to them to be able to state therein that official advices had been received from St. Petersburg that the Ukase had been annulled; and should that be the case, I have to express the hope of the Committee to be favored with a communication from you to that effect.

Whereupon, Mr. Canning, before he answers Mr. Lyall, communicates with Count Lieven and says: Here is a question which has been put to me. What am I to tell these shipowners?

I have received the inclosed letter from the Ship-owners Society; my answer to it must be in writing, and not long after it will be in print.

I wish, therefore, that you should know beforehand what the nature of it will be, and for that purpose I inclose a draft of it, which I will be obliged to you if
904 you will return with any remark that may occur to you, returning also Mr. Lyall's letter.

Here is Count Lieven's answer, which I translate thus:

I am infinitely obliged for your communication that you have been good enough to make me. In returning the two annexed inclosures to your letter, and in availing myself of the permission that you have had the goodness to give me, I beg the liberty of observing to you that it will be desirable that the passage marked in pencil in the minute of your response should be substituted by the announcement.

Then follow the words in inverted comas.

"That the new instructions given to the commanders of Russian cruisers are conceived with the object of preventing disturbance between the Russian vessels and those of other nations, and that in general they may be considered as having suspended provisionally the effect of the Imperial Ukase of the 4th of September 1821."

The PRESIDENT.—That is not quite right. It should be as being such as to suspend.

Sir CHARLES RUSSELL.—That is still stronger; I am much obliged to you.

Thereupon Mr. Secretary Canning by his Secretary communicates to the ship-owners in this way:

Mr. Canning cannot authorize me to state to you in distinct terms that the Ukase has been *annulled*, because the negotiation to which it gave rise is still pending, embracing, as it does, many points of great intricacy as well as importance.

But I am directed by Mr. Canning to acquaint you that orders have been sent out by the Court of St. Petersburg to their Naval Commanders calculated to prevent any collision between Russian ships and those of other nations, and, in effect, suspending the Ukase of September 1821.

Here we have got to a definite point: the suspension of the Ukase of 1821. What had been done therefore amounted to this—a paper assertion of territorial sovereignty by the Ukase, and by the Charter under

it, communicated to two foreign Powers; a prompt refusal by those Powers to recognize the rights on the basis on which it purported to support them: and finally, a suspension of the Ukase, fully admitted by November of 1823. Did either Russia—it is no longer a question of what Great Britain did—but did either Russia or Great Britain ever retire from that position? Clearly not.

Then follows a long correspondence, a great part of which is conversant with the territorial claim, with which I need not trouble you; but there is rather an important passage on page 65 in Mr. George Canning's letter. Certain projects had passed between the parties which it would take me a great deal too long to go through. But on the 24th of July, 1824, the points in difference had been reduced to very few; and Mr. George Canning writing to Sir C. Bagot says:

The "Projet" of a Convention which is inclosed in my No. 26 having been communicated by me to Count Lieven, with a request that his Excellency would note any points in it upon which he conceived any difficulty likely to arise, or any explanation to be necessary, I have received from his Excellency the Memorandum a copy of which is herewith inclosed.

905 Your Excellency will observe that there are but two points which have struck Count Lieven as susceptible of any question. The first, the assumption of the base of the mountains instead of the summit as the line of boundary.

That, you will understand, Mr. President, relates merely to the *lisière*.

The second, the extension of the right of the navigation of the Pacific to the sea beyond Behring's Straits.

How can it be said that there was any question about the intervening sea, that is Behring Sea itself, when the question had resolved itself into the right of navigation in the sea *beyond* Behring Straits.

As to the first, no great inconvenience can arise from your Excellency (if pressed for that alteration) consenting to substitute the summit of the mountains instead of the seaward base, provided always that the stipulation as to the extreme distance from the coast to which the *lisière* is in any case to run be adopted (which distance I have to repeat to your Excellency should be made as short as possible), and provided a stipulation be added that no forts shall be established or fortifications erected by either party on the summit or in the passes of the mountains.

As to the second point, it is perhaps, as Count Lieven remarks, new. But it is to be remarked in return, that the circumstances under which the additional security is required will be new also.

By the territorial demarcation agreed to in this *Projet* Russia will become possessed, in acknowledged sovereignty of both sides of Behring's Straits.

The Power which could think of making the Pacific a *mare clausum* may not unnaturally be supposed capable of a disposition to apply the same character to a strait comprehended between two shores of which it became the undisputed owner; but the shutting up of Behring's Straits, or the power to shut them up hereafter, would be a thing not to be tolerated by England.

Nor could we submit to be excluded, either positively or constructively, from a sea in which the skill and science of our seamen has been and still is employed in enterprises interesting not to this country alone, but to the whole civilized world.

The question of the Northwest Passage, if I am not wrong, was then a matter that was agitating the minds of men of enterprise.

The protection given by the Convention to the American coasts of each Power may (if it is thought necessary) be extended in terms to the coasts of the Russian Asiatic territory; but in some way or other, if not in the form now prescribed, the free navigation of Behring's Straits and of the seas beyond them must be secured to us.

These being the only questions suggested by Count Lieven, I trust I may anticipate with confidence the conclusion and signature of the Convention, nearly in conformity to the "*Projet*", and with little trouble to your Excellency.

It is almost needless that I should pause here. They were discussing the freedom of navigation in the Arctic Ocean beyond the Behring Sea, and about the avenue to the Arctic Ocean, the Behring Strait; and yet

it is supposed that although we have got to that point, yet the questions as to the intervening sea by which alone the Behring Straits could be approached were not already settled; namely, that there was free navigation, according to the rules of general international law.

In order to put this matter beyond the possibility of doubt, will you be good enough to turn back to page 63.

Mr. CARTER.—You do not read the letter at the bottom of the page.

906 Sir CHARLES RUSSELL.—I am going to read it in a moment.

At the top of page 63 the project which is there referred to is in these words:

It is agreed between the High Contracting Parties that their respective subjects shall enjoy the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Behring's Straits, and shall neither be troubled nor molested in carrying on their trade and fisheries, in all parts of the said ocean, either to the northward or southward thereof.

It being well understood that the said right of fishery shall not be exercised by the subjects of either of the two Powers, nearer than 2 marine leagues from the respective possessions of the other.

That is the only limitation there made. But the point, of course, that I am upon is the other limitation, of the enjoyment of the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Bering Straits.

Then says Mr. Canning the questions are limited to whether the base or the summit of the mountains is to be taken as the inside boundary of the *lisière*. Secondly, the extension of the right of the navigation of the Pacific to the sea beyond Behring Straits.

I now turn to page 66 to read what Mr. Carter drew my attention to, and which I was going to read. There was, a question whether or not there should be any formal renunciation, or whether a formal renunciation was necessary, or whether the treaty should be left to speak for itself; and Mr. Adams, writing from Washington, says—

A convention concluded between this Government and that of Russia for the settlement of the respective claims of the two nations to the intercourse with the north-western coast of America reached the Department of State a few days since.

The main points determined by this instrument are, as far as I can collect from the American Secretary of State, (1) the enjoyment of a free and unrestricted intercourse by each nation with all the settlements of the other on the northwest coast of America; and (2) a stipulation that no new settlements shall be formed by Russia south, or by the United States north, of latitude 54 degrees 40 minutes.

The question of the *mare clausum*, the sovereignty over which was asserted by the Emperor of Russia in his celebrated Ukase of 1821, but virtually, if not expressly, renounced by a subsequent declaration of that sovereign, has, Mr. Adams assures me, not been touched upon in the above-mentioned Treaty.

Mr. Adams seemed to consider any formal stipulation recording that renunciation as unnecessary and supererogatory.

It had been renounced, and the Treaty was inconsistent with it; and therefore, says Mr. Adams—and quite rightly, I think—any formal or express renunciation would be simply requiring a great Power to do something which might be regarded as more or less of a humiliation, and was not at all necessary.

Now I am enabled to hurry on. Let me just remind the Tribunal of the dates. The Baron de Tuyl incident had occurred in July of 1824. The Treaty with America had been signed, and, Mr. Adams having declared that the treaty must speak for itself, had been signed without any modification. The object of the proposed modification being, as you will recollect, that north of 59 degrees 30 minutes, Russia would like to have it understood that there was no right to visit the creeks, gulfs, interior seas, etc., for the ten years' period.

Baron de Tuyll had been informed by Mr. Adams, that he had "no power to construe the Treaty; it must speak for itself." Obviously some suggestion of the same kind had been made by Count Lieven to Mr. George Canning, to see whether in the English treaty, which was not then at the same stage of completion, some modification of the same sort could not be introduced; and when the American treaty comes to hand, Mr. George Canning reads it, and thereupon, on the 25th of October, meets and meets successfully Count Lieven's point. On the 28th October, 1824, page 72, he says:

MY DEAR COUNT LIEVEN: I cannot refrain from sending to your Excellency the inclosed extract from an American newspaper, by which you will see that I did not exaggerate what I stated to you, as the American construction of the Convention signed at St. Petersburg.

Count Lieven had obviously been trying to effect the same thing with England that Baron de Tuyll had tried to effect with the United States.

It is to this construction that I referred, when I claimed for England (as justly quoted by Count Nesselrode) whatever was granted to other nations.

No limitation here of 59 degrees.

Believe me, etc.

GEORGE CANNING.

Yet, says my learned friend, Mr. Carter, we inherited this secret meaning which was put by Russia upon the 1824 Treaty with America: I do not think he said, but rather suggested, that it was accepted by the United States. After that, he says, comes the treaty with Great Britain; and therefore, as you find the one clause borrowed from the other, you must give it the same meaning in each. Therefore you are to put upon the second the meaning which Baron de Tuyll suggested, even if no modification were made, might be put upon the first, although that secret meaning, or a suggestion of it, was never conveyed to Great Britain.

Mr. Justice HARLAN.—What does he mean there by "No limitation here of 59 degrees?"

Sir CHARLES RUSSELL.—Do you not see, Judge, that Baron de Tuyll's memorandum was directed to getting an admission that the right to visit the interior seas, creeks, harbors, etc., did not apply to Russian possessions north of 59 degrees?

Mr. Justice HARLAN.—Yes; but his memorandum was after that letter. The Baron de Tuyll memorandum in Mr. Adams' diary, was after the date of the Canning letter.

Sir CHARLES RUSSELL.—No; on the contrary, I have just been stating the opposite.

Mr. Justice HARLAN.—The quotation from Mr. Adams' diary is under date of December 28, 1824, and this letter you are reading from is dated October 25, 1824.

908 Sir CHARLES RUSSELL.—I think, Sir, there must be some mistake.

Mr. Justice HARLAN.—That was the reason I asked you.

Sir CHARLES RUSSELL.—It was quite a proper reason, Sir. I think that date should have been July 24th, instead of December 24th, because by December 24th the Treaty had already been signed and ratified. It was all past and gone. It was in April of 1824, and therefore that must be a mistake in date.

Sir RICHARD WEBSTER.—I think it is a mistake in Mr. Blaine's letter. I will trace it out.

Sir CHARLES RUSSELL.—I think, Sir, it is clear that the date of December 24th, as the date on which the conversation took place, must be inaccurate, for the reason I have given; because the American

Treaty was signed and ratified, I think, in April of 1824—the 17th of April, 1824.

MR. CARTER.—It was signed, but where is the evidence that it was ratified?

SIR CHARLES RUSSELL.—We will follow it up, if it be material. It does not seem to me to be of much importance, one way or the other.

MR. JUSTICE HARLAN.—I only asked because you seemed to be expounding this letter of October 25th 1824. I gather from the minute in Mr. Adams' diary that when his conversation occurred with Baron de Tuyll, the Treaty had not then been ratified.

SIR CHARLES RUSSELL.—Certainly Judge; so do I, also. But let me explain what the position of things is. We will get the dates right, and put them before you at our next meeting. But we can discuss the point wholly apart from dates.

MR. JUSTICE HARLAN.—Yes.

SIR CHARLES RUSSELL.—What appears is this: After the Treaty had been agreed upon and signed, but before its ratification, Baron de Tuyll sought to have it modified in the sense set out in Mr. Adams' diary. Mr. Adams' answer was: "The Treaty is the Treaty; that must speak for itself." At the same time, or at a later period, it may be, they were endeavouring to get the same limitation into the English treaty. What was that limitation? It was this:

It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized, as well understood and placed beyond all manner of doubt, the principle that beyond 59 degrees 30 minutes no foreign vessel can approach her coasts and her islands, nor fish nor hunt within the distance of two marine leagues.

That is to say, beyond 59 degrees 30 minutes.

Accordingly, when Count Lieven and Mr. George Canning are discussing the matter, Count Lieven seeks to have introduced into the English Treaty, a limitation of that right of approaching creeks and interior seas, to 59 degrees 30 minutes. I hope you follow me, Judge.

MR. JUSTICE HARLAN.—I do.

SIR CHARLES RUSSELL.—In other words, the ten-year clause 909 is limited to 50° 30', and not further north, and accordingly, if you will turn to page 69 of the 2nd Volume of the Appendix to the British Case, you will see that in their Contre-Projet, article III, it is proposed:

That as to the possessions of the two Powers, designated in the preceding articles, namely, to 59° 30' minutes of north latitude, but not farther, the respective vessels and those of their subjects shall, for ten years, from the 5 (17) April, 1824, have the reciprocal right of frequenting freely the gulfs, harbours, creeks, etc.

Mr. Canning then gets the newspaper description of the American Treaty. Thereupon he writes to Count Lieven, in effect: "You have been pressing me to agree to a limitation of the right to frequent interior creeks, seas, etc., to the point of 59° 30', and no farther north, and you have been urging that upon me because you say that is the American Treaty. I now send you enclosed an account of the American Treaty"—and he winds up his letter:

No limitations here of 59°.

On pages 71 and 72 is the passage which is enclosed:

Extracts from the National Intelligencer, of August 3, 1824.

CONVENTION WITH RUSSIA.—Mr. Lucius Bull, who arrived in this city a few days ago, was the bearer of despatches from our Minister at St. Petersburg. By these it appears that a Convention was concluded on the 5th (17th) April last between

Mr. Middleton, on the part of the United States, and Count Nesselrode and Mr. Poletica on the part of Russia. We understand that the Convention consists of six Articles, in which all the points in dispute between the two Governments are adjusted in a manner the most honourable and advantageous to this country.

The 1st Article authorizes the free navigation of the Pacific Ocean by both Parties, and recognizes the right of fishing and of landing on all points of the west coast not already occupied, in order to trade with the aborigines.

2nd Article provides that the citizens or subjects of neither country shall land at points occupied by either, without the permission of the Governor or Commandant.

3rd Article fixes the boundary-line at 54 degrees, north of which the United States are not to form Establishments, and south of which Russia cannot advance.

4th Article allows free entrance to both Parties for ten years into all the gulfs, harbours, etc., of each for the purposes of fishing and trading with the natives.

5th Article interdicts a trade in fire-arms and liquors, and provides that violations of this Article shall be punished not by seizure of the vessel, but by penalties to be prescribed by each Government on its own citizens or subjects.

6. This Article prescribes that the ratification shall be exchanged within ten months from the date of the Treaty.

This Convention may be regarded as a second signal effect of the manly and independent Message of our President to the late Congress. If the Emperor Alexander had left it to our own Government to fix the terms of the Treaty, it could not more completely have secured all our interests in the Pacific. We congratulate the country upon this new evidence of the excellence of the system which has been pursued by our present Administration.

Now, in the face of that, can anything in this world be clearer why it is that Mr. Canning says, "you have been pressing me about this American Treaty. Here is the American Treaty. No such limitation north of 59 degrees at all."

Now, sir, I think I have explained the point you referred to.

910 Mr. Justice HARLAN.—Will you point me again to the document which shows that Count Lieven was pressing that important view about 59 degrees?

Sir CHARLES RUSSELL.—That appears only from the *Projet* to which I have already referred. It is called Counter Draft of the Russian Plenipotentiaries. It is on page 69.

Mr. Justice HARLAN.—Which of the articles is that?

Sir CHARLES RUSSELL.—Article III—beginning with the first paragraph of Article III.

My friend says in reference to the suggestion, that I made—a suggestion which I thought was probable, namely, that he had been putting forward the American Treaty, that there is no evidence in the correspondence that he was using the American Treaty as an argument in that direction. That does not appear in the correspondence, but he was pressing forward that *projet*; and the answer is the answer I have given. He says triumphantly to Count Lieven, "No limitation here of 59 degrees", and in effect he says "We are not going to be satisfied with less than the United States people have secured under their Treaty." That is the purport and character of the negotiation, and on that basis the negotiation proceeds.

I am afraid I shall have to go through the Treaty at some length, and I would prefer to do that to-morrow.

The Tribunal accordingly adjourned until Wednesday, May 17, 1893, at 11.30 o'clock A. M.

TWENTY-FOURTH DAY, MAY 17TH, 1893.

Sir CHARLES RUSSELL.—Mr. President and Gentlemen, yesterday I stated that the Baron de Tnyll incident as recorded in Mr. Quincy Adams' diary, under the date of December 24, was, as we conceived, inaccurately stated as having taken place in December. We thought we had discovered extrinsic reasons showing that it was at an earlier date; but I find, on further examination with my learned friends, that I was not well founded in that, and that the date is correctly recorded in the diary as being in December, 1824. I want to explain in a sentence how that whole matter arose.

The PRESIDENT.—Have you ascertained if it was before the ratification?

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—What is the date of the ratification?

Sir CHARLES RUSSELL.—It was subsequent. The actual ratification was, I think, in January, 1825. I have not got it accurately in my mind at the moment; but my learned friend suggests that date to me.

Sir RICHARD WEBSTER.—It will be found at page 277 of Volume I of Appendix to the United States Case.

Mr. Justice HARLAN.—The Treaty in English and French is found at page 76 of your volume.

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—It is dated the 11th of January, 1825.

Sir CHARLES RUSSELL.—Now I was about to explain, as I can do in a sentence, without troubling the Members of the Tribunal to refer to any document, the origin of the representation of Baron de Tnyll and also the attempt at limitation which is mentioned in the *contre-projet*, and which is referred to in the correspondence of August, 1824. This is the explanation. I have told the Tribunal that this Commercial Company was a very important and influential Company. It was the Company which, as the diplomatic correspondence has shewn, had been largely instrumental in obtaining the Ukase of 1821. Persons in high positions and of commanding influence apparently were concerned in it, and after the Treaty with the United States had been agreed to and signed, but before the exchange of ratifications, there had

The Baron de Tnyll incident.

912 been a meeting which was called a Council of Dignitaries; and that was held in July, 1824. That Conference of Dignitaries was undoubtedly held at the instance of this same Company; and, in view of the construction which that Company was putting upon the Treaty concluded with the United States, and as the outcome of that Conference of Dignitaries, two things took place at a later date.

The conference was in July. In August 1824 we have in the communications with Mr. Canning the attempted limitations in the *contre-projet* that I referred to yesterday, and later we have the representations in December of the same year of Baron de Tnyll at Washington. Now as regards that Council of Dignitaries, my learned friend, Mr. Carter,

did not, and I should have been surprised if he had, lay any stress upon it so far as the document itself is concerned, for the position of things is this: it is a record of a private meeting of a number of distinguished persons. It records certain views and opinions as to the Treaty, which views are expressed to have been not the unanimous views of the members of the conference, but a majority of the conference. The document was never communicated to the United States. It was never communicated to Great Britain. It lay buried and forgotten, until when examining the records with a view to this controversy it was disinterred. But as far as either the United States, or Great Britain is concerned, neither the documents, nor the results of that conference, were communicated to either one or other of the Powers; and it is entirely out of place, therefore, in the consideration of what the construction of the United States Treaty in fact is. I have dealt with that, and will not recur to it. Mr. Adams took the position which was the only position he could take. We have entered into a definite Treaty: the construction of that Treaty is not for me. We stand by it, whatever its purport and effect are. As regards the English negotiations, I do not require to recur to them again to mention the suggested limitation, but if there is anything in the mind of the Court which I could help to explain, I should be glad to, because I desire that my argument should at least be clearly apprehended by every member of the Tribunal.

Mr. Justice HARLAN.—The President was asking me when the Senate ratified the Treaty. I do not know the exact date, but it was between December 6th, 1824, and the 11th January, 1825.

The PRESIDENT.—I asked because it would seem that he might still have been at liberty to alter it, as it was not ratified by the Senate. I mean it might have been altered if he had not insisted on his interpretation of it.

Sir CHARLES RUSSELL.—I should like to say this, especially in reference to an observation that Mr. Senator Morgan has made more than once in this matter, that no executive minister of the United States, even in the name of the Executive, could alter the Treaty. There is no power to do that.

The PRESIDENT.—But it had not passed the Senate, and he was not bound. He was free to go on negotiating.

Sir CHARLES RUSSELL.—Yes, but before it reached the point to which it had then attained there must have been some means, I should apprehend, of obtaining the views of the Senate upon it, because the Treaty was agreed to by the United States, and all that was required was the formal ratification and exchange of formal documents, and ratification implies the assent of the Senate. It is not to be supposed that the United States Government, not having the power to make a treaty which would be binding, would proceed to those lengths without having first ascertained what the views of the Senate would be.

Mr. Justice HARLAN.—The Senate does not know anything about a Treaty under our system, until it is concluded by the Executive Department and submitted to that body.

Sir CHARLES RUSSELL.—That is very likely correct, but I do not suggest anything inconsistent with that.

Lord HANNEN.—My impression is that the ratification is something different from the assent. It would be treated as a formality.

Sir CHARLES RUSSELL.—So I understand.

Mr. Justice HARLAN.—That is true.

Sir CHARLES RUSSELL.—But I did not understand what was the position of the Senate in December; and though I cannot think it important, I confess, I do not know where Mr. Justice Harlan finds that the adoption by the Senate was after December?

Mr. Justice HARLAN.—Because the date in Mr. Adams' diary is December 6th, 1824, and the proclamation of the President is the 11th January 1825.

Sir CHARLES RUSSELL.—Quite so; that is a mere formal business. The point is, when was the assent of the Senate given?

The PRESIDENT.—He says on the 6th December—"I added the Convention would be submitted immediately to the Senate." That is in the diary which you read yesterday, and that shows that the Executive was at liberty to continue negotiations, but in reality they insisted on their view.

Sir CHARLES RUSSELL.—Yes, that would appear to be so. Then it stands thus: Neither party being bound, there was the opportunity, if the Senate desired, to fall in with the views of negotiating the Treaty upon different lines and submitting it upon different lines to the Senate for its approval. But Mr. Adams says:—No, the Treaty is the Treaty as it stands, and as it stands it has to be submitted to the Senate. It does not matter, as far as the strength of the argument is concerned, what is the state of things as regards the United States and as regards Great Britain. The suggestion emanating, as far as we can judge, from that Conference of Dignitaries, appears in the 3rd article of the *contre-projet* that I referred to yesterday. It is an attempt to limit the right of visitation in the gulfs, harbours and creeks. That is enclosed and sent by Sir Charles Bagot to Mr. Canning in the letter which immediately precedes it of the 12th August 1824.

Now how was that suggestion met? I pass to page 72 of that same volume and there you will find a letter from Mr. George Canning, 914 Foreign Minister in London, to Mr. Stratford Canning, who was then at St. Petersburg, of the 8th December 1824.

Meanwhile, in the month of October previously, information had reached Mr. Canning through the public channels of information what the terms of the Treaty as between the United States and Russia were, and accordingly Mr. George Canning in October writes the short letter, that you now understand and appreciate, to Count Lieven, the important words of which are, after calling attention to the terms of the American Treaty:

No limitation here of 59°.

He says the proposed limitation is out of the question. There is nothing of the sort in the American Treaty, and he will not have it in the English Treaty.

That is the purport of it. Now comes the formal detailed answer from Mr. George Canning in London in reference to the *contre-projet*.

He says:

I inclose to you a copy (1) of the *projet* which Sir Charles Bagot was authorized to conclude and sign some months ago, and which we had every reason to expect would have been entirely satisfactory to the Russian Government.

(2) Of a *contre-projet* drawn up by the Russian Plenipotentiaries, and presented to Sir Charles Bagot at their last meeting before Sir Charles Bagot's departure from St. Petersburg.

(3) Of a despatch from Count Nesselrode, accompanying the transmission of the *contre-projet* to Count Lieven.

Then he goes on:

In that despatch, and in certain marginal annotations upon the copy of the *projet*, are assigned the reasons of the alterations proposed by the Russian Plenipotentiaries.

In considering the expediency of admitting or rejecting the proposed alterations, it will be convenient to follow the Articles of the Treaty in the order in which they stand in the English *projet*.

You will observe, in the first place, that it is proposed by the Russian Plenipotentiaries entirely to change that order, and to transfer to the latter part of the instrument the Article which has hitherto stood first in the *projet*.

To that transposition we cannot agree, for the very reason which Count Nesselrode alleges in favor of it, namely, that the "économie" or arrangement of the Treaty ought to have reference to the history of the negotiation.

The whole negotiation grows out of the Ukase of 1821.

So entirely and absolutely true is this proposition, that the settlement of the limits of the respective possessions of Great Britain and Russia on the north-west coast of America was proposed by us only as a mode of facilitating the adjustment of the difference arising from the Ukase by enabling the Court of Russia, under cover of the more comprehensive arrangement, to withdraw, with less appearance of concession, the offensive pretensions of that Edict.

It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the Continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

You will therefore take care, in the first instance, to repress any attempt to give this change to the character of the negotiation, and will declare without reserve that the point to which alone the solicitude of the British Government and the 915 jealousy of the British nation attach any great importance is the doing away (in a manner as little disagreeable to Russia as possible) of the effect of the Ukase of 1821.

That this Ukase is not acted upon, and that instructions have been long ago sent by the Russian Government to their cruizers in the Pacific to suspend the execution of its provisions, is true; but a private disavowal of a published claim is no security against the revival of that claim.

And so forth.

The Tribunal will forgive me if I ask permission to read one or two more passages, because I feel I ought to apologize for labouring this point, which we submit is absolutely clear; but, as the Tribunal have not thought fit to make any intimation, nor my learned friends either, of course I can leave no ground untouched which demonstrates beyond question the position we assume. The concluding sentences are as follows:

The right of the subjects of His Majesty to navigate freely in the Pacific cannot be held as matter of indulgence from any Power. Having once been publicly questioned, it must be publicly acknowledged.

We do not desire that any distinct reference should be made to the Ukase of 1821; but we do feel it necessary that the statement of our right should be clear and positive, and that it should stand forth in the convention in the place which properly belongs to it "—that is, the first Article,—" as a plain and substantive stipulation, and not be brought in as an incidental consequence of other arrangements to which we attach comparatively little importance.

Now, I beg attention to the remainder of this.

This stipulation stands in the front of the Convention concluded between Russia and the United States of America; and we see no reason why upon similar claims we should obtain exactly the like satisfaction.

The word "not" is left out there. The sentence which follows is particularly significant.

For reasons of the same nature, we cannot consent that the liberty of navigation through Behring Straits should be stated in the Treaty as a boon from Russia.

Of course, if there was to be navigation through Behring Straits, there must be navigation through Behring Sea, which leads to Behring Straits.

The tendency of such a statement would be to give countenance to those claims of exclusive jurisdiction against which we, on our own behalf, and on that of the whole civilized world, protest.

No specification of this sort is found in the Convention with the United States of America, and yet it cannot be doubted that the Americans consider themselves as secured in the right of navigating Behring Straits and the sea beyond them.

Mr. Justice HARLAN.—May I ask you, Sir Charles, whether you contend that the Ukase of 1821 was intended to close the open waters of Behring Sea, outside of the 100 miles, to navigation?

Sir CHARLES RUSSELL.—I certainly most distinctly say that that was its effect, whatever the intention was: it was the assertion of a right to do it.

The language of M. de Poletica is distinct. He says:

We have a right to treat it as a shut sea; it fulfils all the conditions of a shut sea;

916 He was asserting that there was only an intention to exercise territorial jurisdiction 100 miles from the land, apparently ignorant of the fact that the assertion of 100 miles from the land would make Behring Sea a closed sea. There can be no question about it, I think. It was so treated by the King's Advocate: it was so treated by Lord Stowell, whose authority of course is great. Both these lawyers treated it as an assertion of territorial dominion practically closing Behring Sea, and assuming dominion over Behring Sea. In fact, M. Poletica's explanation is clear. He says:—That is the extent of our right, but we do not intend to exercise it beyond 100 miles from the shore.

The PRESIDENT.—The language of M. de Poletica, and of the Minister of Foreign Affairs, Count Nesselrode, which you read yesterday, is very significant upon the point—that Russia asserted a right which they did not intend perhaps, to exercise, or press; but they asserted it, and were very eager in these Treaties not to bring into the discussion any question of principle.

Sir CHARLES RUSSELL.—There is no other part of that letter which I think is important. There is however one letter I should like to call attention to in the United States correspondence relative to the English Treaty. It is on page 152 of Volume 1 of the Appendix to the United States Case. Mr. Middleton is writing from St. Petersburg, and he is giving his views of the Treaty, which he knows has just then been concluded between Great Britain and Russia. He says:

I have the honor to acquaint you that a convention was signed yesterday by the Russian and British Plenipotentiaries relative to navigation, fisheries, and commerce in the Great Ocean, and to territorial demarcation upon the northwest coast of America. In a conversation held this day with Mr. Stratford Canning, I have learned this Treaty is modified in a degree upon that which was signed by me in the month of April last, and that its provisions are as follows, to wit:

The freedom of navigation and fishery throughout the great Ocean, and upon all its coasts; the privilege of landing at all unoccupied points; that of trading with the natives; and the special privileges of reciprocal trade and navigation secured for 10 years upon the northwest coast of America, together with the mutual restrictions prohibiting the trading in fire arms.

And so on. There is the view which Mr. Middleton expresses of the British Treaty.

Now let me emphasize this matter before I come to the Treaty itself, which, if it were not for the introduction of an enormous mass of collateral, and to a large extent irrelevant topics, I should, in the ordinary course, have gone to straight. But let me, before I come to the Treaty, briefly emphasize one or two points. It is, clear, first, that the United States, by the mouth of Mr. Adams, traversed the whole claim set up by Russia:—We can admit no part of this claim. That claim was an assertion of territorial right from the Behring Strait, along the coast south to 55 degrees of north latitude.

The attitude of Great Britain on the other hand, is equally emphatic, I might almost say more emphatic, because they say again and again,—There are two questions here involved—the question of territorial dominion on the mainland, and the assertion of territorial dominion on the sea: We regard the latter as the more important.

And what can be more emphatic than that note of the Duke of Wellington which I read yesterday, in which he says, in reference to the paper handed to him as an intended basis for negotiation: We cannot condescend to enter into negotiation upon the basis of a paper which claims this absurd pretension of jurisdiction 100 miles from the coast.

You recollect the memorandum I read yesterday.

We will not enter into a negotiation until that is removed from the area of discussion.

Thereupon we have the intimation given that the orders to cruisers will be confined to the coast; that nothing will be done that will call for objection; that the orders given by Russia to its cruisers will limit the effect of the Ukase to the distance from the shore recognized by general international law; and upon that basis the question proceeds.

Now I come to the Treaty itself, making my final comment, if I may be permitted to do so, in the shape of a question. Supposing Russia had said: We intend to confine this treaty to the south of the Aleutians as far as freedom of navigation is concerned, but we do not intend to budge one inch from our assertions of claim of dominion and jurisdiction in Behring Sea—What would have been the result? Is there any member of the Tribunal who has any doubt that there would have been an end of the negotiations altogether, and the question never could have been settled at all on the lines of the Treaty, because the Duke of Wellington says: I will not treat a paper as the basis of the negotiations in which that pretension is put forward.

Now I come to the Treaty, which, as I said, in an ordinary case I should have come to hours ago. I refer for convenience to the print of that Treaty in the first volume of the ^{Consideration of} Treaty of 1825. United States Appendix, page 39. It begins by reciting that the Powers are desirous—

By means of an agreement which may settle upon the basis of reciprocal convenience the different points connected with the commerce navigation and fisheries of their subjects in the Pacific Ocean:

Without any limitation.

As well as the limits of their respective possessions on the northwest coast of America.

Again without any limitation.

I answer the suggestion that that went up to Yakutat Bay, at 59° 30', by saying that there is no contemporaneous document in which any such limitation of the northwest coast is mentioned, while there are a great number—I have already read many of them, beginning with the Ukase itself—in which the northwest coast is described as beginning from Behring Straits and going down, according to the Russian claim, to 55° of north latitude.

918 Then it proceeds in Article I, in these words:

It is agreed that the respective subjects of the High Contracting Parties shall not be troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following Articles.

Is there any one Member of the Tribunal in whose mind there is the slightest doubt that in this Treaty (which was a Treaty to cover the whole area of the dispute, in order to settle once and for ever the pretensions of the Ukase of 1821 with its assertion of jurisdiction) it was intended by the use of the words "in any part of the Ocean commonly called the Pacific Ocean", to include Behring Sea? Is there the slightest doubt that it was not intended to exclude from that term "Pacific Ocean" a vast extent of sea measuring from north to south something like 1,400 miles and from east to west in its widest part something like 1,000 miles?

Now I go on to Article II, which says:

In order to prevent the right of navigating and fishing exercised upon the ocean by the Contracting Parties, from becoming the pretext for an illicit commerce, it is agreed that the subjects of His Britannic Majesty shall not land at any place where there may be a Russian establishment without the permission of the Governor or Commandant: and, on the other hand, that Russian subjects shall not land without permission at any British establishment on the north-west coast.

Then Article III, says:

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west, shall be drawn in the manner following.

I need not trouble the Tribunal to follow that line of demarcation, but the concluding words of the description are not unimportant. After describing the course of the line nearly up to the Arctic Ocean, the Article concludes with these words:

Shall form the limit between the Russian and British possessions on the continent of America to the north-west.

What does that mean except the north-west coast of America?

Then there is a stipulation as to the mode in which the inland boundary is to be drawn, namely, that it is not to exceed 10 marine leagues from the ocean, following the line of mountains where they do not exceed 10 marine leagues. Then it proceeds in Article V to say:

It is moreover agreed that no establishment shall be formed by either of the two parties within the limits assigned by the two preceding Articles to the possessions of the other; consequently British subjects shall not form any establishment

I call attention to this language—

either upon the coast or upon the border of the continent

that is the *lisière*—

919 comprised within the limits of the Russian possessions as designated in the two preceding Articles, and, in like manner no establishment shall be formed by Russian subjects beyond the said limits.

Then Article VI says:

It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the interior of the continent, shall for ever enjoy the right of navigating freely and without any hindrance whatever, all the rivers and streams which in their course towards the Pacific Ocean may cross the line of demarcation upon the line of coast described in Article III of the present Convention.

That clearly applies to the *lisière*; and it is a provision that, the crest of the mountains when they do not exceed 10 marine leagues from the coast being the dividing line, there is to be a right of navigation of rivers which would be the means of reaching the British possessions behind that 10-league strip, and therefore the stipulation is that for ever there shall be the right to navigate these rivers freely and without hindrance.

Now I go to Article VII. Article VI grants a perpetual right. Article VII is limited to a definite period. It says:

It is also understood that, for the space of ten years from the signature of the present Convention, the vessels of the two Powers, or those belonging to their respective subjects shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens and creeks on the coasts mentioned in Article III, for the purposes of fishing and of trading with the natives.

Therefore under that Article there is for a limited period of time a right given (even as to waters which would be according to law territorial waters) of user of such waters, and that extends along the whole of the coast mentioned in Article III. Really I feel that I should be wrong in dwelling too long on this matter; but there are one or two other things to which I must call attention.

The Tribunal will ask the question:—What position after this Treaty, and before the concession to the United States, did Russia in fact assume? Because of course the conduct of Russia will throw light upon its view of its obligations and its rights so far as they were based on that Treaty, or so far as they are affected by that Treaty, or so far as they existed according to general law. For that purpose I will refer the Tribunal to the British Case, and I would begin, (although I do not intend to read it all) at page 77, which gives a history of the various records, so far as we have got them, of tradings, which, up to 1824–1825 unquestionably were almost entirely south of the Aleutian peninsula. But I pass on, and I ask the Tribunal to follow the position taken up by the United States in the first instance in 1840 in the case of the “Loriot”. This vessel undoubtedly was seized or ^{Position assumed by United States in the case of “Loriot”.} interfered with in a position south of the Aleutians, and somewhere in the neighbourhood of Sitka. But we have

920 got the views taken, at that time, by Mr. Forsyth (who was then the Secretary of State), of the effect of the Treaty of 1824. At page 80 an excerpt is given from a letter to Mr. Dallas. It is in these words:

On the other hand, should there prove to be no Russian Establishments at the places mentioned, this outrage of the “Loriot” assumes a still graver aspect. It is a violation of the right of the citizens of the United States, immemorially exercised, and secured to them as well by the law of nations as by the stipulations of the 1st article of the convention of 1824, to fish in those seas and to resort to the coast, for the prosecution of their lawful commerce upon points not already occupied. As such it is the President's wish, that you should remonstrate in an earnest and respectful tone against this groundless assumption of the Russian Fur Company, and claim from His Imperial Majesty's Government for the owners of the brig “Loriot”, for their losses and for the damages they have sustained, such indemnification as may, on an investigation of the case, be found to be justly due to them.

Mr. Dallas himself, wrote on the 16th August in these terms:

The 1st article asserts for both countries general and permanent rights of navigation, fishing, and trading with the natives, upon points not occupied by either north or south of the agreed parallel of latitude—

without any limitation at all.

Then Mr. Forsyth writes to Mr. Dallas on the 3rd November, referring to the same Article. He says:

The 1st Article of that instrument is only declaratory of a right which the parties to it possessed under the law of nations, without conventional stipulations, to wit, to navigate and fish in the Ocean upon an unoccupied coast, and to resort to such coast for the purpose of trading with the natives.

.....
 The United States, in agreeing not to form new establishments to the north of latitude of 54° 40' N., made no acknowledgment of the right of Russia to the territory above that line.

So far as the United States is concerned probably that may be correct; I do not stop to criticise that. Then he goes on:

It cannot follow that the United States ever intended to abandon the just right acknowledged by the 1st Article to belong to them under the law of nations—to frequent any part of the unoccupied coast of North America for the purpose of fishing or trading with the natives. All that the Convention admits is an inference of the right of Russia to acquire possession by settlement north of 54° 40' N. Until that actual possession is taken, the 1st Article of the Convention acknowledges the right of the United States to fish and trade as prior to its negotiation.

Then in his despatch of the 23rd February, 1838, Count Nesselrode says:

It is true, indeed, the first Article of the Convention of 1824, to which the proprietors of the "Loriot" appeal, secures to the citizens of the United States entire liberty of navigation, in the Pacific Ocean, as well as the right of landing without disturbance upon all points on the northwest coast of America not already occupied, and to trade with the natives.

Again, Mr. Dallas wrote to Count Nesselrode on the 5th (17th) March 1838, and in that he interprets the Convention as applying to any part of the Pacific Ocean. He says:

The right of the Citizens of the United States to navigate the Pacific Ocean, 921 and their right to trade with the aboriginal natives of the north-west coast of America, without the jurisdiction of other nations, are rights which constituted a part of their independence as soon as they declared it. They are rights founded in the law of nations enjoyed in common with all other independent sovereignties, and incapable of being abridged or extinguished except with their own consent.

Then he proceeds to argue the question; but I do not think I need trouble the Tribunal to read the whole of that, although I do not mean to suggest it is not important; but it looks like piling up a mass of argument upon a point which we have to submit is exceedingly clear.

Somewhere between 1835 and 1845 the whaling industry seems to have become very important. Whalers undoubtedly had penetrated to Behring Sea, and accordingly you will find at the bottom of page 83 this statement:

At this time—
that is in 1840:

whalers were just beginning to resort to Behring Sea; from 1840 to 1842 a large part of the fleet was engaged in whaling on the "Kadiak Grounds". Writing in 1842, Etholen says, that for some time he had been constantly receiving reports from various parts of the Colony of the appearance of American whalers in the neighborhood of the shores.

In the same year Etholen relieved Kuprianof as Governor at Sitka.

In 1841 the Charter of the Russian American Company was renewed for a further term of twenty years. Etholen reported the presence of fifty foreign whalers in Behring Sea.

I hope the importance of this is appreciated—whaling is one of the things expressly mentioned in the Ukase. There is no restriction in the Treaty to any kind of fishing; it is general and without qualification. Then at the bottom of page 83 you will find this:

In 1842, according to Etholen, thirty foreign whalers were in Behring Sea. He asks the Russian Government to send cruisers to preserve this sea as a *mare clausum*.

His efforts were, however, unsuccessful, the Minister for Foreign Affairs replying that the Treaty between Russia and the United States gave to American citizens the right to engage in fishing over the whole extent of the Pacific Ocean.

The reference to that is given.

Mr. Justice HARLAN.—Who is Etholen?

Sir CHARLES RUSSELL.—He was at that time Governor of Alaska.

Then it proceeds:

In the same year, inland explorations by Zagoskin, which continued till 1844, began. Sir George Simpson, Governor of the Hudson's Bay Company, reached the Stikine post just in time to prevent an Indian uprising. He also visited the Russian establishment at Sitka, and completed an arrangement between the Companies to interdict trade in spirits on the coast.

Lord HANNEN.—You were about, Sir Charles, to tell us where that statement is. I am referring to the bottom of page 83.

Sir CHARLES RUSSELL.—It is in Bancroft's History of Alaska, page 583.

922 Lord HANNEN.—I mean the sentence with reference to the Minister for Foreign Affairs.

Sir CHARLES RUSSELL.—That will be found in the citations lower down.

Lord HANNEN.—That is what I want to get.

Sir CHARLES RUSSELL.—It is in Bancroft, who is an American author, as probably you are aware. Then it goes on to say:

About this time the Russian American Company became alarmed at the danger to their fur trade. Every effort was, therefore, put forward by the Company and the Governors to induce the Foreign Office of the Russian Government to drive off these whalers from the coasts, and by excluding them for a great distance from shore prevent trespasses on shore and the traffic in furs.

At this time pelagic sealing, although it is admitted to have been carried on from time immemorial—I mean from the coasts, by the natives—probably, had not assumed very large proportions; and apparently the American subjects and the British subjects, and others, were doing what, at another period, the Americans had done in the Falkland Islands, namely, making descents on the islands themselves, and taking seals in that way, which they had no right from any point of view to do; and accordingly the suggestion is here made, that in order to prevent raids the Russian Government should authorize the driving of these whalers off the coasts.

Then it proceeds to say:

In 1843 explorations were carried out by the Russian on the Sutchina and Copper Rivers.

The whalers from 1843 to 1850 landed on the Aleutian and Kurile Islands committing depredations. United States captains openly carried on a traffic in furs with the natives. Tikhmenieff writes, From 1843 to 1850 there were constant complaints by the Company of the increasing boldness of the whalers.

This is an extract from a historical review of the formation of the Russian American Company and their proceedings, written by Tikhmenieff, a Russian chronicler. It is referred to on page 40 of volume 1 of the Appendix to the British Case.

I am also reminded in this connection that the United States Counter Case, on page 24, refers to this enumeration of historical facts by us, and says:

Later, however, especially in the years following 1840, Behring Sea was actually visited, as pointed out at pages 83 to 90 of the British Case, by numerous vessels, mostly whalers.

Of course, the point of this is to see what, if anything, Russia did. That is the point which I am now coming to. I now read from page 84 of the British Case.

In 1846 the Governor General of Eastern Siberia asked that foreign whalers should not be allowed to come within 40 Italian miles of the Russian shores.

Tikhmenieff thus describes the result of these representations:

The exact words of the letter from the Foreign office are as follows:

923 The fixing of a line at sea within which foreign vessels should be prohibited from whaling off our shores would not be in accordance with the spirit of the Convention of 1824, and would be contrary to the provisions of our Convention of 1825 with Great Britain. Moreover, the adoption of such a measure, without preliminary negotiation and arrangements with the other Powers, might lead to protests, since no clear and uniform agreement has yet been arrived at among nations in regard to the limit of jurisdiction at sea.

In 1847 a representation from Governor Tebenkof in regard to new aggressions on the part of the whalers gave rise to further correspondence. Sometime before, in June 1846, the Governor General of Eastern Siberia had expressed his opinion that, in order to limit the whaling operations of foreigners, it would be fair to forbid them to come within 40 Italian miles of our shores, the ports of Petropanlovsk and Okhotsk to be excluded, and a payment of 100 silver roubles to be demanded at those ports from every vessel for the right of whaling. He recommended that a ship of war should be employed as a cruiser to watch foreign vessels.

Now there is a distinct claim addressed to the Government for protection. This is the answer:

The Foreign Office expressly stated as follows in reply:

This is again a textual quotation.

We have no right to exclude foreign ships from that part of the Great Ocean which separates the eastern shore of Siberia from the northwestern shore of America, or to make the payment of a sum of money a condition to allowing them to take whales.

What was that sea which is part of the Great Ocean unless it was the Behring Sea—that part of the Great Ocean which separates the eastern shore of Siberia from the north-western shore of America? May I call the attention of the Tribunal to the map? What is the sea that separates Siberia, on the one hand, from the north-west coast of America on the other, unless it is the Behring Sea; and what is the Great Ocean of which that intervening sea is described as part unless it is the Great South Sea, or the Pacific Ocean? The language is indubitable and unmistakable.

Tikhmenieff continues,

The Foreign Office were of opinion that the fixing of the line referred to above would re-open the discussions formerly carried on between England and France on the subject. The limit of a cannon-shot, that is, about three Italian miles, would alone give rise to no dispute. The Foreign Office observed in conclusion, that no Power had yet succeeded in limiting the freedom of fishing in open seas,

that is literally, historically true;

and that such pretensions had never been recognized by the other Powers. They were confident that the fitting out of colonial cruisers would put an end to all difficulties; there had not yet been time to test the efficacy of this measure.

That is with reference to preventing raiding upon the islands and coasts. Then there is another statement there with further details, bringing it down to a later period.

The PRESIDENT.—Is the authority of this official gentleman acknowledged by the other party?

924 SIR CHARLES RUSSELL.—Yes, I thought I read a moment ago a passage in which, referring to the very pages I am reading from (pages 83 to 90)—the United States referred to these quotations in our Case.

The PRESIDENT.—I mean the quotations from the Russian official documents?

SIR CHARLES RUSSELL.—Yes, I thought the Tribunal would have appreciated my reference. I referred to page 24 of their Counter-Case,

in which, referring to the very passages I have been reading, they make this comment

Later, however, especially in the years following 1840, Behring Sea was actually visited, as pointed out at pages 83 to 90 of the British Case, by numerous vessels, mostly whalers, but it is shown by Bancroft, the author so frequently quoted by the British Government, that the whaling industry was not for the Russians a profitable one.

And this is their comment :

General FOSTER.—Would it be convenient for you to read page 255.

Sir CHARLES RUSSELL.—I will, if you like.

General FOSTER.—I should be glad if you would, in view of the President's enquiry, because it shows that we contradict distinctly the quotations, made.

Sir CHARLES RUSSELL.—I will read it if you wish. It says here:

But it is shown by Bancroft, the author so frequently quoted by the British Government, that the whaling industry was not, for the Russians, a profitable one, and there appears to have been no motive for protecting that industry by the imperial Ukase of the colonial government.

That is all the comment that is made so far. Then it goes on:

Bancroft is also referred to in the British Case (pp. 83 and 84) to show that in 1842 the Russian Government refused Etholin's request that Behring Sea be protected against invasions of foreign whalers, on the ground that the Treaty of 1824 between Russia and the United States gave to American citizens the right to engage in fishing over the whole extent of the Pacific Ocean. From what is said, however, by this same author immediately following the above citation, it appears that, through the endeavours of Etholin the Government at length referred the matter to a committee composed of officials of the navy department, who reported that the cost of fitting out a cruiser for the protection of Behring Sea against foreign whalers would be 200,000 roubles in silver, and the cost of maintaining such a craft 85,000 roubles a year. To this a recommendation was added that, if the company were willing to assume the expenditure, a cruiser should at once be placed at their disposal. Hence, according to Bancroft, the failure to protect Behring Sea can not be traced to the fact that the Russian Government considered it had lost the right to do so by the treaties of 1824 and 1825.

General FOSTER.—It was a question of money, not of right.

Sir CHARLES RUSSELL.—Could any thing be more absurd than this comment, which is gravely referred to as a comment impugning the accuracy of the excerpts from these official accounts? Where is the suggestion that these accounts are not accurate? What there is here is a suggestion that the failure to protect Russian rights was

925 owing to the fact that it would be too expensive to do it. That is the only suggestion that is made on this page.

General FOSTER.—Bancroft says so.

Sir CHARLES RUSSELL.—If he said so, it is cited in your case.

General FOSTER.—Quoting from your own author.

Sir CHARLES RUSSELL.—I think there must be a limit to these interruptions. I have gratified you so far, and have been pleased to be able to gratify you, because it is a strong point in favour of what I have been addressing the Tribunal upon. I have read the pages from the letters of the Foreign Minister in which he said: We have no right to do it: it will re-open the question between the British Government and the Government of America if we attempt to do it.

The PRESIDENT.—Is that all, General Foster, you wish to be read from the Counter-Case under the present circumstances?

General FOSTER.—As it appears the interruption is unwelcome, I will reserve it.

Sir CHARLES RUSSELL.—I assure you, it is not unwelcome—my friend is quite wrong. If I am reading anything, and there is any-

thing else which explains its meaning or puts a different meaning on it, I shall always be willing to read it; but really to make this a foundation for stating that the United States had impugned the accuracy of our quotations, I must say, is absurd.

General FOSTER.—I understood Counsel just now to remark that he has read an authoritative declaration from the Russian Minister. He will find that he read it from a historian.

The PRESIDENT.—That is quoted from the Foreign Office. It is in inverted commas.

Sir CHARLES RUSSELL.—I beg General Foster's pardon. It may be my fault, but I thought I read "Tikhmenieff thus describes the result of these representations"; and then he proceeds to say: "The exact words of the letter from the Foreign Office were as follows". Then the words are given in inverted commas. Then on the next page—I have no doubt I was not expressing myself with sufficient clearness—he goes on in inverted commas to say "The Foreign Office expressly stated as follows in reply:

We have no right to exclude foreign ships from that part of the Great Ocean which separates the eastern shore of Siberia from the north-western shore of America, or to make the payment of a sum of money a condition to allowing them to take whales.

Lord HANNEN.—Have you got "Baneroft" here? I do not mean in the room, but for reference.

Sir CHARLES RUSSELL.—We have. It is quite available, and I can send for it at any moment.

Now, I am loth to make a reference to a subject not pleasant to either of us, and I will content myself with saying that certain of those falsified documents relate to the period after the Treaties, 926 and consist, in large part, of interpolations suggesting that there had been interference by Russia, which would have been inconsistent with its true action as we now know it to be. I content myself with saying that. They begin at page 60 of the original Case, and go on. I do not enlarge upon it.

Then there is one other thing I must say in this connection, and I think it brings this matter practically to a conclusion. After the Ukase of 1821, there were two confirmatory Charters granted to the Russian-American Company, and the significant change in the language of those Charters, compared with the original Charter under the Ukase of 1821, is itself significant and conclusive upon the point upon which I am addressing you.

In order that this point may be appreciated, let me invite your attention to volume I of the United States Appendix, at page 16, to look at what the terms of the original Ukase were.

The pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs, including the whole of the northwest coast of America, beginning from Behring Straits to the 51° of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South cape of the Island of Urup, namely, to the 45° 50' northern latitude, is exclusively granted to Russian subjects.

That is the 4th of September, 1821. There are provisions, as you will recollect, for the confiscation of vessels that come within the limits there set out. The Charter of 1821 is on page 24, and it concedes to the Company the privilege of hunting and fishing, to the exclusion of all other Russian or foreign subjects, throughout the territories long since in the possession of Russia, and then it describes the extent of those territories in much the same language. Now, if you turn to

page 27, you will find the document at the bottom of that page headed, "Confirmation of Charter of 1821". This confirmation was, in fact, published by the Senate on March 29th (April 10th) 1829, five years after the Treaty with the United States, and four years after the Treaty with Great Britain. If Russia was acting, as we assume she was, in good faith in the matter, you would expect to see a recognition of these Treaties, and of the fact of limiting the rights which could be properly granted to the different subjects, and, accordingly, you do find it on page 28.

The limits of navigation and industry of the Company are determined by the treaties concluded with the United States of America 5 (17), 1824, and with England February 16 (18), 1825.

In all the places allotted to Russia by these Treaties there shall be reserved to the Company the right to profit by all the fur and fish industries, to the exclusion of all other Russian subjects.

You see the change at once. Then comes Article VII.

All the articles of these rules and of the privileges published together with them, which are not limited by the aforesaid Treaties, and which are not contrary to the Ukase of October 14th, 1827, concerning entrance into service, shall remain in full force.

Therefore, it is the clearest recognition that they had no longer
927 the right to exclude foreigners from the pursuit of fishing, because the power in the first was exclusive of all other Russian and of all foreign subjects. In the confirmatory Charter of 1829, it is Russian subjects only; and the powers granted to Russian subjects are to be determined and limited by the effect of those Treaties.

Mr. Justice HARLAN.—Do you construe that to mean that Russia intended foreign subjects to profit in the fur and fish industries which would otherwise belong to Russia?

Sir CHARLES RUSSELL.—No; I have said nothing that would bear that meaning. In the Treaty, so far as there were exclusive rights given, of course, she had a right to deal with them; but I deal with the one point only, and do not want to be led away to others, of the recognition of the right of the subjects of Great Britain and of the United States to fish in the Behring Sea; that under the terms of the Charter of 1821, six days after the date of the Ukase, in the whole area, embracing and including Behring Sea, there was an exclusion of all foreign subjects and of all Russian subjects; but, in the confirmatory Charter of 1829, there is the omission of the exclusion, as far as the Treaty affects the area, of foreign subjects altogether.

Mr. Justice HARLAN.—I think I ought to say that I have no desire to lead Counsel to other subjects; my only wish was to follow out the matter to which he referred, as I supposed.

Lord HANNEN.—And I am bound to say I have the same difficulty as Mr. Justice Harlan. That is plainly confined to the exclusion of all Russian subjects in places allotted to Russia.

Sir CHARLES RUSSELL.—Clearly.

The PRESIDENT.—The ten-year clause, I suppose.

Sir CHARLES RUSSELL.—Yes. May I respectfully beg Mr. Justice Harlan's pardon; I am sure I did not mean to convey that I did not desire the question to be put. I thought I had made my meaning clear.

So in the Confirmatory Charter of 1844, on page 28, dated the 10th of October, 1844, Article II says.—

The limits of the navigation and trade of the Company on the shore of the Continent and on the Islands of Northwestern America,——

and it repeats the course of the line of demarcation in the Treaty between Great Britain and Russia; and then, in section 3, it provides:

In all places annexed to Russia by the above-mentioned delimitation there is granted to the Company the right to carry on the fur and fishing industries to the exclusion of all Russian subjects.

I do not think there is anything else in that which it is important to draw attention to.

Now, I have practically dealt with both branches of Article I. The Tribunal will observe that it contains two divisions: first, what exclusive jurisdiction in the sea known as Behring Sea did Russia 928 assert and exercise, and what exclusive rights in the seal-fisheries did Russia assert and exercise? I have incidentally, of course, addressed myself to both questions. I want to say one word, however, about the question of the exclusive right in the seal fisheries.

Mr. Justice HARLAN.—Before you go to that, Sir Charles, let me make one enquiry so that I may get your view fully.

We are required in the first question to answer what exclusive jurisdiction Russia asserted and exercised. If I remember rightly, both M. de Poletica in his letter to Mr. Adams, and Baron Nicolay in his letter to Lord Londonderry or Count Lieven, said that Russia, if it deemed proper, could declare the whole of the Ocean, the Pacific Ocean, *mare clausum*; but they did not intend by such Ukase to assert any such right, but only limited their declaration to particular localities. Now, do you contend that in answering that question we should regard this announcement of Russia of its right, if it thought proper, to exercise this exclusive jurisdiction over these waters, as an assertion within the meaning of the Treaty?

Sir CHARLES RUSSELL.—Certainly, an assertion.

Lord HANNEN.—But not an exercise?

Sir CHARLES RUSSELL.—But not an exercise. I will formulate in precise language what we submit ought to be the answers to each of these four questions.

I was saying a word about what exclusive rights in the seal-fisheries did Russia assert and exercise. Upon this there does not seem to be any room for question. Russia was the territorial owner

of the Pribilof Islands. Russia exercised the rights of territorial ownership upon those Islands, and had the rights, whether she exercised them or not I know not and care not, but the right to exercise them exclusively of all

other persons and Powers, not only on the Islands, but within 3 miles of the coast of the Islands. There is no suggestion that Russia, as regards the seal fisheries, made at any time any assertion greater than or different from the assertion which she would be justified in making as territorial owner. I find none. My learned friends would answer that, and, as I conceive, quite rightly, by saying that there was no need for her to assert any right outside, because pelagic sealing had not got to such dimensions as to call for her interference. That I do not propose to deal with at this stage of the argument at all, because it would embrace the more wide and general question of what right she could have asserted in point of fact, which is not the point touched by question 1. It is not the question of what right she had in fact, it is what right she asserted and exercised. I will consider whether she could have any right. Of course, the Tribunal knows I assert that she could not, except the rights that belong to her as territorial owner,—rights *ratione soli*; the exclusive right to take what was upon her territory, the right to exclude anybody else from that territory; and a similar

Nature of the exclusive right in the seal fisheries exercised by Russia.

right extending to the maritime belt of three miles beyond her territory.

929 Senator MORGAN.—As to that marginal belt, I understood you to say a moment ago that Russia at that time said that the Nations had not agreed to the 3-mile limit as a matter of international law.

Sir CHARLES RUSSELL.—In order that the Tribunal may follow this exactly, I will repeat the question that you, Sir, have been good enough to address to me in relation to my limitation of the 3-miles on the coast: you suggest to me that, in one of the communications from Russia, it had been stated that the 3-mile marginal belt was not then determined, or fixed or universally agreed upon limit of territorial waters.

I think there is truth in that suggestion. It was, to a greater or less extent, indeterminate. It was I think generally fixed at the length to which cannon-shot could be carried, and that may have varied more or less; but it is quite true to say that at that time it was not quite clearly fixed, whether it was 3 miles, or 4 miles, or 5 miles, but beyond that there was no difference. There was a certain marginal belt, the precise limit of which has in later years come to be recognized at 3 miles, or a marine league.

The PRESIDENT.—It has no relation to our subject, and perhaps it would be better not to press that question too tightly even to-day.

Sir CHARLES RUSSELL.—No, because as the power of arms is increased, it may be the application of that principle *terra dominium finitur ubi finitur armorum vis* may receive a greater expansion. It is not a question, I would venture to say, that need trouble us. It is admitted that there is a marginal belt which to-day may be indeterminate, but indeterminate only within narrow and confined limits.

Senator MORGAN.—Then, I take it, it was entirely indefinite how far Russia claimed at that time jurisdiction in a territorial sense in Behring Sea.

Sir CHARLES RUSSELL.—Do you mean before or after the Ukase?

Senator MORGAN.—At that time.

Sir CHARLES RUSSELL.—There is a great difference. It is clear that by the Ukase if that had been persisted in she claimed territorial jurisdiction over the whole of Behring Sea. As I have pointed out she was insisting on 100 miles from the land, which 100 miles from the land would have shut Behring Sea and made it a *mare clausum*.

Mr. Justice HARLAN.—May not that throw some light on the fact, which struck me in the correspondence, that Mr. Canning did not at any time mention the Behring Sea or the Sea of Kamschatka, but seemed to have constantly in his mind keeping open Behring Straits, because if the 100-mile limit was enforced that would close Behring Strait. Of course he must have proceeded on the ground that Russia disclaimed any purpose of keeping foreign vessels out of the open waters of Behring Sea. They could not get out to the Arctic Ocean unless Behring Straits were open.

Sir CHARLES RUSSELL.—With deference that is not what the correspondence shews, because the question of Behring Straits being
930 closed comes up in relation to a different subject—the access to the Arctic Ocean beyond it.

Mr. Justice HARLAN.—Mr. Canning said—We cannot get to the Arctic Ocean with vessels of discovery unless we go through Behring Straits.

Sir CHARLES RUSSELL.—True he uses the reference in a very significant way. He says the Power that could propose to itself the notion of treating the Pacific Ocean as *mare clausum* might think it right to close Behring Straits, which is only 48 miles wide. That the Ukase

involved the assertion of territorial dominion over Behring Sea is made apparent also by the statement of M. Poletica justifying the Ukase on the ground that they were entitled to treat it as a *mare clausum, mer fermée*, but they did not intend to push their rights to that length, losing sight of the fact that pushing their rights of sovereignty to 100 miles from the coast did, it was insisted on, effectually close Behring Sea up. And that that was a claim of territorial sovereignty is clear from the opinion of the King's Advocate, which I read, and also the more important opinion of Lord Stowell, that a right to prevent people coming over any land covered by water is necessarily an assertion of territorial dominion over that water.

Mr. Justice HARLAN.—The language of Lord Stowell is, the territories claimed are of different species, islands, portions of the Continent, and large portions of the sea adjoining.

Sir CHARLES RUSSELL.—Quite right, Sir, and Behring Sea would be a very large portion of the sea adjoining, and that would make the point stronger. He was regarding it as 100 miles from the coast. He says that is territorial jurisdiction over 100 miles from the coast.

Mr. Justice HARLAN.—I do not say you are not right; I only wanted to see what your view was.

Sir CHARLES RUSSELL.—I do not think it could be contended by the other side that, if a Power asserts an exclusive right to possession of a certain area of land covered by water, and says, we have the right to exclude anybody else from coming in that area, that that is anything but an assertion of territorial jurisdiction over that area.

Mr. CARTER.—My argument was distinctly the other way.

Sir CHARLES RUSSELL.—I confess, it astonishes me to hear it.

Mr. CARTER.—I only seek to correct a misapprehension.

The PRESIDENT.—And of course it is correct for Counsel to acknowledge that they did not argue the point in that way. I think they stand on the same ground as you do. They do not argue the point of jurisdiction as to the first question. [To Mr. Carter] I do not understand in your argument you called upon us to decide that the rights claimed or exercised by Russia were rights of territorial jurisdiction.

Mr. CARTER.—We do not. The interpretation that I put in my argument on the Ukase was that it was not an assertion of territorial dominion over the sea, but a mere assertion of a right to protect a shore industry by protective measures stretching over the sea.

Sir CHARLES RUSSELL.—Then we agree as to the first question.

931 The PRESIDENT.—It is a relief to us to believe you do. You do not deny historically, that is as a point of history, that Russia asserted these territorial rights of jurisdiction, which, upon my impression at first sight (though I do not express any definite opinion of my own) according to the despatches of M. de Poletica and Baron Nicolay and Count Nesselrode, seem to be expressly reserved by Russia.

Mr. CARTER.—I do not quite understand the suggestion of the learned President.

The PRESIDENT.—In the diplomatic despatches of M. de Poletica and Baron Nicolay and of Count Nesselrode, the Minister of Foreign Affairs, the Russians declared that they might have the right of considering the sea between the two coasts of Asia and America, that is to say, not only Behring Sea but a great portion of the North Pacific Ocean, as being a *mare clausum*; that is to say, a sea on which they have the rights of territorial sovereignty. I say you did not touch that point in your argument.

Mr. CARTER.—I said in reference to that, that while they declared that they might have asserted that right, they expressly declared, or

what I understood as expressly declared, that they did not intend to assert it; that the measure was designed as a preventive one. That is to say, it was as I understood it for the purpose of protecting a shore industry; that they did not intend to assert territorial dominion over Behring Sea, although they said they might assert it.

The PRESIDENT.—That they might assert it if they chose to do so?

Mr. CARTER.—If they chose to do so; but that they did not choose to assert it by the Ukase.

The PRESIDENT.—There is some doubt as to the use of the word “assert”. I think you use the word “assert” in a different meaning from what Sir Charles does.

Mr. CARTER.—They said they might assert it, and assert it right-fully. There is no doubt about that.

The PRESIDENT.—They did not mean to exercise it?

Mr. CARTER.—They did not mean even to assert it.

Sir CHARLES RUSSELL.—Mr. President, there is a latent ambiguity in my friend’s statement which must be cleared up. I began, in order to avoid that ambiguity, by giving to this Tribunal what I conceived to be the meaning of that first question, in order to show that when “right” and “exclusive jurisdiction” were there referred to, it did not mean the general inherent right which a nation has to protect its property or its interests, which I will discuss hereafter, but that the question was pointed to whether Russia had asserted and exercised territorial jurisdiction.

Let me recur to that point, which I now see I was quite right in endeavouring to make clear at the beginning of the discussion. I pointed out that a right of defence of property or interest was not an exclusive right. The word in the question is “exclusive”. I pointed out further that still less was it an exclusive right of jurisdiction 932 in a defined area, because I pointed out that a right of defence or protection of property or interest knew no circumscription of space except where the property to be defended was, where the interest to be defended was. I was not then discussing whether there were the rights which my learned friend professes exist in that regard. I was assuming them for the moment. Thereupon I proceeded to point out, and I hope established, that what the question meant was whether Russia had or had not asserted a sovereign authority exclusive of all other persons, and in a defined and definite area, namely, Behring Sea; and I made that out—at least I thought I made it out—by saying that the case of the United States had been built up on that theory by the use, amongst other things, of these documents which have proved to be unreliable. I made that out by showing the legislative enactments of the United States Congress, based upon its derivative title. I further made that out by the mode in which they have invoked that municipal authority, as a municipal authority exercisable in a definite area. And finally I made that out by the libel in the Court; by the argument of their counsel; by the argument before the Supreme Court at Washington, and by the appreciation of that argument and position as expressed by the Judges of that High Court.

The PRESIDENT.—That is perhaps more of historical than of practical interest to the question which is laid before us.

Sir CHARLES RUSSELL.—I think myself it is important, as I take the liberty of saying, because of its far-reaching consequences. My argument has been, from first to last, that every one of these assertions up to the time we came into Court—practically every one of these assertions—is based on the territorial claim of the United States: question

five as well as questions one, two, three, and four. But I do not wish to anticipate. The point I am upon is this: you have, with great deference, to answer the question in the sense in which you understand that question; and the sense in which that question is to be understood, I am respectfully submitting, is that the Tribunal is asked to say whether Russia asserted and exercised—and I repeat my words, asserted and exercised—territorial or sovereign authority, exclusive of all other persons, in the Behring Sea. That is the question to which you have to make your answer.

The PRESIDENT.—Certainly; one of the questions.

Sir CHARLES RUSSELL.—As to the question of exclusive rights in the seal fisheries, I have already dealt with that, and I cannot see that there is much room for discussion or difference between us. There is no suggestion that Russia either asserted or exercised any rights in relation to seal fisheries other than those that belonged to her, *ratione soli*, as owner of the Pribilof Islands.

Mr. Justice HARLAN.—The difference between counsel, then, in respect to this finding, I understand to be this: You assert that Russia, in these different ways you have pointed out, did assert, within the meaning of that question, exclusive jurisdiction in the whole of 933 Behring Sea by this Ukase. On the other side, it is contended that Russia did not assert such exclusive jurisdiction by that Ukase, but expressly disclaimed a purpose to assert it.

Sir CHARLES RUSSELL.—So I understand. But again, Judge, with great deference, that statement illumines the point with which the Tribunal must still deal, as to what is the meaning of the question.

Mr. Justice HARLAN.—I understand that.

Sir CHARLES RUSSELL.—And my point is—and I submit I have demonstrated it—that when “exclusive jurisdiction” is spoken of, it means exclusive jurisdiction in Behring Sea; and an exclusive jurisdiction in Behring Sea means exclusive jurisdiction in a particular and defined area; and that exclusive jurisdiction in a particular and defined area means territorial or sovereign jurisdiction, and nothing else. Of course if I am to argue the question again as to what the Ukase meant, I should have to go over the ground with which you are very familiar.

Mr. Justice HARLAN.—I think we all understood your argument.

Sir CHARLES RUSSELL.—That I am not going to do; but how it can be contended that when it is stated in the Ukase of 1821,

the pursuits of commerce, whaling and fishery, and of all other industry on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Behring Straits to the 51st degree of Northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring Strait to the South Cape of the Island of Urup, viz, to the 45 degree 50 minutes northern latitude, is exclusively granted to Russian subjects:—

and when in furtherance of that exclusive grant it is prohibited to all foreign vessels to approach within less than one hundred Italian miles, subject to confiscation:

How those two, taken together, can be anything less than, or different from, an assertion of territorial sovereignty, with a sanction to support that territorial sovereignty, passes my comprehension. And that was the case originally made by the United States. I will leave the subject by citing one more passage from their Case, page 69. This makes it apparent, unless I am greatly mistaken. It is near the top of page 69:

From the foregoing historical review it appears:

First. That prior and up to the date of the Treaties of 1824 and 1825, Russia did assert and exercise exclusive rights of commerce, hunting and fishing, on the shores and in all the waters of Behring Sea.

Second. That the body of water known as Behring Sea was not included in the phrase "Pacific Ocean" as used in the Treaty of 1825.

What does that mean? It means that there was nothing in those Treaties which interfered with Russia's assertion and exercise of exclusive rights in Behring Sea mentioned in paragraph one.

Third. That after said Treaty of 1825, the Russian Government continued to exercise exclusive jurisdiction over the whole of Behring Sea up to the time of the cession of Alaska, in so far as was necessary to preserve to the Russian-American Company the monopoly of the fur-seal industry, and to prohibit the taking on the land or 934 in the water by any other persons or companies the fur-seals resorting to the Pribilof Islands.

As I have pointed out, there is not a trace of evidence which relates to the question so far as fur-seals are concerned.

But here again my learned friend Mr. Carter, as I respectfully think, is confusing the motive of this attempted legislation by Russia with the effect. The motive may have been to protect this, that or the other; but the fact was that it asserted territorial sovereignty.

I will bring out my meaning, in concluding this branch of the question, by formulating precisely the answers which I submit the Tribunal ought to give to these four questions. They are formulated with some care and at length at page 26 of our printed Argument:

The foregoing facts and arguments, it is submitted, conclusively establish that the following answers should be given to the first four questions in article 6 of the Treaty of Arbitration.

To question one. That Russia exercised no exclusive jurisdiction in Behring Sea prior to 1867; that in 1821 only, Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

Mr. Justice HARLAN.—What do you mean by the phrase there, "over a part of Behring Sea"?

Sir CHARLES RUSSELL.—That is the hundred miles which is mentioned in the Ukase. We might have treated M. Poletica's letter as an assertion of authority over the whole of Behring Sea, and I think we should have been well founded in doing so; but we preferred to take the legislative act, which speaks of one hundred miles.

Mr. Justice HARLAN.—I do not understand that answer to include the idea that Russia asserted exclusive jurisdiction over the whole of Behring Sea by the Ukase of 1821.

Sir CHARLES RUSSELL.—I do not think it necessarily means that. What the framers of these answers have done is this: They might according to the statement of M. de Poletica, or according to the effect of the Ukase, perhaps have been justified in adopting the claim of dominion over the whole of Behring Sea; but what they have been content with doing was to rely upon the legislative act itself, the Ukase: and as the Ukase made the limit of 100 miles, to state that in the terms of the Ukase itself. I say therefore that this is literally the correct answer to question one:

That in 1821 only Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

That Russia exercised no exclusive rights in the seal fisheries in Behring Sea prior to 1867; that in 1821, only, Russia claimed exclusive rights, as included in her claim of jurisdiction extending to 100 miles from the coast, but that she withdrew the assertion and never afterwards asserted or exercised such rights. The only exclusive right which Russia subsequently exercised was the right incidental to her territorial ownership.

To question two. That Great Britain neither recognized nor conceded any claims by Russia of jurisdiction as to the seal fisheries, i. e., either (a) of exclusive 935 jurisdiction in Behring Sea, or (b) exclusive rights in the fisheries in Behring Sea, save as already mentioned.

That is to say, saving the rights incidental to territorial ownership.

To question three. That Behring Sea was included in "Pacific Ocean" in the Treaty of 1825; that Russia neither held nor exclusively exercised any rights in Behring Sea after the Treaty of 1825, save only such territorial rights as were allowed to her by international law.

To question four. That no rights as to jurisdiction or as to the seal fisheries in Behring Sea east of the water boundary in the Treaty between the United States and Russia of the 30th March 1867, passed to the United States under that Treaty, except such as were incidental to the islands and other territory ceded.

Those are the answers which we say we have by the argument that I have submitted established as the correct answers to be given to each of these four questions.

Senator MORGAN.—There are seven or eight answers there to four questions, as I understand it.

Sir CHARLES RUSSELL.—As a matter of fact there are four answers to four questions. There is the precise number of answers to the precise number of questions.

Now, sir, I have, I am happy to say, got to the end of that; and I really feel—or I did feel until my friend's interposition—that I ought to offer an apology for taking so long to demonstrate what we humbly submit is very easily made clear.

The PRESIDENT.—We will come next to the fifth question.

Sir CHARLES RUSSELL.—Yes, Sir.

The Tribunal here adjourned for a short time.

THE FIFTH QUESTION.

Sir CHARLES RUSSELL.—Mr. President, I now proceed to address myself to the consideration of what the answer of the Tribunal ought to be to the 5th question of Article VI; and in order to assist the Tribunal in formulating that answer, it is obviously necessary, in the first place, as I have thought it necessary in the case of the first four questions, to endeavour to fix what is the meaning of the question itself, because, unless the question itself is clearly understood, it cannot be seen what is the proper and definite answer to the question. Now, in order to convey to the Tribunal the meaning which I submit is the correct one, I have to call your attention to what I understand to be the general suggestion or meaning put upon it by my learned friends on the other side, and I wish to state to the Tribunal how I propose to deal with the matter. I propose in the first place to state and to justify, if I can, the meaning which I attach to the question.

I cannot, of course, venture to assume that that is the construction which the Tribunal will attach to it; and, therefore, I shall proceed to consider what ought to be the answer assuming that my construction is wrong, and that put by the other side is right. Now, speaking broadly, the construction put by the other side is this, that the Tribunal is asked to say what right of protection or of property of any kind, the United States possesses in respect to seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit. They put their interpretation in various ways: first, what right is there in the individual fur-seal? although they say it is not necessary for them to put the right so high as that: secondly, if they have not property in the individual fur-seal, what right of property is there in what they are pleased to call the fur-seal herd? and, again, they say it may not be necessary to put it even so high as that. And, finally, if they have no property in the individual

seal, nor any property in the herd, what right in the nature of a property right is there in the industry carried on by means of the fur-seals upon the Pribilof Islands? They say that in one way or other of those three forms question 5 is addressed to the question of property: either in seals, in the herd, or in the industry; and that the right of protection there referred to is such right of protection as a nation may exercise, according to international law, in defence of its property in the seals, or in the herd, or in the industry founded upon them.

Now I think I have stated correctly the various modes in which their suggestions are made. I shall consider those, and assume that they are right in their construction of the meaning of the question, but I have first to say that I dissent entirely from that as being the meaning of the question. *I dissent from the suggestion that it is either the right of property or the right of protection that is intended to be covered by that fifth question.* Then I shall be asked, and properly asked, what is my construction of that question? *Does it mean property and right of protection in the fur-seals frequenting the Behring Sea wherever those fur-seals are to be found? I say, no.* It is a question just like Questions 1, 2, 3, and 4, at the bottom of which is the assertion of exclusive jurisdiction; and therefore (I am now indicating the point, not arguing it: I will justify it presently), *that as the main volume and strength of their case was presented and is presented in the correspondence,*

the property right indicated in Question 5 is the exclusive right to take fur-seals in the Behring Sea; that is to say, a property right of an exclusive character in the fishery in the Behring Sea and not in the seals either as individuals or as a herd,—in other words, an exclusive right to take fur-seals in Behring Sea, to prevent anyone else taking them in Behring Sea,—in other words, the assertion of a property right of an exclusive character in the fishery in Behring Sea, and not in the individual seals or in the herd.

Question raised by question 5 is one of exclusive jurisdiction in Behring sea.

How is this position made clear? In the first instance, the reference in the opening words of Article VII shew that the framers of the 937 Treaty designed to treat article V, like the preceding questions, as a question of exclusive jurisdiction, because the words of article VII are:

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary:

Then the question of Regulations is to arise; and it is not argued, it could not be argued, therefore, that question 5, as it stands in this Treaty, was not intended to raise a question of exclusive jurisdiction. That exclusive jurisdiction would be the exercise of the right to which I have already adverted, the exclusive right to take the seals in the Behring Sea and, accompanying that right and in protection of that right, exclusive jurisdiction in the eastern part of Behring Sea, for the protection of that right.

Now, how is that made apparent? I have referred to the language of Article VII; I have now to refer to the 5th article of the *Modus Vivendi* of 1892. That Article deals with what is to be the effect on the question of compensation should the right of Great Britain be affirmed, or should the right of Great Britain to take seals be negatived.

Senator MORGAN.—You mean British subjects; not the Government of Great Britain?

Sir CHARLES RUSSELL.—Yes, certainly; I mean British subjects, because it runs thus—If the result of the Arbitration be to affirm the right

of British sealers to take seals in the Behring Sea within the bounds claimed by the United States, that is the eastern part of Behring Sea under its purchase from Russia, then compensation is to be made by the United States; if, on the other hand, the result of the arbitration is to deny the right of British sealers to take seals within the said waters, then compensation is to be made by Great Britain to the United States.

And I point out that if question 5 was intended to touch or to raise a question of property in the individual seals, or in the herd of seals as they have been called, or in the industry founded on those seals, the limitation as to compensation could not have been restricted to the mere question of the right to take seals in Behring Sea; because property is property, and if the property in the fur-seal is affirmed to be in the United States, I agree most entirely with the argument of Mr. Carter that that right of property is not lost because possession of the thing is lost.

The rights of property attach to a thing wherever the thing is; so as to the herd, so as to the industry; and what makes this point clear is that we have now upon the question of Regulations the argument put forward that in truth the greatest injury that is done to the seals as individuals, to the seals as a herd, to the industry carried on, or said to be carried on in relation to them, is done outside Behring Sea and in the approaches to the Aleutian passes; and yet the limitation as to compensation is to depend simply upon "aye" or "no", is there a right in the British subject to take seals in Behring Sea within the bounds claimed by the United States under its purchase from Russia.

938 Senator MORGAN.—That is not the compensation that is provided in the *Modus Vivendi*. That compensation is provided, because the Government has taken this subject up, and it is a question between the Governments as to damages under the *Modus Vivendi*, because of their intervention in the matter of seal hunting or fishing, to prevent it.

Sir CHARLES RUSSELL.—I quite agree, but I do not see how that weakens the force of my position.

Senator MORGAN.—I do not say that it does at all.

Sir CHARLES RUSSELL.—The two Governments, of course, are merely representatives of the interests of their respective nations.

Senator MORGAN.—This is the first time they assumed to be so. They made the *Modus Vivendi* and agreed to submit the damages arising out of that fact to the Arbitrators.

Sir CHARLES RUSSELL.—That may be. I am not concerned to dispute that. My point, of course, is this, that if the framers of this Treaty had any idea of raising before this Tribunal the question as it is now presented, of individual property in the seals or in the seal herd or in the industry founded upon it, the Article dealing with the question of compensation ought not to have been restricted, could not legally have been restricted, merely to killing within Behring Sea, especially as it is apparent, according to the allegation made on the other side, that the greater portion of the mischief is done outside Behring Sea.

Mr. Justice HARLAN.—May that not be explained in part by the fact that that relates to damages for abstaining from the exercise of that right, during the pendency of the Arbitration, to take seals outside Behring Sea?

Sir CHARLES RUSSELL.—That is exactly what I am pointing out. If it was intended to say there was a right in the individual seals outside Behring Sea, or in the herd outside Behring Sea, or that the industry could be affected by anything outside Behring Sea, then the limit of compensation would not have been put as it is in the 5th Article. That is exactly my argument; but, of course, I am only beginning my justification of

this meaning, because the Tribunal must be good enough to bear in mind,—I have in all conscience recurred to it often enough, and I am afraid, so as to weary the Tribunal,—that my contention is this, that the whole case of the United States actually presented in the diplomatic correspondence *was a case founded primarily upon territorial dominion and jurisdiction in the eastern part of Behring Sea.* The case based upon their municipal legislation—the case advanced in the Courts, inferior and superior—the case based on the Executive action—based on the instructions and argument of their counsel—based on the reasons on which they invoked the authority of their municipal Tribunals—based on the arguments presented to the Supreme Court—based on the judgments of those Supreme Courts, was a case founded upon this territorial dominion. I am not saying that there is not in the Case and Counter-Case put forward by the United States Counsel a different interpretation. I am dealing with the Treaty, with the conduct of the United States and their advisers, and with the diplomatic correspondence up to the date of the Treaty. And now I turn to that correspondence for one moment, though not at any great length. I begin with an important letter of Mr. Blaine, frequently referred to, of the 17th Dec., 1890, which is at page 263 of the large volume of the United States correspondence. I am not going to trouble the Tribunal with the whole of that letter.

On the 2nd of August 1890, the Marquis of Salisbury had written to Sir Julian Pauncefote the letter of that date, to which I do not think I need refer, in which the Marquis of Salisbury says as you well recollect, Sir:

You will state that her Majesty's Government have no desire whatever to refuse to the United States any jurisdiction in Behring Sea which was conceded by Great Britain to Russia, and which properly accrues to the present possessors of Alaska

and so on.

Now on the 17th December Mr. Blaine's letter is written, in which that passage occurs to the effect that: If Behring Sea was included in the phrase Pacific Ocean, then there is no ground of complaint; and towards the end of which he invokes some general considerations based upon, I think, Mr. Phelps' letter of September 1888. But the part I am now upon is this. He says in that letter—I am reading from page 285 of volume I of the Appendix to the United States Case:

It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years. I shall endeavour to state what, in the judgment of the President, those issues are.

And then he formulates a number of questions. Then he says, in the preceding paragraph to the one I have just read:

The second offer of Lord Salisbury to arbitrate, amounts simply to a submission of the question whether any country has a right to extend its jurisdiction more than 1 marine league from the shore.

Then he says:

Her exception placed an obstacle in the highway between continents. The United States, in protecting the seal fisheries, will not interfere with a single sail of commerce on any sea of the globe.

Then he proposes questions 1, 2, 3 and 4, all of which deal, as it is conceded, with the questions of exclusive jurisdiction and exclusive rights, and then he proceeds:

Fifth. What are now the rights of the United States as to the fur-seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits, whether

such rights grow out of the cession by Russia of any special rights or jurisdiction held by her in such fisheries or in the waters of Behring Sea, or out of the ownership of the breeding islands and the habits of the seals in resorting thither and rearing their young thereon and going out from the islands for food, or out of any other fact or incident connected with the relation of those seal fisheries to the territorial possessions of the United States.

940 Now, shortly stated, that question is briefly this: What are now the rights of the United States as to the seal fisheries in the waters of Behring Sea outside the ordinary territorial limits, however such rights have arisen. *Seal fisheries in the waters of Behring Sea*: those are the words.

In further elucidation of that same meaning, I may point to question 6 which he suggests shall be as follows:

If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur seal in any part of the waters of Behring Sea, then it shall be further determined: First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and breeding therefrom. Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal fishing industry, so valuable and important to mankind, from deterioration or destruction—

and so forth.

Now in the answer on page 290 of the same volume, Lord Salisbury, writing to Sir Julian Pauncefote on February 21st, criticizes these questions. As to the 5th question he says, at page 294,

The first clause, what are now the rights of the United States as to the fur seal fisheries in the waters of the Behring Sea outside of the ordinary territorial limits? is a question which would be very properly referred to the decision of an Arbitrator.

Now I pass on. The next letter to which I desire to refer, is from Sir Julian Pauncefote to Mr. Wharton, on page 326. There, Sir Julian Pauncefote writing to Mr. Wharton says:

Either Government may submit to the Arbitrators any claim for compensation which it may desire to prefer against the other Government in respect of any losses or injuries—

You will observe the large words in which Sir Julian Pauncefote proposes the reference.

any losses or injuries in relation to the fur-seal fishery in Behring Sea.

And so on.

Mr. Wharton replies on the 23rd of July, at page 326. He replies proposing instead this clause, which you will see printed in small type on page 398.

The Government of Great Britain having presented the claims of its subjects for compensation for the seizure of their vessels by the United States in Behring Sea that matter is to be referred to the Arbitrators. Then I go on, next, to the letter of Mr. Blaine to Sir Julian Pauncefote of the 4th of May 1891. This is distinctly in relation to the *Modus Vivendi*. It is at page 301. Mr. Blaine there writes proposing the following arrangement.

The Government of the United States limits the number of seals to be killed on the islands, for purposes just described, to 7,500.

941 The Government of the United States guarantees that no seals shall be killed in the open waters of the Behring Sea by any person on any vessel sailing under the American flag or any American citizen sailing under any other flag.

The Government of Great Britain guarantees that no seals shall be killed in the open waters of the Behring Sea by any person.

and so on.

Now on the 3rd June 1891 at p. 305 this is the proposal which Her Majesty's Government puts forward for a *modus vivendi*.

The Government of Great Britain and of the United States shall prohibit, until May, 1892, the killing of seals in Behring Sea or any islands thereof, and will, to the best of their power and ability, insure that subjects and citizens of the two nations—

and so on.

And Mr. Wharton, on the following day replies in the letter which is at page 306, and which will be found to be very important in this regard. He says:

I am directed by the President to say, in reply to your note of the 3rd instant, conveying to the Government of the United States the response of Her Majesty's Government to the proposal of Mr. Blaine for a *modus vivendi*, relating to the seal fisheries in Behring Sea during the present season—

First. In place of the first and second subdivisions of the agreement, as submitted to you, the President suggests the following:

(1) The Government of Great Britain shall prohibit, until May 1892, the killing of seals in all that part of the Behring Sea lying east, eastwardly, or southeastwardly, of the line—

that is the line of demarcation.

Then:

(2) The Government of the United States shall prohibit, until May, 1892, the killing of seals in that part of Behring Sea above described—

and so on.

He then proceeds, in the next paragraph, to say:

These changes are suggested in order that the *modus* may clearly have the same territorial extent with the pending proposals for arbitration;

You observe the words "these changes"—that is to say the limitation to the eastern part. You will observe the counter proposal was general—"all killing in Behring Sea". Says Mr. Wharton: We change that to "the eastern part of Behring Sea".

These changes are suggested in order that the *modus* may clearly have the same territorial extent with the pending proposals for arbitration.

Then, near the middle of the third paragraph of that letter, he says:

The fourth clause of the proposal of Her Majesty's Government, limiting the taking effect of the *modus vivendi* upon the assent of Russia, presents what seems to the President an insuperable difficulty—

and so on

942 Then he says:

He is surprised that this result did not suggest itself to Lord Salisbury, and does not doubt that it will be apparent to him on a re-examination.

Then comes this important passage: I respectfully ask attention to this language:

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring Sea eastward of the line of demarcation described in our convention with Russia—

and so on.

Then the final sentence in that paragraph is in these words:

It was never supposed by any one representing the Government of the United States in this correspondence or by the President, that an agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective Governments.

In other words, it is limited to the eastern part of Behring Sea, and cannot go outside the eastern part of Behring Sea, and it never

occurred—it was never supposed by anyone representing the Government of the United States—that the *Modus Vivendi* could be broader than the subject of contention. Now in the next sentence he says:

Negotiations for an Arbitration have been proceeding between the United States and Great Britain, and if these Powers are competent to settle by this friendly method their respective rights and relations in the disputed waters—

always a limitation of area—

upon a permanent basis, it would seem to follow that no question could arise as to their competency to deal directly with the subject for a single season. If Great Britain now insists upon impossible conditions, viz, that the conclusion of a *modus vivendi* is to be delayed until and made contingent upon the assent of Russia to stop the killing of seals on its own islands and in its own waters, and upon the exercise by the President of powers not conferred by law, this would be, in his opinion, a practical withdrawal by Great Britain from the negotiations for a *modus vivendi*—

and so on.

Then comes the memorandum from Sir Julian Pauncefote, with which I do not think I need trouble you. But, finally, on the 9th of June, Mr. Wharton wrote proposing the *Modus Vivendi* which was ultimately actually adopted; and in the letter on the subject you will find this passage, on page 312.

As to the third clause of your proposition, I am directed to say that the contention between the United States and Great Britain has relation solely to the respective rights of the two Governments in the waters of Behring Sea, outside ordinary territorial limits, and the stipulations for the co-operation of the two Governments during this season have, of course, the same natural limitation. This is recognized in Articles I and II of your proposal—

and then he goes on to argue the point.

Then comes the Agreement, which he sets out at page 313.

An Agreement between the Government of Her Britannic Majesty, and so on, 943 for the purpose of avoiding irritating differences, and with a view to promote friendly settlement of the questions pending between the two Governments touching their respective rights in Behring Sea and for the preservation of the seal species, the following Agreement is made.

At this time, it is clear that the fifth question which I am now upon, had been already settled and determined, as appears from a letter of the 14th April, 1891. This therefore is the *modus vivendi*.

Her Majesty's Government will prohibit until May next seal killing in that part of Behring Sea lying eastward of the line of demarcation.

and so on.

The United States Government in the same part of Behring Sea will prohibit seal killing for the same period.

Then:

Every vessel or person offending against this prohibition in the said waters of Behring Sea—

and so forth.

And now comes, at page 353, a letter of the 24th February 1892, from Mr. Blaine to Sir Julian Pauncefote.

We have now passed the time of the agreement to the Treaty.

I am in receipt of your favour of the 19th. You therein inform me that Lord Salisbury cannot express any opinion on the subject of the *modus vivendi* until he knows what we desire to propose. I am glad to hear that Lord Salisbury contemplates a *modus*.

This is the *Modus Vivendi* of 1892.

Then he goes on to say:

If Her Majesty's Government would make her efforts most effective, the sealing in the North Pacific Ocean should be prohibited, for there the slaughter of the mothers heavy with young is the greatest.

Then on the 7th March, Sir Julian Pauncefote again writes, which will be found at page 355:

Lord Salisbury's proposal of a 30 mile radius round the Pribilof Islands within which no sealing should be allowed, is a judicious temporary measure of precaution pending the establishment of permanent Regulations for the fishery as a whole. It is a somewhat larger proposal than that which you originally made to me on the 16th March 1891, and which was for a similar radius of 25 miles only.

Then comes the most important of these letters from Mr. Wharton to Sir Julian Pauncefote, of the 8th March, 1892, which is at page 356.

The United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a three-mile limit. This serious and protracted controversy, it has now been happily agreed, shall be submitted to the determination of a Tribunal of Arbitration, and the Treaty only awaits the action of the American Senate.

We have, therefore, got to the point not merely of the Treaty of Arbitration, but we have at this time reached the second *Modus Vivendi*, and here we have Mr. Wharton's distinct intimation of what is at that point (and Mr. Wharton was quite right, because it was the case that was made in the previous diplomatic correspondence), the case made as to the justification of the seizure.

The United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a three-mile limit.

That is exactly what I say is the issue intended to be raised by this fifth question.

I think there is one other passage that perhaps I ought to read:

The President cannot agree, now that the terms of Arbitration have been settled, that the restrictions imposed shall be less than those which both Governments deemed to be appropriate when it was still uncertain whether an early adjustment of the controversy was attainable. He, therefore, hopes that Her Majesty's Government will consent to renew the arrangement of last year with the promptness which the exigency demands, and to agree to enforce it by refusing all clearances to sealing vessels for the prohibited waters, and by re-calling from those waters all such vessels as have already cleared. This Government will honourably abide the Judgment of the High Tribunal which has been agreed upon, whether that Judgment be favourable or unfavourable, and will not seek to avoid a just responsibility for any of its acts which, by that Judgment, are found to be unlawful. But certainly the United States cannot be expected to suspend the defence, by such means as are within its power, of the property and jurisdictional rights claimed by it pending the Arbitration and to consent to receive them from that Tribunal, if awarded, shorn of much of their value by the acts of irresponsible persons.

Senator MORGAN.—Will you allow me to suggest to you this enquiry? The *Modus Vivendi* of 1891, as I understand, is not included in the Treaty of February the 29th 1892; but the *Modus Vivendi* of 1892 is included in that Treaty?

Sir CHARLES RUSSELL.—Quite so.

Senator MORGAN.—The *Modus Vivendi* of 1891 is entirely left out of consideration in the Treaty of February the 29th 1892?

Sir CHARLES RUSSELL.—That is so, Sir.

Senator MORGAN.—Now, the proposition you have just read is that the United States claims an exclusive right to take seals in a portion of Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals outside of the 3 mile limit. I wish to call

attention to this as a question, and only as a question, whether that exact subject is not provided for in Article I, instead of in the 5th point in Article VI.

Sir CHARLES RUSSELL.—No; with great deference, I think not, because question I, as you yourself very early in the discussion pointed out, is entirely conversant with what exclusive jurisdiction and what exclusive rights Russia asserted and exercised.

Senator MORGAN.—I spoke of article I of the Treaty.

Sir CHARLES RUSSELL.—Oh, I beg your pardon.

945 Senator MORGAN.—I think when they came to formulate the Treaty, and drew up the final agreement, the question you have been considering and reading an extract from was included in the first question submitted in Article I of the Treaty.

Sir CHARLES RUSSELL.—I was about to refer to that Article, strangely enough, in an entirely different sense, to show that that supports, as I submit, the contention I am upon.

Senator MORGAN.—It may do so.

Sir CHARLES RUSSELL.—The thread of that contention on the part of the United States runs all through the assertion of exclusive jurisdiction in a defined area, and I submit it is borne out by the language of Article I.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning—
what?

the jurisdictional rights of the United States in the waters of the Behring Sea and concerning also the preservation of the fur-seal.

Jurisdictional rights to be determined as a matter of right: the preservation of the fur-seal to be determined as a matter of regulations.

Senator MORGAN.—The questions submitted seem to be presented in Article I, while the five suggestions or enquiries in Article VI are called points—five points which very properly may be included within the questions for consideration. The question submitted to the Arbitration seems to me to be worthy of consideration, whether the questions are not the ones to which the Award must respond.

Sir CHARLES RUSSELL.—I should have thought, with deference, that the questions are formulated, and if there be anything outside these questions mentioned in Articles VI and VII which the Tribunal should think ought to be answered, of course they are to be answered; but I take Articles VI and VII as intended, whether they have been effective or not is another question, to formulate for the assistance of the Tribunal the precise questions which would settle the controversy between the parties. The way in which the matter is put is this:

In deciding the matters submitted to the Arbitrators it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of the said five points, to wit

and then Article VII very properly treats those as questions.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such a position that the concurrence of Great Britain is necessary

then there are to be Regulations.

946 Senator MORGAN.—That brings us up to the point whether or not the word “questions” in article VII does not refer to the three questions which are propounded in the first Article of the submission, and not to the five points mentioned in Article VI.

Sir CHARLES RUSSELL.—I should with great deference have said, when Article VII began with the words “If the determination of the foregoing questions”, which you will observe are all put with a note of interrogation at the end of them, that Article VII pointedly, clearly, and distinctly referred to the foregoing five questions, and I think I am right in saying, subject to correction on that point, that there was not any difference in the argument of my learned friend and that which I now submit.

Senator MORGAN.—I am aware of that fact, but, of course, we have our own views.

Sir CHARLES RUSSELL.—Naturally, and I do not suggest the contrary. Now I think I have only to refer to two other letters. On the 22nd March there is a letter from Mr. Wharton to Sir Julian Pauncefote at page 361:

For it must not be forgotten that if Her Majesty's Government proceeds during this sealing season upon the basis of its contention as to the right of the Canadian sealers, no choice is left to this Government but to proceed on the basis of its confident contention that pelagic sealing in the Behring Sea is an infraction of its jurisdiction and property rights.

Finally, on page 363, Sir Julian Pauncefote writes to Mr. Wharton thus:

As an alternate course, Her Majesty's Government are also willing, after the ratification of the Treaty, to prohibit sealing in the disputed waters, if vessels be excepted from the prohibition which produce a certificate that they have given security for such damages as the Arbitrators may assess in case of a decision adverse

and so on.

Then there is a letter on page 364:

With reference to my previous note of this date, and to the discussions which have taken place regarding the claims of our respective Governments to compensation in relation to the fur-seal fishery in Behring Sea, I have been instructed by the Marquis of Salisbury,

and so on. Then he says this:

That in case the Arbitrators shall decide in favour of the British Government, that Government may ask them further to decide whether the United States Government has since 1885 taken any action in Behring Sea directly inflicting a wrongful loss on the United States or its lessees, and if so, to assess the damage incurred thereby.

Senator MORGAN.—But that feature did not get into the Treaty.

Sir CHARLES RUSSELL.—That is the feature which did get into Article V of the *Modus Vivendi*, which is a part of this Treaty.

Senator MORGAN.—Yes.

Sir CHARLES RUSSELL.—Then there is one passage which I wish to emphasize before I go on, in the letter of the 4th of June, 1891; it is at the foot of page 306:

The fourth clause of the proposal of Her Majesty's Government, limiting the 947 taking effect of the *modus vivendi* upon the assent of Russia, presents what seems to the President an insuperable difficulty, as an adherence to that suggestion by Her Majesty's Government will, in his opinion, prevent the conclusion of any Agreement and will inevitably cause such a delay.

and so on:

That I have already read. You observe that the object of Sir Julian Pauncefote was, by including Russia, to have the extension of the *Modus Vivendi* so as to prohibit the killing in other parts of the Behring Sea westward of the line of demarcation; and this is the way in which that suggestion is met by Mr. Wharton.

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring Sea eastward of the line

of demarcation described in our convention with Russia, to which reference has already been made, and that Russia has never asserted any rights in these waters affecting the subject-matter of this contention and cannot, therefore, be a necessary party to these negotiations if they are not now improperly expanded. Under the Statutes of the United States, the President is authorized to prohibit sealing in the Behring Sea within the limits described in our Convention with Russia, and to restrict the killing of seals on the Islands of the United States. But no authority is conferred upon him to prohibit or make penal the taking of seals in the Waters of Behring Sea westward of the line referred to, or upon any of the shores or islands thereof. It was never supposed by anyone representing the Government of the United States in this correspondence, or by the President, that an Agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective Governments.

Now, Sir, I submit that I have said enough to show that I am raising a grave question for the consideration of this Tribunal, as to the true construction of that question 5: whether, in other words, I am not justified in stating that that question, like the first four, is conversant with questions of jurisdiction and exclusive right in a limited area, namely, the eastern part of Behring Sea; and that in no part of the correspondence leading up to the Treaty, nor in the Treaty itself, is there raised the question of a right of property in the individual fur-seal, or in the herd, or in the industry based upon the fur-seal, except as a question of jurisdiction within this limited area. I, of course, have already told the Tribunal that I cannot venture to assume that the meaning which I am putting upon this question is the meaning which the Tribunal will say is right, and, therefore, it would be incumbent upon me to argue it presently as if it had a different meaning, such as my learned friend suggests. That I will not shrink from doing, but I feel bound to put before the Tribunal our view, justified as I contend by the legislative and executive action of the United States, and by the diplomatic correspondence: that from first to last this was a question, in whatever shape it was put, which was based upon jurisdiction of an exclusive, in other words of a territorial character, and it is properly in that character referred to, in Article VII, as being a question of exclusive jurisdiction.

Now I must assume at this present stage of my argument that
 948 the question is, has the United States an exclusive right to take fur-seals in the eastern part of Behring Sea, and an exclusive jurisdiction to enforce and protect by the exercise of sovereign power that right in the eastern part of Behring Sea?

The PRESIDENT.—Do you believe that the words in Article VII

The fur-seals in or habitually resorting to the Behring Sea

were originally conceived as making part of the first wording of that Article VII, or were they brought in afterwards? Do you know anything about that?

Sir CHARLES RUSSELL.—I can answer that question, Sir, because the original frame of the question is to be found in Mr. Blaine's letter of December 1890. I have read that letter to you and I will read it again. It is in page 286 of the United States Appendix Volume 1. Of course I have read the correspondence which brought it down to a later period, showing the views of Mr. Wharton after the Treaty was actually executed and signed. The words are there in the original letter of Mr. Blaine; and if you turn to page 295, you will see that Mr. Blaine repeats the substance of the same question in that letter of the 14th April 1891; the 5th question is stated in the form in which it is there suggested.

Mr. Justice HARLAN.—What Baron de Courcel is referring to now is, what is the 7th Article, but which was originally the 6th question: and

that 6th question, in the form in which it appears in the Treaty first appears in Mr. Wharton's letter of June 25th 1891, page 319.

Sir CHARLES RUSSELL.—That is quite right.

Mr. Justice HARLAN.—That is where the words "habitually resorting to" come into the 6th question?

Sir CHARLES RUSSELL.—Yes, but with great deference they also appear, not as part of the 7th question, for there was no 7th question at that moment, but they also appear in the letter of Mr. Blaine of the 17th December that I have mentioned.

Lord HANNEN.—Is that their earliest appearance?

Sir CHARLES RUSSELL.—As far as I know.

Mr. Justice HARLAN.—What do you say appears there?

Sir CHARLES RUSSELL.—They do not appear in the letter of December 17th—I mean not exactly.

Mr. Justice HARLAN.—I have not been able to find them in the sixth question anywhere prior to June the 25th, 1891.

Sir CHARLES RUSSELL.—I think that is correct.

Mr. Justice HARLAN.—When Mr. Wharton reframes the sixth Question, he submits it in the precise words of Article VII.

Sir CHARLES RUSSELL.—I think you are right; I think that is so.

Senator MORGAN.—A different mind had got hold of the correspondence, and put in that additional idea.

949 Sir CHARLES RUSSELL.—I should like to emphasize this. If you will turn to page 305, you will see that, at that time, the five Questions had been settled; and Sir Julian Pauncefote writes.

The undersigned has been instructed by the Marquis of Salisbury to inform the United States Government that Her Majesty's Government are prepared to assent to the first five questions proposed to be submitted to arbitration in the note of the Hon. James G. Blaine to the undersigned, dated 14th of April last.

That letter is at page 295.

Her Majesty's Government cannot give their assent to the sixth question formulated in that note. In lieu thereof they propose the appointment of a commission to consist of four experts, and so on. "The Commission shall examine and report on the Question which follows":

For the purpose of preserving the fur-seal race in Behring Sea from extermination, what international arrangements, if any, are necessary between Great Britain and the United States and Russia or any other power?

As regards the question of compensation, Her Majesty's Government propose the following article.

It shall be competent to the Arbitrators to award such compensation, and so on.

Therefore at that date, and long before the correspondence with Mr. Wharton which I have been reading, the first five questions had been settled, and I was using that correspondence for the light it throws upon the meaning which Mr. Wharton attached to those five questions. Then, after the 3rd or 4th June arises the question which is now the 7th Article, namely the question of Regulations. That is the way in which the matter stands.

The PRESIDENT.—Then you do not construe the protection spoken of in question 5 of Article VI in the same way as the protection mentioned in Article VII?

Sir CHARLES RUSSELL.—In one sense yes, and in another sense no. I would prefer, if the Arbitrators would allow me to do so, to reserve my construction of Article VII till I come to it. I think it would be better that I should do so. I have a strong view about it, if the President will allow me to say so, but I do not want to mix up the question of right and the question of Regulations.

Senator MORGAN.—It occurs to me, perhaps I am entirely mistaken, that the decision, whichever way it may turn, on the five questions in Article VI—still omits a decision upon this question of the rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters. Of course, that question would be negatively answered in the affirmative proposition that the seals belonged to the United States, or that the United States had a right of protection over the seals; but, at the same time, this affirmative question is put to the Arbitrators; and we are instructed here that we shall decide every question that is submitted to us, and it seems to me that we must give an affirmative answer on that proposition. I mean, by an affirmative answer, a direct answer.

950 Sir CHARLES RUSSELL.—I think you do. I should have respectfully submitted, as far as I can at present see, that the answers to the first five questions answer everything. For instance, assume the first four questions to be decided in the sense that Russia exercised and asserted these rights and that Great Britain recognized and conceded them, and that to those rights the United States succeeded by right of cession, then the answer in that sense would be the negation of the right of anybody else, because you would have then found that there was an exclusive right and an exclusive jurisdiction, and that would be a distinct answer. Equally the other way; if the answer is there was no exclusive right and no exclusive jurisdiction, then it follows that it is left to be determined according to general international law; in other words, it is a matter of common right. Article I is a mere general statement of the nature of the questions that have arisen. Article VI deals with the specific points which are to determine those questions.

Senator MORGAN.—But Article I says: “These questions shall be submitted to a Tribunal of Arbitration”.

Sir CHARLES RUSSELL.—Yes; that is to say, the matters that have arisen.

Senator MORGAN.—No; “these questions.”

Sir CHARLES RUSSELL.—I know, Sir; but that is a description merely of the matters of difference that have arisen. That is my conception.

Now if I am right in this interpretation—and I have said all I desire to say upon it—I may deal with the argument upon it very briefly indeed. I have, in fact, already dealt with it in the argument as to Russian assertion of rights and Russian exercise of rights, because although it is true to say that question I of Article VI does not ask what rights Russia in fact had, but only what rights she asserted and exercised, it is not too much to say that if she had any other rights than those she did assert and exercise, she would have asserted them and exercised them if it had been necessary for her purpose to assert and exercise them.

We have come therefore to this point: That if my interpretation is right—and of course I am arguing upon that assumption at present—it must be held that the United States can assert that it has rights which Russia had not. In effect it comes to that. I have already discussed what rights Russia had. Russia was the possessor of dominion on the Pribilof Islands. She was therefore the owner of the islands to which these animals resorted for a considerable portion of the year. She therefore had special facilities for capturing, taking possession of, and killing these animals. She had that exclusive right by reason of her territorial dominion. She had the extension of that exclusive right to the three mile limit, or whatever the marginal belt is to be considered.

She had no right beyond, unless there is to be asserted on the part of Russia, or on the part of United States, some power over the adjoining sea of an exclusive kind, which is not found to be recognized by international law. There may be such a right if there is property in the fur-seal. That I shall discuss when the question comes up.

951 may be such a right if there is property in the seal herd. That I shall discuss when I come to the question in its proper order. I am assuming that the question relates not to property in the seal, and not to property in the herd, but to what the rights are; and the circumscription of the rights which, as territorial owner, any nation possesses is, according to authority, exactly as I have stated it.

Now, what is the foundation of this argument? The ultimate foundation of it is this—that no question of exclusive jurisdiction in a defined area can exist apart from territorial dominion, from Exclusive jurisdiction in a defined area cannot exist apart from territorial dominion. sovereign power, over that area; because the assertion of exclusive jurisdiction is an assertion that nobody else has a right to go there; is an assertion of the right to exclude everybody else from that place; is an assertion of the right to treat the particular area covered by so much water just on the same principle as if it were so much land, and a part of the admitted *terra firma* of the particular Power that is claiming to exercise it. What does that amount to when it is extended to a claim on the high seas? It conflicts with, is repugnant to, two great principles: first, the principle of limitation of territory to a specific distance from the shore, *terre dominium finitur ubi finitur armorum vis*. It is next repugnant to the great principle of the equality of every nation, small and great, upon the high sea outside the three mile limit, or whatever the marginal belt is. It is therefore an assertion conflicting with the sovereignty of any and all other Powers, who are equal and have equal rights upon the high sea.

Am I to be invited by the Tribunal to justify that position, apart from the right of defence incident to property, which I am not dealing with? I am assuming the question to mean what I have endeavoured to demonstrate it means. Is it necessary that I should argue that upon the basis there is no such right? Why, it is hardly put forward in the argument of my learned friend. What is put forward by my learned friends is to be found on page 19 of their Counter Case.

The distinction, between the right of exclusive jurisdiction over Behring Sea on the one hand, and the right of a nation on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary, even though they be somewhat unusual, measures, whether on land or sea, is so broad—

Yes, indeed!

as to require no further exposition.

And so they are content to leave this proposition. If that means preserve for the use of its citizens its interests on land by adopting measures at sea to protect its property or its property interest, which I suppose is what is meant, I will deal with it presently; but what I am dealing with now is the first part of the case, that this claim, this question five, points to the right of the exclusive territorial jurisdiction over the eastern part of the Behring Sea; and if that be the right meaning of the question, my learned friends admit it is the
952 latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

The PRESIDENT.—Sir Charles, if you construe the question five as meaning only rights of jurisdiction, do you not think then that question five would be just a repetition of question four?

Sir CHARLES RUSSELL.—In one sense yes, and in another sense no.

The PRESIDENT.—I say if under question five in Article VI we are to understand nothing but rights of jurisdiction—

Has the United States any right, etc. . .

that would be just exactly the same as question four.

Did not all the rights of Russia as to jurisdiction pass unimpaired to the United States?

Sir CHARLES RUSSELL.—I quite agree, Sir; practically, yes. That is what I am arguing. I have argued this question five, and my meaning is the same when I have been discussing the first four questions, except with this difference: that articles one, two, three and four deal solely with derivative rights from Russia, and in article five the question is, what rights has the United States as a matter inherent in its own possession of territory.

The PRESIDENT.—The authors of the Treaty must have anticipated something different from what was in the preceding questions.

Sir CHARLES RUSSELL.—It does not necessarily mean that it should be something different. It contemplates the possibility of its being something different; but it merely contemplates the possibility in this sense: "We assert that Russia asserted certain exclusive claims of jurisdiction; we also assert that we have certain exclusive claims of jurisdiction".

In each case, if my contention is right, it is limited to a claim of territorial dominion.

The PRESIDENT.—I believe, as we understand the case of the United States, they understood that this question five meant also derivative rights. They did not argue that they had new rights which originated in the cession of territory in their hands only, but that the same rights were vested in Russia.

Sir CHARLES RUSSELL.—That is what I venture to say; and that is the reason I said that in arguing what rights Russia asserted and exercised, I was also really arguing question five. You see the distinction is that questions one, two, three and four, were directed to what rights were asserted and exercised. Question five may have a more restricted or a more enlarged meaning—what rights in fact the United States have. But I was about to say that I could deal with this matter very briefly because I have shown, if my interpretation of the question is right, that that is not the nature of the right which the United States are claiming for themselves; because I take it that although this is a statement that the latter right, and not the
953 former, is the right which the United States contend was exercised first by Russia and later by themselves, that they embrace not only their own derivative claim under Russia, but their own claim, whatever it is, as inherent in their territorial possessions.

The PRESIDENT.—Their argument is that they have peculiar rights. Your argument is that this question five merely limits the right of jurisdiction, like the preceding questions?

Sir CHARLES RUSSELL.—Unquestionably, sir, although it is conceivable that there may have been a right which the United States possessed that Russia neither asserted nor exercised. It is conceivable. That is all.

The PRESIDENT.—You think it is upon that hypothesis that the question has been brought in?

Sir CHARLES RUSSELL.—I can only judge by the terms of the question itself. I take the language in which Mr. Wharton, the Acting

Secretary of State, construes it. I take the language in which the diplomatic correspondence construes it.

I was going to say I propose to deal briefly with this because of the views which have been put. The point where my friends and I differ—materially differ, I mean—here, is as to what the meaning of this question is. I have already told the Tribunal I am not going to assume my meaning is the correct one. I propose to argue it also on the basis that their meaning is the correct one. That I will presently come to; but I must take it step by step.

The PRESIDENT.—Do you mean to argue it at some length?

Sir CHARLES RUSSELL.—I have four or five authorities; but they are authorities upon points which I conceive not to be disputed.

The Tribunal thereupon adjourned until Tuesday, May 22, 1893, at 11:30 o'clock a. m.

TWENTY-FIFTH DAY, MAY 23RD, 1893.

The PRESIDENT.—We are happy to resume our hearing again, Sir Charles, and are quite ready to hear you.

Sir CHARLES RUSSELL.—Mr. President, when the Tribunal last sat, I was discussing what was the true meaning of question 5 of Article VI. I had pointed out what we conceive to be the meaning, and I had added that I proposed also to discuss the different effect given to that question in various forms in the Argument on the part of the United States. While I was endeavouring to establish the point that question 5 is of the same character as the preceding questions, in the sense that it relates to a question of exclusive jurisdiction, and is so designated in the succeeding Article VII,—while I was dwelling upon that point, you, Mr. President, put to me the question whether the result of the argument would not be in effect to say that question 5 was the same as question 4: to which I answered, and I repeat that answer: in effect, yes. But I have now to suggest the probable reason why question 5 was added.

It will be observed by the Tribunal that all the previous questions, 1, 2, 3, and 4, are conversant with rights which Russia asserted and exercised. It has, therefore, nothing to do with what rights Russia possessed.

Therefore question 5 might properly find a place in the Article in order to cover the possibility (it was no more than a possibility) that there were rights which Russia had in fact, but which she did not assert or which she did not exercise. That would I think be a sufficient explanation by itself why question 5, although of the same character as the preceding questions, still finds a place in that Article. A further explanation might be found in this fact, that at the period to which the first four questions relate, namely, the period of Russian dominion, the whole of the territory on the east side of Behring Sea down to and including the Aleutian chain, and the whole of the territory upon the west side of Behring Sea from Behring Straits down to the southern side of Kamschatka, were also Russian territory. Therefore question 5 may also have been framed in order to leave open the point whether any rights over the intervening waters that Russia may have asserted and exercised, treating it if she so willed, and as she professed to have the power to do, as a shut sea—whether that condition of things was or was not altered when the portion of the territory bounding the eastern side of Behring Sea passed into other hands so that the territory on each side came to be in different ownerships.

But so far as the mere questions in Article VI are concerned—
955 I say it with all respect to my learned friends—I care not what meaning is put upon them so far as those five questions are concerned.

I shall have to submit that just in proportion as they depart from the main argument of Mr. Blaine based upon the assertion of territorial dominion derived from Russia, just so in proportion do they become more and more involved in absurdities, more and more indefensible in law become the positions they assume. I only attach importance to it

and would not have dwelt even at this length upon it but that it has strictly a more wide-reaching significance; because I have utterly failed in my argument if I have not conveyed to each member of this Tribunal the contention which we are submitting, that in truth the whole area of dispute between these parties was Behring Sea, and nothing outside Behring Sea: and that if the area of dispute was Behring Sea, and nothing but Behring Sea, the area of jurisdiction of this Tribunal is restricted within the same limits.

But I repeat, and I leave that part of the argument by saying that I think the Tribunal will find the more they examine the history of the United States contention, their executive action, their proceedings in their local Courts, the arguments of their representative counsel at Washington—the Solicitor and Attorney General—the diplomatic correspondence, Article VII of this Treaty, and lastly Article V of the *Modus Vivendi*, which recognizes and limits the right to compensation to be paid by us if we have no right to kill seals merely in the Behring sea—that, taking all these things into consideration, the Tribunal, whatever may be its desire, will find it exceedingly difficult to satisfy themselves that the area of dispute is not limited by the terms of this Treaty strictly to Behring Sea.

I have now to say in connection with this, and to repeat what I have already said, that if my suggested interpretation of these questions be correct, namely, that it meant an exclusive right to take fur-seals in Behring Sea, that is to say, a property right of an exclusive character in the fishery in Behring Sea and not in the seals as individuals or in the herd, and that the claim of protection referred to meant a claim of exclusive jurisdiction to protect them within the eastern part of Behring Sea,—that if that be the true meaning, I am saved the discussion of it, because I have already discussed it, and discussed it at length, under the question of the derivative title claimed under Russia. I hope that is appreciated by the Tribunal, and I do not desire to repeat myself, nor do I at this stage propose to trouble the Tribunal with the citation of the authorities which show that a claim within a definite area and a claim by which it is sought to exclude other ships of other nations from that definite area of the sea, is a question of the sovereignty: that nothing can justify it according to the rules of international law short of an assertion founded upon the just reasons of prescription and acquiescence, upon which alone can be based claim of territorial dominion pure and simple.

Now, I assume, and I confess it would be quite natural that the Tribunal should be anxious to assume, as wide a meaning to this 5th
956 question as it is capable of; for I agree it is much more important to determine what rights the United States has rather than what is the meaning of this particular question, although the Tribunal, of course, will see that, in order to answer that question correctly, the attempt must be first made to fix what the true meaning of the question is. I have suggested one.

Now, I will assume that it means the assertion of a right of property in one of three different forms: in the seals, or in the herd as it has been called, or in the industry founded upon the seals; and, correlative to that right of property, the further right of protecting it by search, seizure and confiscation; and I proceed, therefore, to enquire whether there is, in any one of those alleged forms, any legal right of property whatever in the United States.

I am glad to find myself in agreement on some points with my learned friends; I agree that the question of property in the seals or in the

seals as a collection, or group, or herd, depends upon the nature and habits of the animal and the physical relations of the United States to that animal. For my own part I am entirely unable to draw any distinction between the claim of property in the seals and the claim of property in the so-called seal herd. I cannot see where there is any legal ground for any such distinction. If there is property in the individual seals, there is property in the herd composed of those individual seals. If there is no property in the individual seals, it passes human comprehension, at least my comprehension, how it can be alleged that there is a property in the herd or collection of individual seals. Because it cannot be that a congregation of items each one of which is, upon the hypothesis, not property, yet, when they make up the whole, which is called a herd, become property. The question, therefore, really is; Is there a property in the individual seals? Because I am not going to argue (it would be absurd, in my judgment, to argue), that if there is a property in the individual seals, there is not a property in the herd which is made up of a number of individual seals. I will speak of the industry presently. Upon this part of the case the question is:—Has the United States property in the individual seals?

Now, I would like the Tribunal to note the signs of distrust with which this argument is advanced upon the part of the United States. I propose to cull some brief passages from the written Argument of my learned friends. At page 104 this passage occurs:

It may be asked whether the claim made by the United States goes to the extent of asserting a legal right of property in *any individual seal* which may at any time be found in the seas between the Pribilof Islands at the north and the coast of California at the south. And whether they would insist that in the case of any seal captured anywhere within those limits by any person other than a native Indian, and for purposes of scientific curiosity, or to satisfy hunger, a trespass had been committed upon the property of the United States, and an action might be maintained in their name in a municipal tribunal to recover damages, or for the recovery of the skin of the animal, if it should anywhere be found. The United States do not insist upon this extreme point, because it is not necessary to insist upon it. All that is needed for their purposes is that their *property interest in the herds* should be
 957 so far recognized as to justify a prohibition by them of any *destructive pursuit* of the animal calculated to injure the industry prosecuted by them on the islands upon the basis of their property interest. The conception of a *property interest in the herd*, as distinct from a particular title to every seal composing the herd, is clear and intelligible; and a recognition of this would enable the United States to adopt any reasonable measures for the protection of such interest.

Well, Mr. President, it may be my fault—the Tribunal must say—but I confess so far from the conception of a property interest in the herd being clear and intelligible as distinct from a particular title to the individuals composing the herd, I utterly and absolutely fail to appreciate it—The sole point is property or no property. How in the name of heavens, if there be no property in the individual seal, the collection of a number of items, each of which is not property, yet go to make up property in the whole, I cannot realize; and it is a matter greatly I think to be regretted that either in the written argument, or in the oral argument, more effort was not made to convey this so-called clear intelligible conception to minds like those of my learned friends and like mine, which have certainly entirely failed to grasp it.

Now another passage in the same sense is found in page 133 in the same argument.

While the United States Government asserts and stands upon the full claim of property in the seals which we have attempted to establish, it is still to be borne in mind that a more qualified right would yet be sufficient for the actual requirements of the present case. The question here is not what is the right of ownership in an

individual seal, should it wander in some other period into some other and far distant sea; that is an inquiry not essential to be gone into; but what is the right of property in the herd as a whole,

But the whole is made up of parts; and if there is no property in the parts how is there property in the whole?—

in the seas and under the circumstances in which it is thus availed of by the United States Government as the foundation of an important national concern.

Now, lastly (and I cannot deny myself the pleasure of referring to this), when my friend Mr. Carter got to this very ticklish point, some of the members of the Tribunal interposed questions. I am referring to page 475 of the revised text of my friend Mr. Carter argument.

Mr. CARTER.—One moment, Sir Charles—there are not that number of pages in the argument as revised by me. I do not know what you are referring to as the “revised text.”

Sir CHARLES RUSSELL.—I am referring to the report which we have been furnishing to the Tribunal.

Mr. CARTER.—I shall insist that the only report that can be referred to is the one revised by me.

Sir CHARLES RUSSELL.—That would indeed be very strange.

The PRESIDENT.—If there is any objection to what Sir Charles Russell reads, you will be able to state your objection.

Mr. CARTER.—Yes, but I object to the practice of referring to it.

958 Sir CHARLES RUSSELL.—That would be very extraordinary.

I have not even read my friend's argument in any other form than the form with which I have been familiar.

The PRESIDENT.—Both reports are unofficial.

Mr. CARTER.—Yes, but of two unofficial reports I submit that the one which the Tribunal should use in a matter of reference should be the one prepared by counsel.

The PRESIDENT.—If there is any doubt about it, of course, you will refer to your text.

Sir CHARLES RUSSELL.—I think my friend will see that he has no reason to complain.

Mr. CARTER.—I object to the practice, that is all.

Sir CHARLES RUSSELL.—Then I insist on my right, Mr. Carter, if you put it so.

Mr. CARTER.—And I object to it.

Sir CHARLES RUSSELL.—I was going to say that, my friend will have no reason to complain, because if there be anything that he wishes to disavow in what is here recorded, I will accept his disavowal at once.

Mr. CARTER.—Yes, but there is an authorized report of the argument.

Lord HANNEN.—There is no such thing as an authorized report of the argument.

Sir CHARLES RUSSELL.—With great deference, I cannot accept the statement of my learned friend. The authorized argument was the oral argument. We for our convenience, and at our own sole cost, have furnished the Tribunal all through with an authentic report, carefully revised as far as the intelligence of those to whom that task was allotted enabled them to do it—fairly and properly revised.

Lord HANNEN.—You will tell us what you believe Mr. Carter said, and if any dispute arises upon it, of course we shall be very happy to hear what Mr. Carter has to say about it.

Sir CHARLES RUSSELL.—I may at some future time, although I will not promise, have the pleasure of reading my friend's revised edition of his argument, but at present I have not seen it or even looked at it.

Now the page of the daily report to which I am referring is page 475, and my learned friend is dealing with that very thorny subject—the early history of pelagic sealing. He is face to face with the fact, which he admits, that the first and earliest pursuit of fur-seals known in the history of the human race was pelagic fur-sealing, carried on no doubt in a rude fashion—not in as effective a fashion as modern appliances permit, but still carried on as a means of subsistence, and as a means of affording articles for barter (and in that way furnishing them to commerce), along the coast at the instance of the aboriginal natives. My learned friend, addressing himself to that subject, said:

As I said before, many times in the course of my argument, the attack by barbarians on the fruits of the earth is limited, confined, and generally not destructive;

but when civilization makes her attack upon them her methods are perfectly destructive, unless she makes use of those appliances which civilization teaches her by which that destruction may be avoided. Therefore there is no difficulty in awarding to the United States a right of property, subject to the right of the Indians to capture in the manner in which they were formerly accustomed to do before the use of vessels for pelagic sealing; but not a right to go out and engage in pelagic sealing.

The PRESIDENT.—Do you not think it very difficult to draw a legal line of limitation between what an Indian is allowed to do for himself, and what he may be allowed or permitted to do in the service of a European or civilized man?

Mr. CARTER.—There are always practical difficulties connected with dealings with barbaric tribes—greater or lesser difficulties—but not insuperable difficulties connected with it.

My friend evades the point,—does not even appreciate the point. It is not a question of there being greater or less difficulties in dealing with barbaric tribes—it is the question whether it is not difficult to draw the legal limitation between what is admitted to be a thing that the Indian may do for himself, according to his barbaric methods, and what he may do if employed at the instance of civilized man. The learned President recalls my friend to the question with this observation:

Do you find that there is a substantial legal difference between the two cases?

Mr. CARTER.—There is a substantial one.

The PRESIDENT.—Between the case of an Indian fishing on his own account, and an Indian fishing on the account of a civilized man?

Mr. CARTER.—I think there is a very substantial one.

The PRESIDENT.—A substantial legal one?

Then we get to that broad ground which is always the refuge once we are trying to bring these vague, undeterminate propositions to the touch of legal principle.

Yes,

says Mr. Carter,

when I speak of “legal” I mean moral. We are on international grounds—international law, and there is a sharp distinction.

The PRESIDENT.—Moral and international are different fields of discussion, I think.

Mr. CARTER.—I said “there is no sharp distinction”.

Sir CHARLES RUSSELL.—Very well—“there is no sharp distinction”. I take it so. That is to say, being in the field of international law, there is no sharp distinction between moral and legal law—that is the proposition, therefore, of my friend.

Mr. CARTER.—It is.

Sir CHARLES RUSSELL.—Yes, I know. Then the learned President continues:

Moral and international are different fields of discussion, I think; but they may often join.

Mr. CARTER.—They are not so different as may be supposed.

The PRESIDENT.—They are not contrary.

Mr. CARTER.—Oh no, international law rests upon natural law, and natural law is all moral.

The law of nature is all moral, and it is the great part of international law.

960 Here we get back to that same fallacy which I have endeavoured to expose in a few sentences, and to which I must recur at a later period a little more fully—that fallacy which lies at the basis of these proposals—that if you can make out to your private satisfaction that a thing is against morals, or against the law of nature (whatever the law of nature means in the connection in which it is used) it is therefore against international law: it is therefore to be reprehended. With great deference to this Tribunal the distinction is justly, accurately, and truly drawn, in that observation of the learned President in which he said, “Moral and international law are two fields of discussion, but they may often join”, which is to affirm in another way the proposition to which I invited, without any fear of the result, the assent of this Tribunal, namely that while moral law enters largely into the conception of international law—largely tends to the formation of international law—yet only so much of moral law as international law has taken up into and embodied in itself can be referred to in a discussion of lawyers and of judges as forming international law at all. But I do not end this discussion here. My friend Mr. Carter, then proceeds, it having been pointed out to him by Lord Hannen that the mode of hunting pursued by the natives was not confined merely to their sustenance, but that they were the suppliers, in the first instance, of the skins of these wild animals—fur-seals and others included.

Mr. Carter quite candidly says:

That is true. They were the original traders, and they were made use of by the purposes of commerce, but what I mean to say is, that was *commerce*.

Lord HANNEN.—Yes, carried on by the natives.

Mr. CARTER.—I know, but that was commerce. They were supplying the commerce of the world. They were not supplying themselves with clothing—they were not furnishing themselves with seals for food.

The PRESIDENT.—That you would consider was legal at the time, but would not be legal now.

Mr. CARTER.—Before the Russians discovered these regions they were inhabited by Indians, and these Indians did pursue seals in that way. It is a pursuit without method—without making any effort to preserve the stock; destructive, of course, in its character, but not of sufficient extent to endanger the existence of the race of the animal.

Then on the next page, page 477, my friend said:

The distinction which I mean to draw is a distinction of a resort to the seals for the purpose of the personal use of the people, such as they were in the habit of making before they were discovered by civilized men—the distinction between that pursuit and that which is promoted by civilized men for the purpose of supplying the world with these skins. That is the distinction. The first pursuit which is confined to the barbarians is not destructive of the stock. Nor is the other, as long as it is limited to certain very narrow proportions and conditions.

Well, the whole legal proposition is given away in this discussion. Then my friend continues:

961 But when it is increased then it does threaten the stock. What must you do then? You must adopt those measures which are necessary to preserve the stock; and what are the measures which society always employs for that purpose? I have detailed that already—it is to award the institution of property.

Now, did ever an able man present so inconsequential an argument as that to a Tribunal of intelligent judges? It is said: “The Indians had a right to pelagic sealing: They had a right to it, and they carried it on even for the purposes of commerce: Civilized men carried it on,

but carried it on only to a small extent, and they had a right to carry it on to a small extent so long as it did not affect the stock: But when it begins to affect the stock then rights change—that which was a right the day before ceases to be a right the day after that event begins to happen”; and this Tribunal is asked to do what?—Not to declare what the property rights had been and were, but is (to use the language of my friend), *to award the institution of property*. I say that it is not the function of this Tribunal—it is a misconception of the function of this Tribunal to address any such argument to it.

Mr. CARTER.—I observe you did not read the whole.

Sir CHARLES RUSSELL.—I did not, indeed; there are a great many hundred pages of it. If there is any further passage you desire to be read, I will read it with pleasure.

Mr. CARTER.—I said you did not read the whole of what you were upon.

Sir CHARLES RUSSELL.—The whole of that sentence? It is this:

It is, to award the institution of property. Now, must society withhold its effort,—must it forbear to employ those bounties—

Mr. CARTER.—“Agencies” would be a better word.

Sir CHARLES RUSSELL.—Very well.

because here are a few hundreds of Indians in existence who may have some rights in reference to them? No, they are not to be considered, surely. We can not allow this herd of seals to be extinguished just for the purpose of accommodating a few hundred Indians upon that coast,—surely not.

Then, if I go on, I shall have to go on for some distance. Is there anything more you want me to read?

Mr. CARTER.—I do not wish you to read anything; but when you do undertake to do it, I would read the whole of it if I were you.

Sir CHARLES RUSSELL.—I will read to the end of the page, because I think the subject there ceases.

The PRESIDENT.—It may be that the civilized fishermen may not be more than a few hundred also. The number of men employed is not absolutely a foundation of legal discrimination,—a legal duty.

Mr. CARTER.—You mean those employed on the Pribilof Islands may be a few hundreds?

That was really not the point of the question.

The PRESIDENT.—I mean, the pelagic sealing may be carried on by a few hundred Indians, but that is no matter. The difference that you make is whether they are Indians or civilized.

962 Mr. CARTER.—Yes.

The PRESIDENT.—Suppose Indians make commerce, selling or bartering their skins,—you allow that also?

Mr. CARTER.—Where it is not destructive.

The PRESIDENT.—It is a question of proportion,—of measure with you.

Mr. CARTER.—If it is destructive, then it is not to be allowed. They have no right to destroy the race of animals.

The PRESIDENT.—In order to give you satisfaction, the question would be to know within what limits pelagic sealing may be carried on without being destructive.

Mr. CARTER.—Yes, that is practically the question. If you say pelagic sealing can be carried on without being destructive.

The PRESIDENT.—By Indians, at any rate?

Mr. CARTER.—By Indians in their canoes in the way in which it was originally carried on. That does not threaten the existence of the herd.

The PRESIDENT.—That is a natural limitation.

Mr. CARTER.—But it is possible to do this. It would be possible for those who are now engaged in pelagic sealing: for instance, to say: “The Indians are permitted to carry on pelagic sealing; we are prevented from doing it. We will just employ those Indians”.

The PRESIDENT.—That is the difficult point which I just hinted at.

Now, I think I have read as much as will make clear the view that is there put.

Again my learned friend in another part of his argument said: "We affirm that the property in these seals is as clearly the property of the United States as a ship belonging to the United States." Well, it does not do to carry these illustrations too far; but really this does suggest itself to one's mind. My learned friend says a seal is as much property as a ship. Let us suppose a fleet of ships. It would be a very curious result that a fleet of ships was the property of the United States, but that the individual ships were not the property of the United States, if the parallel of the property in the seal and in the ship is so complete as my friend would seem to suggest.

EXAMINATION OF THE NATURE AND HABITS OF THE FUR-SEAL.

But I approach the matter a little more closely. What kind of animal is this? To what order of animal is it to be relegated? I do not care whether it is to be called a "fish" or an "animal", or what it is to be called:—what is it? If an animal, is it a land animal; or is it a sea animal? Well, I observe, in passing, that all through the legislation of the United States the seals are always spoken of in relation to "Fisheries". But that may not be very important. What are its natural appliances for living on land? Can it progress on land with facility? Does it get its support from land; or any of its support from land? No. The animal is one which Nature has not adapted for easy progression on land. It has got no legs; it has got no feet. It can flop, with great rapidity, for a few yards, 50 or 60 at the outside, and then it falls down exhausted; and a curious circumstance in relation to it is this, that it is manageable on land because it is wholly
963 helpless upon land, and has not been furnished by Nature with appliances which enable it easily to progress upon land.

In this connection, I would like to read one passage from the Report of Mr. Elliott in 1890, describing the character of this animal when it is being driven on land. I am reading from page 7 of his letter to the Secretary of the Treasury published with that Report. It is the third paragraph on that page.

The least reflection will declare to an observer that, while a fur-seal moves easier on land, and freer than any or all other seals, yet, at the same time, it is an unusual and laborious effort, even when it is voluntary; therefore, when thousands of young male seals are suddenly aroused to their utmost power of land locomotion, over rough, sharp rocks, rolling clinker stones, deep loose sand, mossy tussocks, and other equally severe impedimenta, they in their fright [This is the *domestic* animal] exert themselves most violently, crowd in confused sweltering heaps one upon the other, so that many are often "smothered" to death; and in this manner of most extraordinary effort to be urged along over stretches of unbroken miles, they are obliged to use muscles and nerves that nature never intended them to use, and which are not fitted for the action.

This prolonged, sudden, and unusual effort, unnatural and violent strain, must leave a lasting mark upon the physical condition of every seal thus driven, and then suffered to escape from the clubbed pods on the killing-grounds; they are alternately heated to the point of suffocation, gasping, panting, allowed to cool down at intervals, then abruptly started up on the road for a fresh renewal of this heating as they lunge, shamble, and creep along. When they arrive on the killing-grounds, after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing; then when driven up into the last surround or pod, if the seals are spared from cause of being unfit to take, too big or too little, bitten, etc., they are permitted to go off from the killing-ground back to the sea, outwardly unhurt, most of them; but I am now satisfied that they sustain in a vast majority of cases internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a

station on the rookery, even if it can possibly run the gauntlet of driving throughout every sealing season for five or six consecutive years; driven over and over again as it is during each one of these sealing seasons.

Therefore, it now appears plain to me, that those young male fur-seals which may happen to survive this terrible strain of seven years of driving overland, are rendered by this act of driving wholly worthless for breeding purposes—that they never go to the breeding-grounds and take up stations there, being utterly demoralized in spirit and in body.

This is also to be found in the British Counter-Case, at page 264.

Now, Mr. President, it will probably occur to you or to some other Members of the Tribunal, though we have heard a great deal of the inhumanity in relation to pelagic sealing, yet that probably, if the seal could have its choice whether it would have itself knocked on the head on the island after these renewed and protracted efforts of cruelty, as one alternative, or would take its chance of being shot in its natural element as the other, if it is half as intelligent as my learned friends in other portions of their argument assert it is, there can be very little doubt which the seal would choose. I am dealing with this, not for the purpose of attacking the management of the Islands, but for the purpose of citing the man vouched by the United States as a great authority on the seal question.

964 Mr. CARTER.—Where is that vouched for?

Sir CHARLES RUSSELL.—Again, and again, and again; and I will refer to the American authorities and executive officers of the American Government who have referred to Mr. Elliott as a great authority, one or more of them indeed referring to him as the only authority on sealing.

Mr. CARTER.—You do not refer to anything in the evidence before the Court.

Sir CHARLES RUSSELL.—I do indeed. Mr. Blaine's letters, among others, refer to Mr. Elliott as the great authority on seal life; and I have certainly many other references.

I was upon the point of showing what the character of this animal is—that its helplessness on land arises from the fact that it is not really a land animal. On the contrary, it is admitted that upon the sea it is at home: that it is capable of easy progression many miles in a day, without any unusual strain upon its vital powers.

Now does it get its sustenance from the land? Not at all. It gets no sustenance from the land, and perhaps the passage I am now about to read on the question of what it does feed upon, may suggest to this Tribunal that if the fur-seal does perish from the face of the earth, as the buffaloes have perished from the face of the earth so far as American possessions are concerned, it will not be an unmixed evil. On page 72 of the same book to which I am now referring, and referring only for this purpose, there occurs this description of the food of these animals.

Lord HANNEN.—I see it is in inverted commas. What is it quoted from?

Sir CHARLES RUSSELL.—It is a quotation from Mr. Elliott's earlier Report of 1874.

Think of the enormous food consumption of these rookeries and hauling grounds; what an immense quantity of funny prey must pass down their voracious throats as every year rolls by.

A creature so full of life, strung with nerves muscles like bands of steel, cannot live on air, or absorb it from the sea. Their food is fish, to the practical exclusion of all other diet. I have never seen them touch, or disturb with the intention of touching it, one solitary example in the flocks of water-fowl which rest upon the surface of the water all about the islands.

I was especially careful in noting this, because it seemed to me that canine armature of their mouths must suggest flesh for food at times as well as fish; but fish we

know they eat. Whole windrows of the heads of cod and wolf fishes bitten off by these animals at the nape were washed up on the south-shore of St. George during a gale in the summer of 1873. This pelagic decapitation evidently marked the progress and the appetite of a band of fur-seals to the windward of the islands, as they passed into and through a stray school of these fishes.

So apparently they destroyed a great deal more than they actually consumed: they bit the fish at the nape of the neck, the choicest part, and let the rest go.

Senator MORGAN.—Do you remember if any other witness besides Mr. Elliott has ever spoken of that fact.

Sir CHARLES RUSSELL.—I think every writer has spoken of the enormous consumption of fish.

965 Senator MORGAN.—But the partial consumption by biting off the heads at the nape of the neck.

Sir CHARLES RUSSELL.—I am not aware; it may be, but I do not know.

Senator MORGAN.—I think he drew on his imagination for that.

Lord HANNEN.—Yes, but he does not say that. He simply says their heads were bitten off. It does not show that some were bitten slightly and escaped. They probably reject that which they do not like.

Sir CHARLES RUSSELL.—I take it to mean that they ate the choicest parts.

Lord HANNEN.—But you added to it that some escaped. There is nothing in Elliott's Report about that.

Sir CHARLES RUSSELL.—No, I did not think the Senator meant that. I think I am right in saying that it is well known that otters, frequenting salmon rivers, will if fish is plentiful simply eat the back of the neck of the salmon and not eat the rest. That is an experience probably all of us who know anything about otter hunting are quite aware of.

How many pounds *per diem* is required by an adult seal and taken by it when feeding is not certain in my mind. Judging from the appetite, however, of kindred animals, such as sea-lions kept in confinement at Woodward's gardens, San Francisco, I can safely say that forty pounds for a full grown fur-seal is a fair allowance, with at least ten or twelve pounds *per diem* to every adult female, and not much less, if any, to the rapidly growing pups and young "holluschickie." Therefore, this great body of four and five millions of hearty, active animals which we know on the seal islands, must consume an enormous amount of such food every year. They cannot average less than ten pounds of fish each *per diem*, which gives the consumption, as exhibited by their appetite, of over six million tons of fish every year. What wonder, then, that nature should do something to hold these active fishermen in check.

Mr. CARTER.—He revises those observations on page 307, I see.

Sir CHARLES RUSSELL.—I am obliged. I will refer to it with pleasure. I had not noticed it.

Mr. CARTER.—It begins in the middle of the page at the words "Using the above as a suggestion".

Sir CHARLES RUSSELL.—

Using the above as a suggestion, several writers have hastily assumed that it would be a good thing if the seals were exterminated—that by exterminating them, just so much more would be given to our salmon and cod fishermen to place upon the markets of the world. These men forget the fact that all animal life in a state of nature existing to-day as the fishes and seals do is sustained by a natural equilibrium, one animal preying upon the other, so that year after year, only so many seals, so many cod, so many halibut, so many salmon, so many dog-fish, and so on throughout the long list, can and do exist.

That is dealing with the state of nature.

Mr. CARTER.—But it goes on.

966 Sir CHARLES RUSSELL.—Very well, my learned friend, Mr. Phelps, will refer to it if it is important. I referred to him not for the purpose of shewing the food they consume, but for the

purpose of shewing they were sea animals. So much therefore as to being fitted for land and deriving no food from land; and so far as we have progressed, it stands thus, that as regards formation, as regards the food on which they live, as regards the element in which they move most easily and most naturally, they are sea animals—free swimming sea animals. These facts have some legal bearing. It is said that this sea animal is a domestic animal, or that it is to be relegated to the category of domestic animals; I have pointed out already in my opening observations that this is the first time that such a proposition has ever been advanced in the history of the world, and I have to point out that if I am right in saying that it is a free swimming sea animal, and if I am also right in pointing out that for the greater part of its existence (I will come to the justification of that in a moment) it spends its life in what I have called its natural element, in which not only no authority is exerted over it, but no authority can be exerted over it, then I say it belongs, so far as legal assertion of property in it is concerned, exactly to the same category (though the difficulties are even greater in this case) as the birds of the air or any fish or free swimming animal in the ocean. My learned friends, on the other hand, say it is to be relegated to the same category as cattle on the plains—the boundless prairies of the American Continent.

My learned friends, surely, did not suppose that we were ignorant of what is the legislation in the United States, and in each of the States I believe, upon the subject of cattle on the plains: that there is a regular system there of branding each individual member of the herd; that these branded marks are the subject of legislation, and are required to be publicly announced, publicly advertised, or, as we should say, registered, so that the trade-mark of one man may be distinguishable from the trade-mark of another man; and, I speak subject to the correction of my learned friends, I think it will be found that, even in the case of cattle on the plains, which admittedly belong to the category of domestic animals, if these branding marks are omitted, or are not registered, there is very great difficulty in the owner, who seeks to claim them, establishing his right of property at all.

Now, it is said that these animals resort to the Islands to breed, and resort there in compliance with what has been picturesquely described as the “imperious instincts of their nature”. They do.

And when they get there, what do the representatives of the United States do? Can they do anything to improve the breed? Nothing. Do they make any selection of sire and dam, of bull and cow? Indeed, could they? No. What do they do? They do two things, one positive the other negative, and two things only. The positive thing is that they do what a preserver-game does; he has a gamekeeper to prevent poaching; they have people on the Islands to prevent raiding. The negative thing that they do is that they do not kill all. They
967 knock on the head a certain number, but exercise a certain amount of discrimination or a large amount of discrimination. That is the whole sum and substance of what they do, no more, no less.

Let me illustrate my meaning. Suppose the existence, which there may well be in some undiscovered region, of an Island where there are seals; what does the United States do on the Pribiloff Islands that Nature, unassisted, does not do on the undiscovered Island?

The only thing that Nature does not do is that she does not knock them on the head. Therefore, as they do nothing to bring the seals there, so, when the seals are brought there, they do nothing in regard to them to improve their stock or to increase their stock; and except for

the control, whether effective or not I do not care, by which raiders are kept off by the representatives of the United States, or of the lessees, upon the Islands, they do nothing, except the negative act of not knocking some of them on the head, exercising, with regard to killing, as I have said, a certain amount of discrimination.

Do they do anything to induce them to go there? No, they do not. On the contrary, if they were to attempt by any kind of artificial means to provide for the reception of the seals, it would have the effect of driving them away, not of inducing them to come. Unlike the case of the bees,—the wild hive of bees, for which the man desiring that hive provides a mechanical contrivance, and also the beginning of a supply of food for them to induce them to form their combs of honey,—unlike the case of the doves, for which the owner supplies food and a dove-cote where they get shelter from the weather, the owners of the Pribiloff Islands do nothing; and if they were to do anything, it would have the effect of repelling rather than of inducing them to come.

Now, let me go a little further. It is said that they come to the Islands, and I think I must refer to the very words in which this is put,—I could not do justice to the pathetic language used in this case if I did not read it,—it is said, not only do they come to the Islands, but that they “voluntarily submit themselves to the control of man”, and have entered into a kind of treaty (“pact” I think is the actual word used) to yield up a certain proportion of their skins in consideration of the protection that man affords them and in return for it. Let me read it, so that it may not be said I am doing an injustice to this passage. I read from page 92 of their Argument.—

In the added light thrown by this inquiry into the foundations of the institution of property the case of the fur-seal can be no longer open to doubt, if it ever was. It is a typical instance.

Now, this is the sentence which I desire to read.

Polygamous in its nature, compelled to breed upon the land, and confined to that element for half the year, gentle and confiding in disposition, nearly defenceless against attack, it seems almost to implore the protection of man, and to offer to
968 him as a reward that superfluity of increase which is not needed for a continuance of the race.

The other passage to which I wish to refer, where the phrase is used, is on page 47.

The Alaskan fur-seals are a typical instance for the application of this doctrine. They are by the imperious and unchangeable instincts of their nature impelled to return from their wanderings to the *same place*; they are defenseless against man, and in returning to the same place voluntarily subject themselves to his power, and enable him to treat them in the same way and to obtain from them the same benefits as may be had in the case of domestic animals.

Now, what is the meaning of that phrase, “voluntarily submit themselves to his power”? Does it, in fact, mean more than that they come to the Islands and breed, and that, being on the Islands to breed, they can be the more readily knocked on the head? But, in the sense of saying that they do voluntarily and of their own free-will submit themselves to the control of man, the idea is absurd on the face of it and it is unsupported by facts. They come, “by the imperious necessity of their nature” (if I am to adopt that rather grandiloquent expression, which I am willing to do), to breed on the Islands; they are in a position in which man can readily knock them on the head; but it is absurd to say that they come to the Islands to submit themselves, or that they do submit themselves, voluntarily, by the exercise of any volition on their part, to the control of man, in the same sense of the word as domesticated animals undoubtedly do.

They submit themselves to the control of man just in the same sense, and in no other sense, as they submit themselves to the control of the killer-whale when they go out into the sea where the killer-whale can catch them. They are safe from the killer-whale on land; but they are obliged, "by the imperious instincts of their nature", to return to the sea, and there they return to a place where they are exposed to the ravages of the killer-whale; and it would be as true to say that they *voluntarily* submit themselves to the ravages of the killer-whale as to say that by resorting to the Islands they *voluntarily* submit themselves to the control of man. You might as well say the turtle, that comes to deposit its eggs in the sand to be hatched by the rays of the sun, coming upon the land indeed "by the imperious and unchangeable instinct of its nature" submits itself to the control of man because man may take advantage of the opportunity to knock it on the head; or, as my learned friend reminds me, may begin by turning it on its back and keeping it on its back a certain time before it is knocked on the head.

Then the next thing said is this; they have, by this imperious and unchangeable instinct of their nature, the *animus revertendi*. And then the United States say they constantly come back to us, and even if we do nothing to domesticate them, even if we cannot find a property in them *per industriam*, even if we do nothing to induce them to come there or to give them this habit of returning, yet the fact of their coming back gives us a property interest. Now, with great deference, this is an entire misconception of the doctrine of *animus revertendi*. First of all, I know of no case, and my learned friends have cited none, in which this doctrine has ever been applied to the case of migratory animals.

969 Could it be applied for instance to the wild ducks that breed in the northern parts of the Canadian territory and come down at a different season to the south, afterwards returning to the north? There is no case that I am aware of decided on this doctrine of *animus revertendi*, or which has any reference even to it, unless the habit or custom of returning operates after a short interval calculated by hours, or perhaps by days. As truly might you say that there was the *animus revertendi* to the ocean as an *animus revertendi* to the Pribilof Islands. When you get an animal which spends half its life in one place and half in the other, I think it will be found that this doctrine of *animus revertendi* has no bearing on the question.

But there is another ground on which the reference to this doctrine has been entirely misconceived. There is no case that I am aware of, and I speak subject to correction, but certainly none has been cited, where *animus revertendi* has been referred to in connection with the right of property, except where the *animus* has been induced by the effort or industry of man.

Where the instinct belongs to an animal and it acts according to its influence, where man has nothing to do to get it to return, where man has nothing to do to foster that return, where man has nothing to do to induce it to return, as by providing home or food, the doctrine of *animus revertendi* has no application. And I may illustrate my meaning I think in a sentence. I will take three or four well known classes of animals: pheasants, rabbits, grouse, hares. Let us see what happens in each of these cases.

What does the man who raises pheasants begin by doing? He begins by stealing the pheasants' eggs out of the nest in order to induce the hen pheasant to lay more eggs; and, having done that, he proceeds to hatch the eggs he has abstracted under a common barn-door hen.

When the birds are young he feeds them, and when they are old he feeds them. They spend a great part of their time on his land, but they make excursions to adjoining land which is not his, and they return to his land because they expect to be fed there.

Take again rabbits: you have a warren in a sand-hill on your estate, which supplies very little food indeed to the rabbits, but which gives them every facility for constructing their houses or burrows in the sand. They go elsewhere, it may be to another estate of yours, it may be upon your neighbour's estate, in the dead of the night, or early morning, for their food; and then they come back to your warren. They have, by the imperious and unchangeable instincts of their nature, the *animus revertendi*.

And with grouse almost the same thing happens.

970 So with wild deer. One may multiply the instances. These animals all have the *animus revertendi*: but has any law ever said, though there are cases in which you actually induce them to return by making them homes, and even by giving them food, that your neighbour, when they are off your land, may not shoot them as wild animals. No: no case has ever said anything of the kind. No case ever could say anything of the kind.

I go a little further. It is stated in this case,—and I am at present engaged, as the Tribunal will see, not in building up an affirmative argument, but in examining and analysing the argument put by the other side: taking it to pieces, as I hope successfully—it is said in the case, and was repeated, to my amazement, by Mr. Coudert, if not also by my learned friend, Mr. Carter, that when the seals were on the island they were the complete and absolute property of the United States or their lessees.

Thereupon Senator Morgan very astutely put the question: if they are the absolute property of the United States or their lessees when they are on the islands, when do they cease to be their property, and how do they cease to be their property,—a very proper question indeed. But there is much virtue in an “if.” “If” they are their property on the islands, they are their property off the islands. But my learned friends have utterly failed to grasp—I see no trace of it in the whole of the argument, written or oral,—the distinction between the right to take a thing when it is on your land, from which land you can exclude everybody else, and an absolute right of property in the thing itself. Surely it is a legal conception capable of very ready and easy apprehension, recognized by all systems of municipal law, in all civilized countries, that on the land you have a right to exclude everybody else: you have a right to treat that somebody else as a trespasser. It follows from that that you have the right to take what is on the land, even though it be wild; and the right to exclude others from the opportunity of taking it. But it follows also, that when the wild animals are off your land your exclusive right ceases. Thus it is that the owner of the land has a special right by reason of his right of ownership, of taking the wild animals on his lands: the right known as *ratione soli*. This fundamental principle I find no trace of in the argument written or oral of my learned friend; but it is a principle which it is important and very essential to be borne in mind in this case.

Now let us look at the question again by the light of an application of my learned friend's doctrine of property in seals. What does it import? What are the consequences of it? It imports this, that if they are property on the Islands they are property everywhere; and

herein I agree thoroughly with my learned friend Mr. Carter (one of my few points of agreement I am afraid) that once you establish the right of property the law will suppose you are in possession, even though you have lost the physical control and dominion over the thing.

You do not lose your property if you once have it, if it escapes out of your hand; you do not lose your property in your sheep or horse, or in any other animal as to which you have an absolute right of property, because it may have strayed miles, even hundreds of miles, away; and therefore if there is property in these seals the property attaches wherever they are.

Senator MORGAN.—A case of constructive possession.

Sir CHARLES RUSSELL.—Quite so. That is a convenient expression.

But that is only where you have the property in the same sense, to use Mr. Carter's illustration, as you have property in a ship. What consequences does this lead us to? It leads us to those absurd consequences from which my learned friends most naturally seek to escape, but from which they cannot escape, namely, that if there is property on the Islands there is property a thousand miles away from the islands. And one might invent, or one might imagine, a colloquy between a representative of the lessees of Pribilof Islands and a pelagic sealer off Cape Flattery. The pelagic sealer is about to shoot a seal which he sees there, and the agent of the lessee says: "No you must not, that belongs to me". "Well, when did you see it last?" "Well I do not know that I ever saw it before." "How do you know it is yours?" "Well I cannot be quite certain that it is mine. I have no mark upon it, but I think it comes from the Pribilof Islands". "You say the property is yours. Do you say that that particular seal is yours?" "Well I cannot quite say that; it is not necessary that I should say that; but it belongs to a lot of seals; we call them a herd,—though I cannot quite undertake to say that particular seal is mine I am pretty sure it is one of a lot of seals that probably came from the Pribilof Islands. You must not shoot him, because when he goes back, as I expect he will (I am not sure) by the imperious instincts of his nature, to the Pribilof Islands I intend to knock him on the head". I need not say the seal, not interested in this discussion, has meanwhile disappeared, and his life is so far prolonged. But does it not present the absurdity of the argument of property in the individual seal, so that as one may say, *ça saute aux yeux*.

Need I dwell upon the farther consequences, namely, that in defence of this property in the individual seals, or in the seal herd, it is claimed by the United States that they may search and seize ships that they believe to be engaged in pelagic sealing, and, if they make good the accusation, confiscate such ships?

Now let me just see whether the facts which I have so far mentioned as characteristic of this animal are not facts as to which there is no doubt or dispute. Is there any real dispute that the animal is a sea animal, a free swimming animal? Is there any dispute that it spends at least half of its time in the open sea? I think not. My learned friend, Mr. Coudert, went the length of saying that it spent eight months of the year on the islands. Now that, upon the examination of the figures, will be found to be quite incorrect. It will be found that a much nearer approximation is from three to five months in the year, and the way in which the longer period has been arrived at has been by taking the date of the earliest arrival and the latest departure; but if you take the mean it will be found somewhere between four and five months, taking each class of seal; the argument that we have put forward on this point, seems to be warranted by the

figures given. It is not much more, if anything more, than a third of each year. So far, therefore, there is very little difference between us. I am not concerned however to demonstrate that the seal is a sea animal. Probably the true explanation is that it is partly a land animal and partly a sea animal, or in other words, what is commonly called "amphibious"; but that does not seem to be very important.

Is there any dispute about the other facts which are important on the question of property: that it gets no sustenance from land, there is no dispute as to that: or upon the fact that the lessees of the United States do nothing artificially to induce it to come to the islands, and that if they did try to do anything artificially to induce it to come to the islands, it would probably have a repellent effect. There does not seem to be any dispute about that.

Then what does it come to? It comes to this: that it is an animal which breeds on the islands, and resorts to the islands mainly to breed. That will be found to be, ultimately, the material fact in the controversy upon the question of property. But how about the character of the animal itself? Is it, or can it be called, a domestic animal?

Now I would like to refer to one or two points in this connection which I think are not unimportant. We have one instance given in the United States Case, where an attempt was made to tame a young seal, and I would like to refer to it as it is the only one I think that is given. The story is given on page 33 of the Second Volume of the Appendix to the case of the United States. It is the case of a pup called "Jimmie". He was very short-lived. How he got his name does not appear; but the accident of his birth is mentioned at the beginning of the section:

Little "Jimmie", as this particular pup was called, was the child of adverse circumstances, as his mother happened accidentally to be caught in a large drive and could not be separated from the herd until the killing ground was reached.

Shortly after being parted out and allowed to go free, on her way to the water, she hurriedly gave birth to this pup and continued on her journey. The pup was watched carefully for a few days, and when it was thought to have been deserted a kind-hearted employé of the Company, Mr. Allis, brought it into the village with a double view of trying to save its life as well as to make a pet of it.

For the first few days, as nobody could manage to make him eat, and as he would generally get the best of some friendly finger in these attempts at feeding he was let severely alone. Then followed various contrivances, mechanical and otherwise, for holding his head so as to feed him with a spoon or a nursing bottle, but all to no purpose, for he would get most of the milk everywhere but where it was intended to go. This went on for all of two weeks or more. I then equipped myself with a large syringe and a flexible tube and about a pint or so of warm fresh cow's milk. Little "Jimmie's" mouth was kept open, the tube was passed down his throat into his stomach, the syringe filled with milk, in quantity as before stated, and which was unanimously agreed was not too much for him at one feeding, was slowly injected down the tube into his stomach.

After the operation the tube was carefully withdrawn, and "Jimmie" was left to his own devices. The pup, much to the gratification and amusement of all present, immediately began to show in the most unmistakable manner the greatest of seal 973 delight, i. e. to lie down in the various positions of seal comfort, on his back and side, and wave and fan himself with his flippers, scratch himself, bleat, etc. As these signs were unmistakable to all present who were familiar with the habits of seals, the operation was thought to be a success. Up to the last time the pup was seen, late that night, he was doing finely, but next morning he was found dead, and I attribute his sudden taking off either to the small boy or an accident during the night".

I believe that is the best authenticated instance—the only one that I am aware of—of an attempt to domesticate the seal: the seal which we are told could be induced to follow you—which was semi-human in its intelligence—which kept appealing to you for aid and protection.

Now, Mr. President, in this connection, I want to read one or two passages from the same volume. The first is at page 69, which expresses,

very strongly, the domestic and gentle nature of this animal. I think it is the strongest passage of this character, and therefore I read it.

The name of the gentleman is Morton, who was the Agent of the lessees and Treasury Agent on the Pribiloff Islands, and he says:

I believe the American Government to be justified in assuming and maintaining the absolute proprietorship of the American seals. They may, I think, in the broad sense of the word, be regarded as domestic animals.

Well, I think it requires a very "broad sense" indeed. Then he proceeds:

They certainly possess qualities of a domestic nature which are susceptible of a high degree of development. During the first two or three months of their lives they are as gentle and docile as most domestic animals:

Well, "Jimmie" was not.

They may be handled and petted, will accept food at one's hands:

"Jimmie" would not.

can be taught to follow one from place to place, and in various ways are amenable to intelligent guidance and training. Even at mature age they are subject to as much control as are sheep or cattle.

They may be driven here and there at will; may be separated and driven together again: divided into groups or "pods", great or small, or be herded by thousands with less effort and trouble than bands of cattle are herded on the plains. They are far from possessing that excessive timidity which has been popularly attributed to them. They soon grow accustomed to the sight of man, and in the absence of offensive demonstration on his part quickly learn to regard his proximity with indifference.

Now I have read that passage because it is the strongest that I could find as to the general statement of the domestic character of this animal. Now let me contrast it with a passage which shews what is the true character of these animals, how frightened they are of man, and what efforts they will make to escape from human control. I turn to page 162, and I wish to point out that the statement which this witness makes is for the purpose of shewing the enormous vitality, as he con-
974 ceives, of the seals—their enormous powers of endurance and vitality. About the middle of page 162, you will find this.—

I never saw or heard of a case where a male seal was seriously injured by driving or redriving.

Then he proceeds to say how they fight on the rookeries, receive wounds, and yet are full of vigour.

Now the next passage I wish to read is this:

To show the wonderful vitality of the male seal, I will give one instance which came under my own observation: A drive of about 3,000 bachelors had been made, and after going a short distance was left in charge of a boy; by his negligence they escaped from his control, and the whole number plunged over a cliff, falling 60 feet upon broken stones and rocks along the shore. Out of the whole number only seven were killed, the remainder taking to the water; and these seven met death, I believe, from being the first to go over and the others falling upon them smothered them.

These are the animals which are easily handled, but which, actually, in order to escape from man, will jump down a cliff sixty feet, pell-mell, helter-skelter, upon the top of one another; and yet they are said to be so easy to control that you may drive them and round them up as you would round up cattle upon the plains.

I may of course be misapprehending the effect of this passage. If so, I should be very glad to be corrected and put right; but to say that an animal which will expose itself to the terrible risk of loss of life and serious injury by jumping down a cliff sixty feet high, which will rush

wildly away, wholly regardless of the consequences to itself, from the attempt of control of man, is not manifesting timidity in the presence of man seems to me very difficult to understand and appreciate. I may not understand this statement rightly. If I do not understand it rightly, the judgment of the Tribunal will set me right, or my learned friend Mr. Phelps, when his time comes; but I can myself suggest nothing which more strongly points to the timidity of the animal, and its fear of man, than the fact that in its endeavor to escape it will attempt to perform acts such as these, which it must be apparent, even to its limited intelligence, are fraught with personal injury and danger to themselves. He says seven of them were killed, he cannot tell how many more, for they may have been so injured that death may have resulted as a consequence.

Is there anything else, when you come to facts, which shows any capacity to control or domesticate the seals? I know of nothing; but not only that, I know of a fact which renders complete domesticity impossible, and that is that if you attempted to keep these animals under control and on the land, they would inevitably die. Therefore the case is stronger than that of most wild animals; because, as regards many wild animals, you may keep them under such close confinement, and in such close custody, and under such close physical control on the land, as to preserve the opportunity of knocking them on the head or cutting their throats whenever you like; but you cannot do that in the case of these seals, because if you confine them or even attempt to keep them under your control on the land, where alone you have any means of exercising power over their motions or their directions, you kill them. It is by the "imperious necessity of their nature" that they must go to sea.

So far as I have yet gone, it seems to me that all these facts that I have dwelt upon are common ground; that there is really no difference about the facts, so far as I have dealt with them; and that, in my judgment, for the reasons I shall presently give, they are conclusive upon the question of property. But there are one or two other facts which I think it is important to ask the Tribunal to regard, which I cannot say are admitted facts, but as to which I can only say that there is a body of evidence in regard to them. The first that I refer to is the question of intermingling of the seals frequenting the Pribilof Islands with other seals from different places. That is established principally by reference to the character of the skins of these animals; and I wish to point out how the evidence stands in relation to this question of pelage.

The consignments of the Commander and Copper skins, which are from the Russian Islands, come by different routes to those who deal with them in the way of commerce in London. The consignments from the Pribilof Islands, equally, are a separate consignment, and reach the market as a separate consignment. And thirdly, there is the Northwest catch, which is the name used to describe the pelagic catch. That again finds its way to the market by a different route, through different agencies, and as a separate consignment. It appears to be undoubted that the Alaskan fur-seal skin has attained a higher reputation in the market than any other fur-seal skin. Whether that is partly owing to the fact that it is the oldest fur-seal known in the market, or whether it is that the name has become attached to a skin of a particular quality, or partly one and partly the other, I do not quite know; but if I am able to show that in each of these consignments there will be found to be a mixture: in the Alaskan consignment an admixture of Copper and

Commander skins, and in the Copper and Commander consignments a mixture of Alaskan skins, and in the Northwest catch a mixture of both: and in all—which is to me the most singular fact—a large percentage of skins approximating to the character of Alaskan skins, or approximating to the character of Copper and Commander skins: then I think it is impossible to resist the conclusion that there is a much wider intermingling, and not only intermingling but interbreeding, in the seal family in this part of the North Pacific than is admitted by my learned friends on the other side.

Senator MORGAN.—I believe there is no doubt that expert witnesses can certainly trace the distinctions between these different skins of different islands. You have no doubt on that point?

Sir CHARLES RUSSELL.—You will see, Sir, what it leaves no 976 doubt upon when I call attention to the evidence, which I propose to do in a moment or two. This fact, if it be the fact—I am not treating it as an admitted fact at all; on the contrary it is denied—but this fact, if it be a fact, of intermingling and interbreeding is only what you would expect. It is a thing you would probably look for; because here at least we are on common ground, namely that the seals wherever they are found, whether in the Northwest Catch or the Russian Catch or the Alaskan Catch, or along the Southern shores, are all of the same species. Therefore, there would be nothing unnatural, on the contrary there would be everything natural, in the fact of their interbreeding, if they intermingle. Then is there anything unnatural or improbable in the fact of their intermingling? No. If the evidence which I shall call attention to in a moment is well founded, it will be seen that although there are two great divisions—one of which goes south east in its migrations, and the other goes south west in the autumn and winter—, yet that they are not two distinct armies, so to speak, in regular Indian file, following one another, but that they are scattered over the whole ocean in a greater or less degree: and that in point of fact there is no part of the ocean in which they are not to be found, and in considerable numbers, at any time during the period of their annual migration.

That again is what one would expect, for a very obvious reason. These are amphibious animals, that live upon fish, and upon fish only. They would, in the pursuit of their natural food, follow such variations as might be suggested to them by the pursuit of their food, the schools of fish being here at one time, and there at another time; and so this intermingling would be brought about.

Lastly, and this is the only other point in this connection which I wish to dwell upon, I think that it will be found to be an entire mistake to suppose, as is suggested on the other side, that during the breeding season the whole seal family make their way to the Pribilof Islands and to the Commander and Copper Islands, and that the whole family or whole families are there on or in the immediate neighbourhood of the islands during that breeding season. That will be found not to be the case. It will be found upon the evidence that even in the height of the breeding season, in the month of July and in the month of August, quantities of seals are to be found all over the seas—I mean at some considerable distance from the coast—as to which the probability is that a very large part of them are barren females, young bachelors, and old seals, that do not go to the islands at all; and that as regards the female seal, the evidence, even from the witnesses of the United States, is to the effect that from the moment she leaves the island in the autumn of the year in which she was pupped, she does not return

to the island until the sexual instinct prompts her return there at two or three years of age, and that she does not return in any permanent sense to the island at all until she comes to deliver her first pup.

Those are points as to which I shall have to trouble the Tribunal with reading some passages in the evidence. I think they have some bearing upon this question of property.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you.

Sir CHARLES RUSSELL.—I am now about to refer, Mr. President, to the evidence of the intermingling, which, as I have said, is not an admitted fact. I have pointed out the reasons why I conceive it to be probable and natural. I will now call attention to the evidence which proves it; and in calling attention to that evidence it will be found to answer the question addressed to me by Senator Morgan.

The PRESIDENT.—We should like, Sir Charles, for one moment, to refer to the English maps which give the course followed by the seals in general. We have the map in the Report of the British Commissioners, which illustrates the resorts and the migration routes of the fur-seals in the North Pacific generally; and we shall be able to follow you.

Sir CHARLES RUSSELL.—I do not intend, Sir, to refer to the map, nor would it aid the Tribunal, in following my argument, to have it before them; I was upon the independent testimony as to the fact of intermingling.

The PRESIDENT.—Is there any contradiction between these maps and the others?

Sir CHARLES RUSSELL.—I do not think there is any contradiction. The further Report of the Commissioners, in view of the further information that they have obtained, undoubtedly points to the fact that although there may be said to be two clearly marked main routes of migration south, yet that it would be incorrect to assume that the whole body of the seals are gathered into one or other of these routes—that there are still a considerable body or seals attached to neither route, but scattered over the whole sea from land to land. The point I was upon was the evidence that goes to show intermingling; and the same evidence will answer the question addressed to me by Senator Morgan as to whether or not it was possible to predicate, as to particular skins, whether they were Alaskan, or Copper, or Commander skins; and the answer will be found to be, that in some cases—in a great many cases—there are skins which they say are Alaskan without doubt; a great many which they say are Copper without a doubt; but there a great many also which they say are undistinguishable from either, and partake of the qualities and characteristics of both. That is the tendency of the evidence. It begins at page 230 of the second volume of the Appendix to the British Counter-Case; and it is the evidence of the same persons, or a great many of the same persons, whose evidence has been utilized by the United States for other purposes. I will only read what is absolutely necessary, and I will commence with the 6th paragraph of the affidavit of Mr. Poland, in which he says:

In inspecting the shipments made through Messrs. Lampson from the Pribilof Islands, I have from time to time noticed the presence amongst them of skins which were undistinguishable from Copper Island skins, and also in the same way
978 I have noticed amongst Copper Island consignments skins which are evidently of the Alaskan description. I have also noticed skins in both classes which in a lesser degree resemble the other class.

I dwell on this particularly, because my learned friend Mr. Connett was, as I conceive, rash when he said—"It would be something if it

could be shewn that Coppers were found amongst the Alaskans, or Alaskans amongst the Coppers." My friend, I think could not have had his attention drawn to this evidence.

Then on the next page—page 231—is the declaration, in French, of Mr. Leon Revillon. It is the last paragraph that I call attention to:

En examinant les peaux envoyées des Iles Pribilof par l'intermédiaire de Messrs. Lampson de Londres, j'ai remarqué de temps à autre qu'il se trouvait parmi elles des peaux qu'on ne pouvait pas distinguer de celles venant de "Copper Island", et j'ai également observé dans les envois provenant de "Copper Island" des peaux qui sont en toute apparence de la description de celles dites "d'Alaska". J'ai remarqué aussi que dans chaque classe des peaux il y en avait qui ressemblaient dans un moindre degré à l'autre classe.

Now in turn to page 235, and will read paragraph 6 of the evidence of Mr. Ince:

In inspecting parcels of skins from Pribilof Islands sold from time to time by Messrs. Lampson, I have noticed amongst them skins of seals which I should have thought, had they not been there, were from the Commander Island skins, and, in the same way, in inspecting skins of Commander Island seals, I have noticed amongst them skins just like Alaskas, and, of course, in each class I have noted skins of the other class, but of a less marked degree of similarity.

Now on the next page is the declaration of Mr. Sydney Poland; and in paragraph 6 he says:

In examining Alaska consignments from the Pribilof Islands sold by Messrs. Lampson, I have noticed among these skins which, in my opinion, were absolutely undistinguishable from Copper Island skins, and in the same way I have found among skins consigned from the Copper Islands, skins which were undistinguishable from Alaskas, and of course also many skins in each class which in a less degree resembled the other class.

Then in paragraph 7 he says:

In their dressed and finished condition it is exceedingly difficult, and to my mind impossible, to distinguish an Alaska from a Copper, and I assert that if half-a-dozen of each description manufactured into jackets were put before any dealer, however experienced, he would find it impossible to tell one from the other.

I read, next, from the declaration of Mr. Lansdell. At the top of page 237, in paragraph 5, he says:

I have found among the Alaska consignments sold by Messrs. Lampson, skins which it would be impossible for me to distinguish from Copper Island skins were it not for the fact that they were in the Alaska catalogue, and also among Copper Island consignments I have found in the same way Alaskas.

Then at the bottom of page 237, Mr. Jay of Regent Street, London, says, paragraph 5, of his declaration:

In inspecting consignments from the Pribilof Islands sold by Messrs. Lampson I have repeatedly observed amongst them skins which were to my mind undistinguishable from skins from the Copper Islands; and, in the same way, in inspecting consignments from the Copper Islands, I have noticed amongst them a considerable quantity of skins which I could not have distinguished from Alaska skins. I should not like to say what the percentage of these skins would be, but I should think that 25 to 30 per cent was probably a fair average.

The next is Mr. Boulter, paragraphs 2 and 3, page 238.

The three best known descriptions of seal-skins are (a) the Alaskas, which come from the Pribilof Islands; (b) the Coppers, which come from the Commander Islands; and (c) what is known as the North-West catch.

I have carefully considered what difference there is between Alaskas and Coppers.

Then Mr. Politzer, paragraph 2, is to the same effect. I will not trouble the Tribunal by reading that; but, in the next paragraph, paragraph 3, the top of page 239, he says:

I have noticed in inspecting the consignments from the Pribilof Islands skins (sometimes as many as 30 or 40 per cent) which were perfectly undistinguishable

from Copper Island skins, and in the same way, in inspecting consignments of skins from the Commander Islands I have noticed skins which were similar to Alaskas, and of course in both classes I have found skins which in a lesser degree resemble the other class.

So again Mr. Halsey speaks to the same effect. I will not trouble the Tribunal by reading each one of these.

So Mr. Slater, on page 240.

So Mr. Weber, on pages 240 and 241.

So Mr. Jungmann, of Paris, and, in paragraph 4, you will see he says the same thing.

So Mons. Émile Hertz, of Paris; at the top of page 242, he says:

At the request of the Representative of Great Britain, I declare in addition thereto that I have from time to time seen among the consignments of Alaska seals offered for public sale by Messrs. Lampson and Company, of London, skins resembling Copper Island skins, and among the consignments of this latter sort skins resembling the Alaska kind, but I believe it to be impossible to affirm absolutely that these doubtful skins belong to one or other of these two localities.

So Mr. Grebert.

So Mr. Haendler.

So Mr. Eysoldt; who says in paragraph 5, on page 243.

In consignments that I have inspected from the Copper Islands, sold by Messrs. Lampson and Company, I have noticed a certain percentage of skins which, had I seen them elsewhere, I should have considered them Alaska; and in the same way I have found skins amongst Alaska consignments that I have inspected which resembled the Copper description.

It is a matter of considerable difficulty to say what is the exact percentage I have so noticed, but I think it would be a safe estimate to say that, in the Copper consignment, I have found from 25 to 30 per cent, which resembled Alaskas, and in inspecting Alaska consignments about the same percentage of skins which resembled Coppers.

So Mr. Friedeberg, paragraph 4, page 244. He puts the percentage from 20 to 40 per cent.

980 So Mr. Creamer, in paragraph 4; he puts the percentage at rather less, I think.

So Mr. Stamp, whose evidence has been dealt with by Mr. Coudert as perfectly reliable, and I have no doubt it is. He says in paragraph 3.

In my opinion, there is no absolute line of demarcation between the Copper Island skins and Alaskas; and in inspecting the consignments made each year from the Pribilof Islands through Messrs. Lampson and Company I have found a certain percentage of skins which were *fac similes* of Copper Island skins; and in the same way, in inspecting the consignments of Copper Island skins, I have seen skins which, had I seen them elsewhere, I should have classed as Alaskas, and also a certain number of the intermediate degrees of similarity. The qualities of the skins vary greatly in different years; some years the Coppers approach in quality very closely to the Alaskas.

Then he speaks, in paragraph 5, about noticing females among the recent consignments.

So Mr. Apfel, on page 246; but I do not think I need trouble the Tribunal with any more of this evidence.

Mr. Henry Poland's statement is at page 250.

Now, unless I am mistaken, the Tribunal cannot fail to attach importance to this evidence, because it must be recollected that the case of the United States has been that, although they do not go the length of saying that the Alaskan fur-seal is a distinct species, yet they say that the seals that frequent the Pribilof Islands are a family of seals, of which no doubt there are other species in the Ocean, that keep their own society, that go on definite routes to the South, that go on definite routes to the North and make the Pribilof Islands their home. Well, of course, it is obvious that if these facts, which have been vouched by

these gentlemen, are true, there cannot be any such distinction of family as they allege, and the more they assert a distinctive character for the Alaskan fur-seal skin, the more they assert that the Alaskan fur-seal skin is superior in character, by reason of the density of its fur, the stronger becomes the evidence of intermingling and interbreeding. If you find this large percentage of an entirely different set of skins mixed with the Alaskan, if you find a large class in this consignment where the qualities of the Copper and Alaskan approach one another, that is the strongest evidence that could be given not merely of intermingling but of interbreeding of these different branches of this species of the fur-seal.

There are one or two other points in that connection which I think it well also to notice; namely, that upon examination it will not be found that the theory presented of an annual migration north of what I may call, for brevity's sake, the Alaskan seal family,—north to the Pribilof Islands,—and a migration south of the same family, so that the southern resort of this fur-seal family would be vacant during the breeding season when the main portion of the family were on the Pribilof Islands, will not be found to be well established; and for that purpose I will refer the Tribunal to one or two points, not at any length, for I am very anxious to get over the ground, to show that at all times of the year there are to be found (and my evidence will be principally directed to the months of June, July, August and September when the breeding season is all over) seals south of the Aleutians, and north of the Aleutians as well.

The first reference I shall make is to the Report of the British Commissioners at page 175, where there is set out a very interesting letter from a gentleman named Swan, who seems to have taken a great deal of interest in seals. He is a gentleman who lives at Port Townsend in Washington territory and is a United States judge in that neighbourhood.

Mr. PHELPS.—No.

Mr. Justice HARLAN.—He is not a United States Judge I think: if that be important.

Sir CHARLES RUSSELL.—If I have done him an injustice I am sorry.

Mr. Justice HARLAN.—He may be a Judge in Canada.

Mr. TUPPER.—No he is not.

Sir CHARLES RUSSELL.—Probably, Mr. President, when each of these great countries disclaim him, the United States on the one hand and Canada on the other, the explanation is to be found in the fact that he is a collector of customs.

Mr. PHELPS.—No, he is the owner of a sealing schooner.

Mr. Justice HARLAN.—At any rate he is called a Judge.

Sir CHARLES RUSSELL.—Yes. In my own justification I was going to say that I called him Judge because I found him called Judge. Perhaps it is because of his superior wisdom he has been so called by his friends and admirers. Let us assume that that is the understanding.

Sir JOHN THOMPSON.—We may start with the understanding that Port Townsend is not in Canada.

Sir CHARLES RUSSELL.—Yes, and that information is necessary for my learned friend Mr. Phelps, because he inquired the other day.

Mr. PHELPS.—Yes, I have since found out.

Sir CHARLES RUSSELL.—And I trust that the information we gave has been found accurate.

On the top of page 175 there is a good deal of abuse of the Lessees

in various points of the Islands with which I will not trouble you, and he says:

The seals begin to make their appearance in the region about Cape Flattery in the latter part of December or the first of January, varying with different seasons. When easterly winds prevail with much snow they keep well off shore, and do not make their appearance in great numbers before the middle of February or the first of March. Last winter was very mild, with but little snow, but the prevailing winds, which were south and south-west, were exceedingly violent, preventing sealing-schooners from doing much hunting. The mildness of temperature, however, with the direction of the prevailing winds, drove the seals toward the coast in incredible numbers. They gradually work up the coast toward Queen Charlotte Island, when the larger portion of the herds move along the Alaskan coast toward Unimak Pass and other western openings into Bering Sea. A portion of these seals, however, pass into Dixon's Entrance, north of Queen Charlotte Island, and into Cross Sound and Cook's Inlet, and do not go to Behring Sea, but have their young on the innumerable islands, fiords, and bays in Southern Alaska and British Columbia. These seals are seen in these waters all summer, at the same time of the breeding on the rookeries of the Pribilof Islands, and are killed by Indians and the skins sold to dealers. The great body of the seals, however, do enter Behring Sea, where they are followed by the sealing-vessels. They usually take to the islands about the first of June, the breeding cows and bulls being earlier than the rest of the herd.

And on the other side, page 176 the third paragraph from the top:

Very little has been published about the migrations of the seals on the North Pacific coast before they enter the Bering Sea, and this point is one from which we got a lot of interesting matter. We have taken a good deal of evidence about the presence of seals at Cape Flattery, and have been told that they were more numerous last spring than they have ever been before. . . . I find a peculiar idea existing among those who claim to be authorities in regard to seals found in the waters of South America, especially about Tierra del Fuego and the Straits of Magellan. The notion that they are the same species of seal as those found in Behring Sea and the North Pacific is quite erroneous.

That is a different matter.

Mr. Justice HARLAN.—That is the language of Dr. Dawson.

Sir CHARLES RUSSELL.—Yes.

General FOSTER.—All of these are quotations.

Sir CHARLES RUSSELL.—No.

Mr. Justice HARLAN.—That which you read before is not a quotation.

General FOSTER.—It is from the London Weekly Times.

Mr. Justice HARLAN.—No, the end of the quotation from the newspaper stops before that.

Sir CHARLES RUSSELL.—Now I come to a paragraph I wish to read. I need hardly perhaps have troubled the Tribunal with the other:

These facts about the habits of the fur-seals of Cape Flattery, which I have known for more than thirty years, have this year been proved to be correct by the Royal scientists, and will seem to show there are always two sides to every question. While I join with all the sealers with whom I have conversed that there should be a close season on the Pribilof Islands, when no seals should be killed on those islands or in Behring Sea, I equally join with some of the more intelligent and observing of these sealers, that the hunting of seals along the coast of Washington, British Columbia and South-eastern Alaska does not in any way affect the seal catch on the Pribilof Islands, as there is every reason to assume that these coast seals never enter Behring Sea.

Thereupon he proceeds to give his views upon pelagic sealing, which is not the point I am now upon.

Then in the last paragraph but one, on page 177 he refers to what is certainly a remarkable fact if it is correct—I believe it is correct—that after the seals are skinned their dead bodies are left on the island, and are not turned to account for the purpose of extraction of oil.

Mr. Tupper is anxious that Mr. Swan's position should be vindicated, and he refers me to a communication which is in volume III of the

Appendix to the British Case; p. 191, I do not think I need trouble the Tribunal to refer to it. He is described as Assistant Collector, Port Townsend, Washington Territory. I am surprised that my
 983 friends should attempt to disclaim him. It is a communication that is published in the records of the 50th Congress miscellaneous documents no 78 presented by Mr. Dolph on the 15th March 1887, and ordered to lay on the table and be printed by the United States; and this shows that he was previously employed to report, because in page 192 he says.

In 1883 I was instructed by Professor Baird to investigate the habits of the fur-seals and to make a report thereon, which report may be found in the Bulletin of the United States Fish Commission, volume III, 1883, page 201.

So that he had some official position, and why my learned friends should think it right to disclaim him I do not know.

Now upon this question of property, I need not point out that if there be this intermingling, that if there be this interbreeding to however limited a degree, it makes the question of property in the individual seals a hopeless one, because the United States say, "These seals are the result of breeding upon the Pribilof Islands"; equally Russia might say, "They are the result of breeding upon the Commander Islands"; and when you get to a community and commingling and confusion of the two herds, and an intermingling or interbreeding of these two herds or families, whatever they are called,—to say there can be fixed, in point of law, a property in any one of that mixed and confused family is a proposition that is quite untenable.

Now, still in that same connection, a very curious fact comes out in the evidence of the British Commissioners, and I speak subject to contradiction and correction if I am wrong. I do not think it is in any way met or contradicted by the United States Commissioners. It is this—that the skins of the seals that come to land become almost immediately, or soon after they come to the land, in the condition known as "stagey"; that is to say, a condition in which their pelage is not in the best condition for the purpose of commerce, but that among the seals that are killed at sea by the pelagic sealers the number of stagey skins is exceedingly limited. This fact would seem to suggest that a change takes place periodically, probably annually, in the skins of each of these animals; yet when they remain almost continually in the water the change is more gradual and scarcely noticeable, whereas when they come to land and remain on the land, and are exposed to the effect of the atmosphere and sun for a considerable time, the stagey condition becomes more marked.

I will not stop to read them, but I would respectfully ask the Tribunal to note that in paragraphs 134, 281, 631 and 632 of the British Commissioners' Report the facts that I have adverted to are mentioned; and in Mr. Macom's Report, to be found in the first volume of the British Counter Case, Appendix, at pages 145 and 139, the same result seems to have been noticed by him.

Now one other point. I have stated that as regards certain of the seals they do not return to the islands at all, until they come there for certain definite purposes in connection with the perpetuation of
 984 their species: in other words, that there is no need for the young male seals to come there till they are a certain age; that some do come but a great many do not; that in the case of the female seal there is no need for her to come there until she comes under the influence of the sexual instinct. Now I want to show that that is a fact.

Senator MORGAN.—Before you approach that point, Sir Charles, I should like to make a suggestion. Counsel on both sides in this case seem to me to have neglected a very considerable and definite part of the evidence upon the subject of a necessity that nature has imposed on all seals, to land during some portion of the season for the purpose of undergoing this very process of shedding their hair. The evidence to my mind is convincing that that is just as much a necessity of the nature of the seal as the other instincts to which you refer; and that therefore it is that every seal is bound by a compulsion of nature to visit the shores during this stagey season, as they call it, when the coat is being shed. That impression having been made on my mind, I call attention to it merely for the purpose of inviting discussion.

Sir CHARLES RUSSELL.—With great deference, I am not surprised that my learned friends on the other side have not dwelt upon that. I think that view is not well founded. It does not appear to be so, and the evidence to which I have directed attention points in a different direction—that, though this stagey operation may be gone through in the case of each seal every year, yet it is not necessary for the seal to come to land. The probability is that the operation is more gradual in the case of those when they do not land than when they do—in other words, the evidence rather points to the fact that they have been on land than to the fact that they are going on land.

Senator MORGAN.—In order to get through with it—at all events it has made that impression on my mind, and especially that Report of Mr. Elliott to which you refer.

Sir CHARLES RUSSELL.—We will look at it again in view of the intimation that you have been good enough, Sir, to make.

In reference to this difficulty, which points to the impossibility, or impracticability, or both, of identification, all they say about it is on page 49 of their written Argument:

The difficulty of identification may be suggested, but it does not exist. There is no commingling with the Russian herd. Every fur-seal on the North-West coast belongs indisputably to the Alaskan herd.

That is statement, but it is not proof. On page 232 they say:

The marked differences between the Alaskan and the Russian seals are such as to be readily and plainly discernible to persons familiar with the two herds and their characteristics. This, once established, would naturally prove that there is no commingling of the respective herds.

We have shown by the evidence which I have read (which I can see no reason to doubt, though it is for the Tribunal to judge) that there is commingling.

985 I am now going to another point; namely the absence of these seals for a long period of their lives from the Islands. I refer to the evidence of Mr. Bryant in volume I of the Appendix to the British Counter Case, page 125. Mr. Bryant is a gentleman who has been employed by the United States before to report on this question; and, on page 125, we have put side by side a comparison of the statements made by this gentleman in his monograph of 1880, written at the instance of the United States Government, and the reports and evidence which he gave from 1869 to 1876.

Mr. Justice HARLAN.—Which side of that page do you refer to?

Sir CHARLES RUSSELL.—For this purpose, to both. He differs, you will see, as to the duration of the absence; but in each case he admits that it is for a long time.

In 1876 he said:

About the 20th of July the great body of the previous year's pups arrive and occupy the slopes with the younger class of males, and they continue to be mixed

together during the remainder of the season. The 2-year-old females, which pair with the young males in the water near the island, also now associate with the other females.

At this stage they (the female pups) leave the island for the winter, and very few appear to return to the island until they are 3 years old, at which age they seek the males for sexual intercourse.

On the other hand, the males return the following year with the mature females.

Mr. Justice HARLAN.—Does that mean the young males?

Sir CHARLES RUSSELL.—I think it does.

But the young females, as already stated, are not seen in numbers until they are 3 years old, when they arrive in the height of the breeding season.

Then:

The masters and officers of these schooners (of the Alaska Commercial Company) who are familiar with the seals, say they see small groups of small (apparently 1 and 2 year old) seals at all times during July and August.

That means in the sea.

These, I think, may be young females, which, as already stated, do not visit the island till they are 3 years old.

Then the other statement that he made in his later Report was:

Returning again, this time as 2-year-old,—

This is the deposition which he makes in this case; therefore, he makes a curious contradiction there of one year,—

the males go upon the hauling-grounds with the bachelor seals, and the females land on the breeding rookeries. It is probable that the females of this age are fertilized by the bulls, and leave the islands in the fall pregnant.

On returning the third year the young male goes again upon the hauling-grounds, and the female to the rookeries, where she brings forth one pup.

Now, there is certainly a very remarkable difference in the two statements; the first statement is the earlier; the one on the left-land side

is that the female, after leaving as a pup a few months old, does not
986 come there except acting under the impulse of the sexual instinct, and then she returns at three years of age; and, again returns the next year, as a 4-year old, to deliver her pup.

Mr. Justice HARLAN.—The phrase "2-year olds" refers to males.

Sir RICHARD WEBSTER.—I think to both.

Sir CHARLES RUSSELL.—Yes, it goes on to say:

It is probable that the females of this age, and so on.

Mr. Justice HARLAN.—The first sentence refers to males.

Sir CHARLES RUSSELL.—Yes; but to females in the next instance. He says:

Returning again, this time as 2-year-olds, the males go upon the hauling-ground

That is, of course, 2-year olds:

And the females, that is the females of the same age, land on the breeding rookeries. It is probable that the females of this age are fertilised by the bulls.

And so on.

Now finally in this connection, and still bearing on the question of property and the possibility of identification, you will recollect that my learned friends have again and again said that not merely do they return to the island upon which they were born and attach themselves to the land of their birth, but that they return to the same spot. We have luckily the means of testing this by experiments which their own witnesses depose to. This same Mr. Bryant went through the experiment of marking a certain number; the account of the experiments will be

found in the large volume of the British Appendix page 451. He states that he was an agent employed by the United States and had previously reported.

I find he states in his deposition, made for the purpose of the Case of the United States, that his experience in the Pribilof Islands extended from 1869 to 1877, so that he had considerable experience.

If you want to know more about his experience, I shall be able to give it to you but I do not think it is important enough. I was referring to page 451 of this last volume. I think it is the same experiment that was referred to by Mr. Elliott, and the paragraph to which I refer is about the middle of the page. He makes a citation from Mr. Elliott in which he says:

Mr. Elliott in fact himself writes on the same page (referring to the presence of a large sealing fleet in Behring Sea), that it could not fail in a few short years in so harassing and irritating the breeding seals as to cause their withdrawal from the Alaska rookeries and probably retreat to those of Russia, a source of undoubted Muscovite delight and emolument, and of corresponding loss and shame to us.

Mr. Justice HARLAN.—That is not Mr. Bryant's statement.

Sir CHARLES RUSSELL.—No I think I said he began by citing Mr. Elliott.

Mr. Justice HARLAN.—I mean to say that that document is not prepared by Mr. Bryant. It is prepared by Dr. Dawson as a memorandum on Mr. Blaine's letter to Sir Julian Pauncefote as you will see at page 436. All I meant to say was that that was not the statement of Mr. Bryant.

Sir CHARLES RUSSELL.—Quite so. I think you are right so far.

I thought it was and I think it will be found that it is in another form. If I have been mistaken in that I shall be very sorry.

I will read the print, however, as it stands.

His remark implies that the seals may resort to either the Pribilof or the Russian Islands, according to circumstances; and who is to judge, in the case of a particular animal, in which of these places it has been born? The old theory, that the seals returned each year to the same spot, has been amply disproved. Elliott himself admits this, and it is confirmed by Captain Charles Bryant, who resided eight years in the Pribilof Islands as Government Agent, and who, having marked 100 seals in 1870 on St. Paul Island, recognized the next year four of them in different rookeries on that island, and two on St. George Island.

Those two islands being some 30 miles apart. But I should like, as Mr. Justice Harlan has referred to it, to see exactly what Mr. Bryant says.

Mr. Justice HARLAN.—You will probably find it in Mr. Allen's book.

Sir CHARLES RUSSELL.—Perhaps that is what it is. I know I have satisfied myself that it was adopted by Mr. Bryant; but I think your observation is quite correct. I find that my reason for so stating it is that on page 129 of our Counter Case, after giving the Elliott experiments which I am now going to refer to, the observation is then made, the same or a very similar experiment is referred to by Captain Bryant, and I can prove that.

Lord HANNEN.—The passage seems to be referred to.

Sir CHARLES RUSSELL.—Yes, and I find also in the Congressional Report on the Fur-seal Fisheries of Alaska, Dr. H. H. McIntyre, who was referred to by my friend as a great authority, says the seals are found indiscriminately on the two islands; that is, seals born on St. George are found on St. Paul, and *vice versa*.

Now I wish to read this experiment of Mr. Elliott. His is the Census Report for 1880, which has been frequently referred to, published in 1881. The document is printed at the Government Printing office at

Washington, Department of the Interior, 10th census of the United States, Walker, superintendent, and so on. The paragraph to which I am referring is on page 31.

The first arrivals are not always the oldest bulls.

I will read this shortly.

Their method of landing is to come collectively to those breeding grounds, where they passed the prior season; but I am not able to say authoritatively, nor do I believe it, strongly as it has been urged by many careful men... that these animals come back to and take up the same position on their breeding grounds that they individually occupied when there last year. From my knowledge of their action and habit I should say very few, if any of them make such a selection and keep these places year after year.—

988 and so on. And he comes to the conclusion that they do not come to the same spot.

He proceeds:

It is entertaining to note in this connection, that the Russians themselves, with the object of testing this mooted query, during the later years of their possession of the Islands, drove up a number of young males from Lukannon, cut off their ears, and turned them out to sea again. The following season, when the droves came in from the hauling grounds to the slaughtering fields, quite a number of those cropped seals were in the drives, but instead of being found all at one place, the place from whence they were driven the year before, they were scattered examples of crows from every point on the island. The same experiment was again made by our people in 1870 (the natives having told them of this prior undertaking) and they went also to Lukannon, drove up 100 young males, cut off their left ears, and set them free in turn. Of this number during the summer of 1872 when I was there, the natives found in their driving of 75,000 seals from the different hauling grounds of St. Paul up to the village killing grounds, two on Novatoshnah rookery, 10 miles north of Lukannon, and two or three from English bay and Tolstoi rookeries, 6 miles west by water; one or two were taken on St. George Island, 36 miles to the south-east, and not one from Lukannon was found among those that were driven from there; probably, had all the young males on the two islands this season been examined, the rest of the crows that had returned from the perils of the deep, whence they sojourned during the winter, would have been distributed quite equally about the Pribilof hauling grounds. Although the natives say that they think the cutting off of the animal's ear gives the water such access to its head as to cause its death, yet I noticed that those examples which we had recognized by this auricular mutilation were normally fat and well developed. Their theory does not appeal to my belief, and it certainly requires confirmation.

Therefore, that experiment shews that this suggestion of attachment to a particular spot or even to a particular rookery, is not well-founded; that it does not exist even with regard to a particular Island, but that of those that were so marked on one Island some were found on another Island 36 miles away, and some were not found at all. What became of the rest? Who can tell? Their natural enemies, no doubt, could account for some of them; some may have intermingled with the Russian herd, and others gone elsewhere. Who can tell? No one. And all this difficulty and uncertainty of identification, the Tribunal cannot fail to see, has a most important bearing on the question of the claim to legal property in the individual seals. Let me illustrate what I mean; supposing, instead of both these Islands being in the possession of the United States, that the dividing line of territory, had been drawn between these Islands, and one was left in the possession of Russia and the other of the United States: would such a claim to property be possible then? Or, again, to take another case which throws a stronger light on this question of property. Supposing that instead of the United States being not merely the sovereign owners of the land, but also the owners of the *dominium utile*,—suppose, as is the case with the Scilly Islands on the south-west coast of England,

and as is the case with many Islands in the Gulf of St. Lawrence, and as is probably the case with many Islands off the coast of America, that the *dominium utile* was not in the Government but only the
 989 “eminent domain”,—that the *dominium utile* was in the man who lived on the Island,—let us see what would be the result of this. The argument for the United States must go the length of saying that the owner of those Islands could assert, against all the world, property in the individual seals frequenting those Islands and might assert the right to maintain that claim of property wherever those seals were to be found.

Again let me put a case which further illustrates what I conceive to be the untenable character of the position. Assume that the Islands are separately owned by two different owners; or separately leased, one to one lessee and one to another lessee; would it be possible to assert, even *inter se*, the right of property in individual seals found in Behring Sea, or anywhere out of Behring Sea, as belonging to one or other of the lessees of those Islands? If it be difficult, *inter se*, to regulate the rights and claims of property, it is still more difficult as regards third persons.

Now, all these considerations, each of them strong in itself, collectively, I submit, are very difficult to meet, and do something more than suggest the impossibility, as I submit, of affirming property in the seals on this initial difficulty of identification.

But those are not the only difficulties. Is there any one of the Tribunal who has any doubt that, taking the facts which are not in dispute as regards this animal, this amphibious animal, I have described an animal which the law has classed, has designated, an animal *feræ naturæ*. Is there any one who doubts it? There are undoubtedly three classes in this connection: The class of wild animals, the class of domestic animals, the class of animals which, while belonging to the class of wild animals, have been taken out of
 that class by reclamation, so that they have ceased to be wild: have become reclaimed, domesticated, and therefore are removed in law out of the category of wild animals. Now is it to be gravely said that seals are in the category of tame animals? What is the index to their being tame? How have the United States even professed to tame them? Have they alleged, can they truly allege, anything more than that which I have conceded to them from the beginning, that by reason of the incapacity and mildness of this animal to defend himself on land, he presents an easier task to the man who goes to knock him on the head with a club; and thereby gives to the United States or their lessees greater facilities for killing them? but except knocking them on the head, and preventing anybody else knocking them on the head, what do these gentlemen, or the representatives of this Government, do to take even the simplest step towards acquiring property in the animal on the ground of reclamation, or *per industriam*.

One further remark before I come, as I suppose I must come, to the propositions, the vague and general propositions, my friends have advanced. It has been a matter of surprise to me that my learned friends have not addressed themselves to the consideration of the very
 990 first step which is to be taken before there can be an assertion of property in any wild animal: that step is possession. You must first take the animal. They have on the islands tens of thousands, according to Mr. Elliott, millions, of seals. They drive large numbers of them under circumstances of great cruelty, if Mr. Elliott's account be true, for the purpose of selecting, knocking on the head, taking pos-

session of, a certain number. In that certain number their property becomes absolute. They have killed them and taken possession of them just in the same way as the man who shoots a rabbit and puts it in his pocket or in his hunting bag has taken possession of that rabbit; the property is his, unless, according to English and according to American law, he has shot it upon land in the character of a trespasser, in which case he does not get the property even then—wherein the English municipal law and the American municipal law, as one of your body will tell you, differs from the civil law. According to the Roman law—which is a little stronger illustration of the wild animal being no one's property until possession is taken of it—according to the civil law, if I shoot a rabbit upon another man's land, although I am committing a trespass on the land in the act of shooting, yet the property in that rabbit will be in me whereas according to English law the property would not be in the trespasser, but would be in the owner of the land. The French law is the same, as I shall hereafter have the opportunity of showing to the Tribunal.

I wish now to come—because I am not relieved from any part of this task—to a little closer examination of the position. If I am right in saying that this animal originally is properly described as an animal *feræ naturæ*, it lies upon my learned friends to bring him out of that category, to show that he belongs to a different category as a reclaimed animal. I have ventured to suggest there is not a scintilla of evidence to justify the claim of reclamation. The *onus* is upon my learned friends by some authority, upon some principle of law, to show that in such circumstances they have a claim to property in that animal on the high sea, or wherever it is outside their domain. I have pointed out they have not the property even when it is on the Island. They have the right to kill it. They have the right to prevent anybody else killing it; but that is not property. It is a mere right to kill; nothing more.

My learned friend is met with this difficulty: He asks himself the question. By what law, in view of what law, am I to consider this question? and knowing, as he does, that the municipal law of Great Britain is the same as the municipal law of the United States, my learned friend says that this is not a matter to be determined by municipal law, but a matter to be determined by international law. I dispute that proposition. What has international law to do with it?

Am I not well founded in saying that by the municipal law of every country in the world, the right to property in things must be made out according to the municipal law of the place where the property is situated, subject always to certain rules as to devolution, etc., with which we are not now concerned, founded upon the principle that *mobilia sequuntur personam*. They must have their right of title by municipal law. Does the United States municipal law give them property? No. The legislation even of the United States has not affected to give property. The United States legislation has proceeded upon the principle which I have so often adverted to, of the assertion of territorial dominion over a given area, and the application of what I may call game laws to that area; but it has not in its Statutes nor by any executive act, nor by lease, nor in any other mode, affected to claim for itself the property as such, nor to give to the lessees the property as such. They give to the lessees no more than they had themselves: a right, namely, a license to kill within certain limits as to number.

Senator MORGAN.—I was about to inquire whether all game laws were not predicated upon the ultimate ownership of the property in the sovereign?

SIR CHARLES RUSSELL.—No, Sir; they are not. There are certain classes of animals, which unquestionably in ancient days—the subject is almost without interest in these times—the taking or killing of which were within the exclusive grant and right and franchise of the Sovereign—the sturgeon was a royal fish, the swan was a royal bird. These were the only exceptions that I can for the moment call to mind. There were certain other franchises which were supposed to be only within the power of the Sovereign to create, as for instance, a free warren, or a deer park; but these are, again, instances which have passed from the domain of practical importance.

But the game laws of different countries have nothing to do with the question of property in the wild animals. Their sole operation is that the hand of the slayer shall be stayed for a certain period of the year; that within the defined period called the “close time”, he shall not be at liberty to exercise that right of killing which the law itself recognizes; but it does not touch, it does not affect in any way the question of property. The question of property, according to the law of every civilized country that I know of, depends upon the considerations of possession and dominion, upon the nature and habits of the animal, and upon the physical relations of man towards that animal.

Senator MORGAN.—I do not question that position as between individuals, but between the Crown and individuals I think it is otherwise.

SIR CHARLES RUSSELL.—Well, Sir, I am not aware of any authority which gives to the Sovereign any more exclusive right to kill wild birds than anybody else, or to interfere with anybody else killing them. Indeed I may remind Senator Morgan that the term that is used to describe wild animals with reference to the rights of others is borrowed from the civil law. They are described as *res nullius*, and therefore a thing which any one may capture, a thing which the man who first possesses and captures may acquire the property in. The authorities which

I shall presently refer to I think will make that clear.

992 There is one other preliminary word I should like to say; and it may have some bearing upon what Senator Morgan has been good enough to ask. I think that perhaps what the learned Senator may have in his mind is a historical recollection of a state of things which has long passed away, which relates back to the time when the feudal system existed and when—and the learned President will recognize the illustration I am giving in reference to the state of things in France before the Revolution—when no one below a certain degree or status had a right to indulge in these sports, which were reserved to what was then supposed to be the better part of mankind; and when these privileges of hunting, shooting, etc., had to be acquired by authority from the sovereign—a state of things which has long passed away, both in this and most countries, and in England: but it has nothing whatever to do with, does not touch in the faintest degree, the question of property.

I must notice, before I proceed, a suggestion, I did not really conceive it to be much more than a suggestion, that this question of property was to be judged differently from the mode in which it would be judged if it were a claim by a private owner of the Pribilof Islands to the property in himself; in other words that the question of property assumes a different character—I do not know that I am well founded in saying that this distinction was made—but that the question of property assumes a different character, is a different thing, is to be tested by different principles, when the claim to the property is put forward in the name of the

United States. If that is so—I do not know really whether it is meant to be so or not—I say there is no such distinction to be made. For what would be the result? You would be called upon to say that if the Pribilof Islands were owned by a private owner, and that he was the person who was here formulating the complaint of interference with his rights of private property, his cause being taken up by his Government and presented to this Tribunal, you would be obliged to affirm—if I am right in my argument so far—that he had no property; but that if the United States is the owner of the Islands, and merely leases them to the lessees, a different set of considerations apply, and that that collective idea, that legal entity, the Government of the United States, may have property although the private individual could not. I say there is no warrant in law for the attempt to draw the distinction. Governments may own property just as individuals do; but their right to that property depends upon the same principles and the same considerations of possession and dominion which are vital to the question of property in an individual. If there be any doubt in the minds of the Tribunal upon that point, I will endeavour to elaborate it a little later in my argument.

That being the position of things, and my learned friend having cited authorities in his written Argument which disprove his case, as I hope to satisfy the Tribunal, and having been obliged to admit that he cannot find any title based upon the municipal law of his own country, or the municipal law of England, or the municipal law of any civilized

993 country in the world, what does my learned friend do? He has—I say it with all deference to him, because he has made the best of a difficult position—he has in the absence of definite authority been obliged to indulge in treacherous generalities; he has been obliged to accept the theories of metaphysical writers as to what they think the law ought to be instead of what the law is. He has floated about amongst the clouds, and he has made very eloquent appeals, very eloquent appeals indeed, to the eternal and immutable principles of justice and humanity. I am reminded of an aphorism, attributed to the late Lord Brougham, who is reported to have said on one occasion when he heard an advocate make an eloquent appeal to the immutable principles of nature and of justice, that he felt quite certain that advocate had very little law on his side.

A similar expression of opinion, I think not without its significance, was also attributed to another distinguished judge, Lord Ellenbrough. On one occasion, an advocate almost as eloquent as my learned friends, Mr. Carter and Mr. Condert, was making these appeals, and amongst other authorities he referred to the great Book of Nature.

“What are your authorities?” said Lord Ellenbrough. “My Lord, the Book of Nature.” “What page, and what edition?” said the learned Judge.

The orator was obliged to descend a little rapidly to the dull level of prose.

Now, what are these propositions of my learned friend; because I suppose I must examine them. We have had a disquisition upon the institution of property, and as to its foundations. We have been told, and I was rather startled at the suggestion, that property existed anterior to human society, and that one of the great objects of the invention of society was the preservation of property. That will be found at page 366 of the report. Therein my learned friend, I think, put the cart before the horse. “Subjects of property existed anterior to society, but there was no property in the legal sense of that term, until

society." Then my learned friend said, on page 393, that individual ownership was an invention of society, from which it would appear to follow that community of property had existed previous to society; and finally he said that "property sprang from the necessity of peace and of order."

I quite agree; but when Adam walked out of the Garden of Eden, there was no need of a policeman to keep order, and property grew because the needs of society required that property should grow. Property grew because of that desire, inherent in the human breast, for peace, for order, for convenience, for the avoidance of disturbance; and as society grew, even in its earliest and rudest stage, a certain moral opinion grew with it, which gradually, at first in very small matters, afterwards in much wider matters, grew to a recognition of a special or exclusive right of user of particular things. But when my learned friend in this connection goes on further to appeal to the law of nature, I merely have to ask the Tribunal, what has the law of nature to do with it? The law of nature, I suppose, means the natural law, or
 994 the law in a natural state of society. Well, the law, so far as there could be said to be law in a natural state of society, was that a man got what he conceived to be necessary for his wants, and stuck to it, as far as he was able to stick to it. I say it would be much truer to say since my learned friend is relying upon the law of nature to support his argument—it would be much truer to say that law in its development, has not been based on the law of nature, but is in restraint of the law of nature, which had for its sanction force, and force only.

But these propositions, while interesting to discuss, seem to me very wide of the questions which we are here engaged upon; and I shall be very glad, if, as the interval of adjournment has been a little longer than usual, I might be allowed to go on a little further with this question of property.

The PRESIDENT.—Certainly.

Sir CHARLES RUSSELL.—My learned friend, in his argument, stated two propositions, one of which I admit to be substantially right, the other of which I submit is radically wrong; and yet my learned friend has put them together, and has said that they were in effect the same proposition. I think it would not be a
 waste of time if the Tribunal would allow me to read Mr. Carter's two propositions as to property in wild animals examined. these two propositions without comment. In the first instance, on page 379 of the print of my learned friend's argument, he says:

Now from all those authorities, drawn from the municipal law of many different nations, confirmed by the ancient Roman law, these propositions are exceedingly clear, that—

This is his first proposition:

In reference to wild animals, if by the art and industry of man, they may be made to return to a particular place to such an extent that the possessor of that place has a power and control over them which enables him to deal with them as if they were domestic animals, they are in law likened to domestic animals, and are made property just as much as if they were domestic animals.

That proposition is, I admit, substantially correct. Then he goes on, a little farther down:

And you may state another proposition fully substantiated by these authorities. It is scarcely another proposition; it is almost the same thing, but the language is in a different form.

Here is the next proposition which is said to be the same as the first. I agree substantially with the first, but respectfully differ with the second:

That whenever man is capable of establishing a husbandry in respect of an animal commonly designated as wild, such a husbandry as is established in reference to domestic animals, so that it can take the increase of the animals, and devote it to the public benefit by furnishing it to the markets of the world, in such cases the animal, although commonly designated as wild, is the subject of property, and remains the property of that person as long as the animal is in the habit of voluntarily subjecting himself to the custody and control of that person.

995 You observe the propositions are essentially different. In the first, he correctly states the foundation upon which the claim of reclamation, or, in other words, the claim *per industriam*, is based: namely, that by the art and industry of man, the wild animals are made to return to a particular place, so that they can be dealt with, etc.

But in the next proposition it is said that "whenever a man is capable of establishing a husbandry in respect of an animal commonly designated as wild, so that he can take the increase", etc., that equally gives him the property.

Now, let me test these two propositions. If the latter proposition is true, it is true also that the owner who rears pheasants on his estate is the absolute owner of them. So as to rabbits; so as to wild deer; unenclosed; so as to grouse. Now let me call attention to the fact how much stronger the case as to pheasants, grouse, rabbits, deer, is. In the case of the pheasants I have already stated what is done in the way of rearing them. I have already stated what is done in the way of feeding them. I have already stated what is done in the way of preserving them from attacks from outside by means of gamekeepers and others. If this proposition is true, then the owner of the pheasantry who kills his game, as he may do, for the purpose of supplying the market, and so establishing an industry or a husbandry, and who can discriminate the sexes, because he can shoot only his cock pheasants,—he too has a property, forsooth, in the industry, and in the cock pheasants and in the hen pheasants, and he may deny the right which the law, as I have said, of every municipal country now gives to everybody, the right of killing these animals when they are outside the land of the particular owner of that pheasantry.

So in the case of rabbits. A man may establish an industry in a rabbit warren. So in the case of grouse. A man may only kill his cock birds. So in the case of wild deer, in an unenclosed park; he may only kill his bucks. This argument would land my learned friend, therefore, in the proposition that as regards all these animals, which are admittedly of the class of animals *feræ naturæ*, which are admittedly not domesticated, but which are "cherished" in a higher sense than the seals are cherished, for they are fed and induced to come back to this place—all these animals would become the subjects of private property.

We have had a frequent reference to the general principles embodied in the phrase "*Sic utere tuo ut alienum non lædas.*" That maxim carries you no further. You have to define what is yours and what is mine. You have to define what is injury and what is not injury. You are all in the vague; you are all in the general. These general maxims tell you nothing. By merely saying "*Sic utere tuo ut alienum non lædas,*" you do not carry your proposition one whit farther, nor help the Judge who is to decide the question.

Then we come to another proposition, to which great significance was attached—a proposition which, so far as I could see, had been invented

996 by my learned friend as a kind of formula for the purpose of meeting the case of the fur-seals. It was this: That only the usufruct of property is recognized by law, and that there is no right exercisable in respect of wild animals, generally speaking, (because he said there were some which were quite inexhaustible, and therefore people might in that case do what they pleased), unless in the exercise of your right you take only the superfluous males, and in that way do not interfere with the stock.

Mr. CARTER.—I made no such argument.

Sir CHARLES RUSSELL.—Oh, really, Mr. Carter, did you not maintain that? If not, I of course withdraw it.

Lord HANNEN.—What page and what edition?

Sir CHARLES RUSSELL.—I am afraid I shall have to give you a good many pages. But I will come to it to-morrow morning and justify myself by reference to the actual pages. I certainly wish to make this quite clear before I go away to-night. Did not my learned friend say that he was affirming only a right of usufruct of property, and that there was no such thing as absolute property?

Mr. CARTER.—I said by the law of nature that was all that was given to man.

Sir CHARLES RUSSELL.—But the law of nature is the same thing as international law, according to my friends, and it is international law that he is here invoking.

Mr. CARTER.—If you are determined not to understand my argument I cannot help it.

Sir CHARLES RUSSELL.—I assure you I am not in that position at all. I really am not; but to avoid any discussion, I will pass that.

Mr. CARTER.—I will not interrupt you again.

Sir CHARLES RUSSELL.—Not at all; it is not the least interruption in the world. I will pass that as a disputed proposition, and I will come to it to-morrow morning and read the pages.

One topic I can deal with, I think, without any risk of being interrupted. My learned friends have expended a great deal of their eloquence in the printed argument, and in the oral argument, upon the wasteful character of pelagic sealing. They have denounced it as a crime, a moral wrong, an indefensible wrong, and have used various other strong epithets. And now I want to ask, and I expect that an attempt will be made to answer it at some later stage. What is the relevance of that argu-
Wastefulness of pelagic killing irrelevant to decision of the question of property.

ment to the case of the United States? Is it because the mode pursued by the Canadian sealers in killing seals is wasteful that they have no right: but that the United States have a right, an exclusive right, because their method is not wasteful? I want to know. Does their right depend upon, or is it stronger or weaker according to whether our mode of killing is wasteful or not wasteful? In other words, if we could discriminate while shooting at sea, between the males and females, if we could only shoot barren females, if we could only shoot young males, do they admit we have the right to shoot 997 them? Do they, if we have the means of shooting them in a manner, to use their formula, which is not wasteful, do they admit we have the right to shoot them?

The PRESIDENT.—That argument would perhaps affect rather the question of regulations.

Sir CHARLES RUSSELL.—You are anticipating exactly the point to which I am coming. But it is used in relation to property.

The PRESIDENT.—The other side have argued both questions at the same time, in one argument.

SIR CHARLES RUSSELL.—I quite agree, sir; but they have mixed them up. They have not only argued them at the same time, but intermingled them. This was put distinctly forward as a consideration in support of the argument on property. I want to know, is it to be relied upon or not. It must be obvious—as you, Sir, with your acuteness, have already perceived—that it can have no bearing upon the question of property. If we have a right to do a thing, the fact that we do it in a wasteful way cannot change a right into a wrong. The fact that we do it in a wasteful way cannot give them a right which they otherwise would not have.

I dwell upon this, however, for this reason, that I want to show you, to satisfy you, that while this question of wastefulness of pelagic sealing is most appropriate to be considered in relation to the question of regulations, it must be discarded from the consideration of the question of property, and ought not to have been introduced into the consideration of the question of property, where it has no legitimate place, where it could only be used for the illegitimate purpose, not of aiding the judgment of the Tribunal, but of prejudicing it and distracting it.

MR. JUSTICE HARLAN.—Does it not bear on the question of the right to protect the industry at the island?

SIR CHARLES RUSSELL.—I am coming to the question of industry presently. I was dealing with the question of property either in the industry or in the seals. I would ask that question again, as Judge Harlan has been good enough to put it. Is it alleged that the right of protection of their industry depends upon whether we kill wastefully or not? I should like an answer to that. Is it to be alleged that the right to protection of the industry is strengthened or depends in the slightest degree upon the question whether we kill wastefully or not?

MR. JUSTICE HARLAN.—If the killing at sea is calculated to destroy the industry, it would seem to have some bearing on the question of protection, if that right to protect exists.

SIR CHARLES RUSSELL.—“If”. “There is much virtue in an ‘if’”.

MR. JUSTICE HARLAN.—I am making a distinction between a mere question of property in the seals or in the herd, and the question of the right to protect the industry on the islands.

SIR CHARLES RUSSELL.—You mean the proposition which my learned friend, Mr. Phelps, advances in his argument, that even if there is no property in the seal, and no property in the herd, yet there may be a right to protect the industry. That I will come to in a moment.

998 MR. JUSTICE HARLAN.—Mr. Carter covered that ground, the question of protection, before he got to regulations.

SIR CHARLES RUSSELL.—Yes.

MR. JUSTICE HARLAN.—You are saying that on the question of property simply, the discussion as to the wasteful character of pelagic sealing was irrelevant. I simply inquired whether, independently of the question of regulations, and independently of the question of property, the wastefulness of pelagic sealing would not bear on the question of the protection of the industry at the islands.

SIR CHARLES RUSSELL.—Oh, independent of any question of property?

MR. JUSTICE HARLAN.—In the seals.

SIR CHARLES RUSSELL.—That pelagic sealing may injure the industry on the islands, if it be so called, nobody doubts. That is not the question we are discussing; but I say that in respect to any right of protection of an industry, or in respect to any right of protection of the seal or of the herd, the question of the wastefulness of the means has nothing whatever to do with it, and cannot give them a right which they have not got without it, or put us in the wrong if we are in the right.

The learned President has said, what is quite, I think, the accurate truth of the matter: it cannot be invoked to give a title to the United States or to their lessees which they have not otherwise got. It is material—most material—when you come to the question of regulations.

The PRESIDENT.—Sir Charles, I must observe that there is a protection of an industry which is often called property today: what we call in French “*propriété industrielle*”, that is, a sort of qualified property. It is a sort of right which in my personal opinion is wrongly called property, but it is so called, however, in the current use of the language of all nations to-day, and Treaties have been made between nations to protect that property. As it is a certain artificial construction of law it may be relevant to plead that it is more or less worthy of protection, according to the more or less degree of morality which resides in it.

Sir CHARLES RUSSELL.—Could you give a concrete illustration, sir, of that law?

The PRESIDENT.—For instance, the right of authors, copyright. That is styled “*propriété littéraire*” in our Treaties. That is not property, in my personal view, but it is commonly called property in international language. That of course is a sort of qualified right, which may be more or less extended and which, in fact, has been more or less extended, I mean, to justify the introduction of the argument of the other side, as to the moral character of the right which is protected, or in respect of which protection is invoked. I do not argue the case now, of course.

Sir CHARLES RUSSELL.—If there is a right there is a right.

Lord HANNEN.—I understand that you are contending now, that the need of the protection to make the thing valuable, does not establish that there is a right to it that protection.

999 Sir CHARLES RUSSELL.—No; I tried to say so, and I think I succeeded in saying so more than once, and I applied this to the right to the industry just as to the fur-seal.

May I say, Sir, as you have introduced the question of copyright, there is no such thing as the recognition internationally of copy right or of patent right except by Treaty. There is no such thing; and there is no country in the world that knows that better than America, because it is only very late in the day indeed that it has come into any arrangement with Great Britain of a protective character of that kind. On the other hand I may point out according to the opinion of distinguished lawyers in England, so far as municipal property is concerned, the statutes which protect copyright are but an affirmation of a principle which is a principle of the common law.

The PRESIDENT.—I understand the argument of the other side to go some what to the same extent as regards the protection of an industry. They want the industry protected as others want copy-right.

Sir CHARLES RUSSELL.—I will come to that presently.

The PRESIDENT.—I think Mr. Justice Harlan was speaking of an industry.

Sir CHARLES RUSSELL.—He was, but I was following the line of property in the fur-seal or herd of the fur-seal, and I will come, in due course, to the question of the industry itself, and what a right in an industry, in point of law, means. That is not the point I was at that moment upon.

The PRESIDENT.—Then perhaps we had better come to that to-morrow.

[Adjourned till to-morrow at 11.30.]

TWENTY-SIXTH DAY, MAY 24TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, yesterday when I was referring to the report of Mr. Elliott upon a point which I conceived affected the consideration of the question of property in seals, I referred to him as a man who was vouched by the United States as a great authority on the seal question, and my learned friend Mr. Carter very properly challenged me upon that and asked me where he was so vouched. I had not the reference at the moment at hand, but I promised that I would refer to it this morning. As early in the discussion as the 4th April, which seems now a long way back, at page 13 of the printed Report I referred to those authorities in a passage which runs thus:

Mr. Elliott is a gentleman who in the diplomatic correspondence leading up to this Treaty has been vouched by successive Ministers of the United States as an authority without any equal. Mr. Bayard, when he was Secretary of the United States, writing upon the 7th of February, 1888, describes Mr. Elliott as “a well known authority on seal life”. That communication is to be found in the United States Appendix to their Case, and I can give my friends the reference, if they have not it at hand. Later, on the 1st of March, Mr. Blaine, who was then Secretary of State in America, on that date quotes Mr. Elliott again, in similar language, as an important authority on seal life; and finally on the 3rd of July 1890, Mr. Goff, Treasury Agent to the United States, cites Mr. Elliott in this language: He says: “There is but one authority on the subject of seal life”, and he refers to Mr. Elliott as that one authority.

That therefore is my justification for the reference which I yesterday made. I have only to say in addition that this gentleman was, by a special statute of Congress of the United States, appointed in the year 1890 for the purpose of making the very examination which resulted in the Report from which I yesterday made certain extracts. At this stage of the discussion, and in this connection, I say no more upon the subject.

There are one or two points to which I wish to refer in order to clear up, possibly, a lingering doubt which may remain in the mind of Senator Morgan, as to the question he put to me as to the paramount right of a State in relation to property. I referred yesterday, and I think with correctness, to the law of France and the law of England in ancient days, founded on the feudal principle, as to grants of hunting and so forth, being in the nature of royal franchises; up to a certain period in the history of both countries, these franchises were only conceded to persons of a certain status. But I have since been thinking that the learned Senator had in his mind the idea expressed by the words “**eminent domain**”: if any doubt remains that that has no connection
1001 with the question of property which we are here considering, I would wish to clear it up. I can best illustrate that by giving a concrete illustration of the law of eminent domain. Assume that the owner of a given estate dies without heirs: by right of eminent domain that estate would go to the Crown, according to the English law, but it would go to the Crown with just the same rights and no more than the original owner of the estate possessed; and applying it to the concrete subject which we are here discussing namely, the question of

rights as to wild animals that might be upon the estate, the rights would be precisely the same as those possessed by the previous owner.—The right *ratione soli* to kill the wild animals when on his land, the cesser of that right when off his land, and the right of any persons who might then capture them to take them according to the general law. Therefore, this right of the Crown does not in any sense touch the question which we are engaged in discussing.

Senator MORGAN.—It was not the right of eminent domain that I had in my mind, but it was the power of the sovereign Government of every nation to control any property within its territorial limits if it is *res nullius*.

Sir CHARLES RUSSELL.—That is undoubtedly the power of the State within its own territory—it can pass any laws it pleases. That is undoubted. That is a proposition of constitutional law which cannot be argued.—It has, undoubtedly, a perfect right to make any laws it pleases within the limits of its territorial jurisdiction, in relation to the property within that jurisdiction.

Senator MORGAN.—And can therefore assume ownership or proprietorship over property that is *res nullius*.

Sir CHARLES RUSSELL.—Certainly, if it so chooses, and I think I am right in saying that by the law of, at least, one country, the law of Russia, there is no such thing as *res nullius*: for that which is not appropriated to private ownership is by the law of Russia regarded as in the ownership of the Crown.

Senator MORGAN.—I thought it was the law of Great Britain as well, but I am mistaken in that.

Sir CHARLES RUSSELL.—Yes, I think so, Sir. I think I have stated it correctly. I do not wish to recur to my argument which related to the conditions necessary to constitute property in wild animals, but I wish to emphasize a point which I am afraid I did not emphasize sufficiently—that there is no such thing as absolute property in wild animals. Without recurring to the conditions which affect the acquirement of property in wild animals I wish to emphasize this point, that even in the case of animals that are reclaimed, there is no absolute property: the property that is created by reclamation ceases if the animal resumes its wild habits and escapes at large, the *animus revertendi* disappears. So that even in the case of reclaimed animals there is no such thing as absolute or perfect property.

When I was upon the point that the manner in which seals
1002 were killed by pelagic sealers could not be the foundation of, or even a buttress for the right of those on the Islands, I failed to notice one point. If that is admitted, then, of course, as I said yesterday, all this discussion, so far as it relates to property—but not to Regulations, for I agree it then becomes relevant—may be disregarded as a mere matter of prejudice; but I failed to point out what must follow from that.

If it is admitted to be irrelevant, as I contend it must be admitted on the question of property, then it must necessarily follow that the United States will be driven to say that they are asserting upon the sea a right superior to ours, even if we kill by pelagic sealing only barren females or old, or superfluous males; even if we can kill non-wastefully, economically and discriminately. That follows inevitably.

Now, I also desire to give in this connection an illustration of the position as to property and as to the right to pelagic sealing by, not an ideal case, but by the case as we know it exists. I will put it, in the first instance, as if it were an ideal case. Assume pelagic sealing to be

pursued for a century, and the island on which the seals breed to be undiscovered: can it be doubted that, in that state of things, there is a right to kill the seals in the manner called pelagic hunting? Can it be doubted? Then, if, at the end of a century, the island on which those seals breed, is discovered, does that which for a century was a right which all the world might exercise, cease to be a right, and does the mere fact that you have discovered the breeding place on those islands change that which was exercised by mankind in common as a right into a moral crime, an indefensible wrong, and all the rest of it?

Now, I say this is no ideal case; this is the actual case you are discussing, because it stands confessed that, till the year 1786, the Pribilof Islands were unknown, and it was in that year, for the first time, that it was discovered that they were a breeding place for seals. That is the statement of my learned friend, and the correct statement, so far as I know, historically. Up to that time all who had an interest to engage in this pursuit, namely the aboriginal inhabitants along the coasts, engaged in it; and is it to be said, can it be said, with any show of reason or justice, or with any warrant of law, that straight away the discovery of the breeding place of the seals deprived those who previously exercised the rights of pelagic sealing, or the industry of pelagic sealing, of those rights?

Now, I proceed with the main line of the argument at the point where I left off, and I had been stating (I had not got very far in stating it) when my learned friend, Mr. Carter, interrupted me (I am not making any complaint of the interruption at all): he did not recognize the proposition which I was stating in order to combat it as one which he had advanced. I had not got, at the moment of his interposition, to the full statement of it; but I will cite it now, and will endeavour to show that I am justified in stating it as a proposition advanced by my learned friend and which I have to meet. I will state the proposition

in two ways, because I find it stated with some variations. One 1003 is that only the usufruct of property is recognized by law; and that, with the exception of a certain class of living creatures said to be inexhaustible, you can only take the superfluous males, and that you can exercise your right of usufruct only in such a way as not to interfere with the stock. And, in another place the proposition is stated in very much the same way, but in slightly different language;—that property in animals useful to mankind, exhaustible in their nature, is by law given to him who can best utilize such animals for the benefit of mankind by taking the increase and preserving the stock. I do not think that my learned friend will quarrel with that as being a pretty accurate statement of the propositions which he advanced?

MR. CARTER.—The last is accurate; the first is ambiguous.

SIR CHARLES RUSSELL.—I do not think it is ambiguous; but, however, he accepts the last as accurate.

Now, I should like to refer to the way this is illustrated in the argument of my learned friend, because I think I shall satisfy the Tribunal that he has here got out of the domain of law and into the domain of ethics,—that he has been relying upon the opinions of writers who have either been dealing with what the law ought to be, and the ethical principles which ought to permeate law and upon which it ought to be based; or he has got to metaphysical writers who have been struggling to find a metaphysical reason to account for the law, and who are not content to accept the law as it is.

Before I read these passages of my learned friend, I should like to make one preliminary observation. You observe the point of this

proposition is that you are not to kill females; that you are to take the increase of males; that you are not to do anything which will diminish the birth-rate of the particular class of animals with which you are dealing.

Now, I want to know where has any municipal law of any country, except the special Statute of the United States in relation to female seals, prohibited the killing of females:—any municipal law, to begin with? I do not know of any. I know of no system of municipal law which lays down any such rule. I do know that, both in hunting and shooting, owners of land do exercise a certain discrimination in preserving a certain proportion of females; but whoever suggested that it would be wrong to kill a doe, or that it would be wrong to kill a hen-pheasant, or a hind, or wrong to kill any but cock-grouse or cock-pheasants?

There is no such principle that I know of to be found in any municipal law. Is there any such principle to be found in international law? Has international law ever affirmed in any shape or form the proposition that there was something intrinsically wrong, morally wrong, or criminal, in the fact of killing a female in any species of animal to be found anywhere on the face of the earth? I know of none.

Senator MORGAN.—I think all the game laws applicable to what we call terrestrial animals—birds and deer and the like—have very distinct reference to protecting the breeding season or nesting season. I suppose that is for the purpose of protecting the females that they may rear their young.

Sir CHARLES RUSSELL.—I quite agree; undoubtedly, that is the object of a close season—not to interfere with the process of nature in producing their young; but there is no question of property involved; it is a question of municipal regulations. What I am now dealing with is this appeal to law—either municipal or international law—and herein I do not find any principle which treats it as a crime or a wrong to kill a female.

I want to follow this reference of my learned friend a little more. At page 58 of the printed Argument this point of usufruct is developed, and the whole argument at this point is addressed to ownership not being absolute. He is asking what is the extent of the dominion which is given by the law of nature to the owner of property. He there says.

In the common apprehension the title of the possessor is absolute, and enables him to deal with his property as he pleases, and even, if he pleases, to destroy it. This notion, sufficiently accurate for most of the common purposes of life, and for all controversies between man and man, is very far from being true. No one, indeed, would assert that he had a *moral* right to waste or destroy any useful thing; but this limitation of power is, perhaps, commonly viewed as a mere moral or religious precept—

So far I have nothing to say against it. We are in the region of moral law: we are in the region of ethics, and I have nothing more to say.

for the violation of which man is responsible only to his Maker, and of which human law takes no notice.

That, he says, is the common notion, but he goes on in the next sentence to say that it is a mistaken notion.

The truth is far otherwise. This precept is the basis of much municipal law, and has a widely-reaching operation in international jurisprudence.

Thus he immediately slips away from the domain of ethics, and he affirms that, though the common idea is that this is a merely moral law,

as to which I agree, yet he apparently goes on to say it is a mistake to suppose it is not also law in the strict sense of that term. Then he puts this question of usufruct, and, in the second paragraph he says:

No possessor of property, whether an individual man, or a nation, has an absolute title to it. His title is coupled with a trust for the benefit of mankind.

That is his first proposition.

Second. The title is further limited. The things themselves are not given him, but only the usufruct or increase. He is but the custodian of the stock, or principal thing, holding it in trust for the present and future generations of man.

That may be all very well as a question of ethics. It is not law. I apply it to a concrete illustration straight away, to one indeed which is put by my learned friends themselves in argument; it shows how little faith they have in these vague general propositions. I affirm, as my learned friends have affirmed, that the United States would have a right if they chose—a right in point of law, and no one could complain of their doing it except as an offence against the moral opinion of the world, if indeed it were such,—they would have a right to knock on the head every seal that came to the Islands; and my learned friends have claimed it, for they have, I will not say threatened, but suggested it to the Tribunal as a thing to weigh with it in arriving at its decision.

Mr. CARTER.—We have not asserted that right.

Sir CHARLES RUSSELL.—I assure you I am well founded in what I say. If I am challenged on that, I will refer to the passage to-morrow morning.

The PRESIDENT.—Mr. Carter says it was not an assertion of right. He has not asserted that right, but you are to take it as a hint.

Sir CHARLES RUSSELL.—What is it if it is not an assertion?

The PRESIDENT.—Call it a hint.

Sir CHARLES RUSSELL.—Very well, I will call it a hint. I certainly understood him to say—and he was well within his legal rights in saying it—that if this Tribunal did not help the United States to protect the seals for the benefit of mankind, so that the blessings of Providence might, through the agency of the United States, be distributed to mankind, that they would have the right, I think he went even further than that and said they would be justified—which is a wider word than right, for it would embrace moral considerations also—in knocking every seal on the head.

Now one other passage. At page 67 of the Argument, enlarging upon this topic and still upon the question of right to the usufruct merely, he says:

There are some exceptions, rather apparent than real, to the law which confines each generation to the increase or usufruct of the earth.

Mark the words he uses. And then he proceeds to give these exceptions: minerals, wild birds, and fish of the sea, which he describes as inexhaustible and outside this rule of usufruct. As

regards that statement, I think it will be found that there is no such thing as any inexhaustible treasure of the earth or the sea; certainly in the case of fish it has been found, in the experience of many countries, necessary to restock the rivers and to try and replace various kinds of fish which have been exhausted.

Now I say, so far, that I have justified myself; but my friend carries, quite logically, his argument still further; and from individuals

Examination of assertion that there is only a right to the usufruct of property.

restricted to usufruct (which I say is not the law), he passes on to the question of what nations may do with regard to their property or their possessions; and in the printed report of his argument, at page 399, my friend shows he is quite consistent, because he proceeds to lay down a series of extraordinary propositions to this effect: That if a particular nation produces a particular commodity the rest of the world can, as of right, compel that nation to part with its commodity for 1006 the benefit of the world. He instanced the case of india-rubber; he instanced the case of tea. Why not instance the case of Bordeaux wine, or any other wine, or any other commodity? He says even that if the interests of a particular nation will not prompt it (as of course it will), to exchange its commodities for other commodities of the world, yet as a matter of international right, as a matter of law, a strong nation can take a weak nation, so to speak, by the throat, and compel it to sell its tea, compel it to sell its india-rubber, compel it to sell its wine; the argument I venture to think being a good deal damaged, when my friend felt compelled (in answer to a question addressed to him by one member of the Tribunal), to admit so much at least as this—that the nation which produced the particular commodity could fix its own price. My learned friend admitted it could fix its own price, but he put a qualification on that—"so long as it is not prohibitory". Who is to be the judge of whether it is prohibitory or not? All this, I say, is enough to show the Tribunal that my learned friend is in all this discussion arguing as a great thinker, adopting the thoughts of great thinkers on ethical and metaphysical subjects, and applying ethics and metaphysics to law. He is not, at least I cannot imagine that he is, arguing as a lawyer to lawyers—as a judge to judges: he is in an atmosphere, and at a point of elevation, quite beyond my reach, or even, I will add, beyond the necessity of my even making the attempt to reach him except in the way I am now doing.

Now I say with reference to each of these propositions—I care not in what form they are stated, that they cannot be accepted merely because my friend is able to cite vague passages of theoretical writers, not dealing as I have said, with the matter, as lawyers, which would give some kind of colour, economically if you like, ethically if you like, to these views. I am addressing a Tribunal called upon to declare legal rights—that is common ground between us; and to support that position, therefore, my friend is bound to produce authority of lawyers, of judges, or to show (if he thinks that international law has any application to the subject matter), that international law has either laid down a principle within which his contention clearly falls, or has adopted a concrete rule applicable to this case. I say he has done neither the one nor the other; and if one comes to the basis of his argument, one fails to see why, if there be any principle in it at all, it is to be confined to *one* class of animals. Why is it to be confined to animals at all? If usufruct only of property is to be allowed, why may a man eat up all his capital?

I presume my friend will not deny that there is no law which compels a man merely to live upon the usufruct of his capital estate—that there is no law which compels him to live only upon the interest of his invested money—that he may eat up his capital if he pleases; and yet my friend's argument, and the authorities he cites, show that he is embracing within this comprehensive principle even the case I am putting, for he cites economic writers to show that abstinence, or 1007 self restraint, or frugality—abstinence from spending is the defence which these ethical writers make for the accumulation of capital.

Now, Mr. President, I cannot think that this helps us very much, nor, so far as this particular case is concerned, do I see that it helps us at all. Suppose there are three persons or nations who are interested—to take the concrete case of pelagic sealing—three nations, the American, the Russian and the Canadian people: suppose further that the home of the seals is still undiscovered: that they are only known to frequent these seas at particular times of the year; that these three nations each pursue the seals in the sea: but that none of them pursue them economically—all aiming at destroying the stock: are all to be restricted according to my friend, or which is to be restricted? If all are on an equality as to wastefulness, or if all are on an equality as to economic use, whose is the right to take? or have none the right to take, or are all excluded? And how are you to determine it, if all three are equally economic:—whose is the right, or whose is the property? The truth is that these vague propositions afford no guide and no help at all to the elucidation of the particular matter in question. It looks to me, indeed, as if this proposition, that property in animals useful to mankind, exhaustible in their nature, is to vest in him who can best utilize such animals and preserve the stock, was a proposition invented to meet the case of fur-seals, invented for the occasion, and ingeniously invented for the purpose of evading the difficulties which stared my friend in the face. I say, therefore, Mr. President, as regards the whole of this matter, and the whole of the argument addressed to these propositions, that while they have a certain academic interest they have only an academic interest; they do not assist this Tribunal in determining the question before us; and, pushed to its legitimate result, even if there be a principle of ethics or economics in it at all, it would result in the affirmation of a principle that property should be attributed to him, or to the nation, that can best turn it to account: a proposition of a very wide character, which would lead to the transfer of a good deal of the world's possessions from the hands that now possess them to others, but for which no warrant is to be found in any system of jurisprudence that I am aware of, and which international law has never even made any approach to recognizing. Let me say in this connection—I shall have to say something about it a little later—that while my friend is quite logical if his original position is correct, namely, that the law of nature and the law of morals are the same as international law—while my friend is quite logical if that first proposition is made out, the superstructure that he has built on that first proposition falls to the ground if that original position is not made out. I say that original position is not made out. I have already dealt with this before in general language—that the moral law and the natural law are not international law, but only so much of them as have been taken up into international law, and adopted with the consent of nations. And I would put this practical test.

1008 Can my friends, or can the erudition of any member of this Tribunal refer to any case of international controversy that has ever been decided by a direct appeal either to the law of nature or to the moral law? I say there is none. The moral law, and the law of nature, of course, have been great factors in the formation of international law, but they are not international law: and I say there is no controversy—of course I speak subject to correction—which can be referred to upon the question of right between nations, which has ever been determined by direct reference either to the moral law or to the law of nature.

Senator MORGAN.—You remember, Sir Charles, that in the Treaty between Great Britain and the United States, the Treaty of Washington in 1871, the two Governments failed to agree as to what the international

law was in its application to the alleged fitting out of those cruisers, and so forth. That they agreed upon three distinct propositions or rules of right to operate between the two Governments in respect of their controversy. They could not agree on them as propositions of international law, but they were so obviously just and proper that they made an agreement in the same Treaty that hereafter those three propositions should stand for international law between the two Governments.

SIR CHARLES RUSSELL.—I have no doubt they showed their good sense.

Senator MORGAN.—I have no doubt they did.

SIR CHARLES RUSSELL.—But what were they doing?

Senator MORGAN.—Making international law.

SIR CHARLES RUSSELL.—With great deference, supplying the absence of international law.

Senator MORGAN.—That is what I mean.

SIR CHARLES RUSSELL.—Doing by Convention that which international law did not do.

Senator MORGAN.—That is what I mean.

SIR CHARLES RUSSELL.—And in truth that is the subject which must engage your attention a little later when I come to another branch of this case, that the fact is, there being no international law upon this question, the place of international law is determined by Convention, which so far as this Tribunal is concerned gets another name—"Regulations".

But now I turn from these vague propositions (as I must respectfully call them, while I am sure I do not desire otherwise than to express my admiration for the learning and ability of my friend), with a certain sense of relief to see whether, when we come to definite authority, my friend is able to produce anything definite in support of his views; and when I come to these authorities what do I find? that of the authorities cited, *all* of them support the argument of Great Britain, some of them indeed are referred to in it; and to the examination of those authorities I now invite the attention of this Tribunal.

1009 EXAMINATION OF AUTHORITIES CITED BY THE UNITED STATES.

The authorities cited in the Argument of the United States are to be found at page 108. They begin with a citation from "Studies in the Roman law" by Lord Mackenzie.

Deer in a forest, rabbits in a warren, fish in a pond, or other wild animals in the keeping or possession of the first holder cannot be appropriated by another unless they regain their liberty, in which case they are free to be again acquired by occupancy. Tame or domesticated creatures, such as horses, sheep, poultry, and the like, remain the property of their owners, though strayed or not confined. The same rule prevails in regard to such wild animals already appropriated as are in the habit of returning to their owners, such as pigeons, hawks in pursuit of game, or bees swarming while pursued by their owners.

All perfectly sound—pigeons for whom a dovecote is provided, who are supplied with food and induced to return not merely to a particular place, but to fly for the shelter of home to a particular place. So hawks, trained by great effort and labour, to fly game and return to the wrist or shoulder of the owner. So bees, naturally wild, but which in a swarm are captured, put into an artificial hive, supplied with food to commence their saving operations,—supplied with mechanical contrivances to aid them in the construction of their combs—it is of these last you will properly say that there is qualified property in them: that that property is not lost when they temporarily disappear. It is in

fact only lost when they have definitely lost their habit of returning, and have resumed their former wild state.

An extract from Gaius' Elements of Roman Law follows, which I do not think I need trouble to read, as it is to the same effect. There is then a quotation from Von Savigny on Possession. The second paragraph is this.

Wild animals are only possessed so long as some special disposition (*custodia*) exists which enables us actually to get them into our power. It is not every *custodia*, therefore, which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend on his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained.

How completely that applies!

When these animals are on the Islands the lessees have the capacity to knock a great many of them on the head and so get possession and capture them; but the moment they go away to sea, they are beyond all human control. And further it is impossible—(as I have pointed out already it makes the case of the seals *a fortiori*), to keep them in that continuous confinement which is possible in the case of purely terrestrial animals, because if they are kept on land they die.

Now about the *animus revertendi* I read from the bottom of page 108 from Savigny.

Wild beasts tamed artificially—

1010 That is to say habituated by art, custom, contrivance and teaching of man.

Wild beasts tamed artificially, are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them.

The doves in a dove-cot, the bees in a hive, the hawk, are taught to go and to return—they are artificially tamed.

The next writer cited is Puffendorf, who is one of the class which I may call metaphysical writers, no doubt of great distinction, but one who is always seeking, as I shall show you—(judged not by my statement, I need not say, but by the statements of critical men of authority)—for some metaphysical reason to justify the existence of a particular law. This illustration of his method occurs to my mind from the reading of it. He explains the right which he admits to exist in all the nations of the world, to take all they choose to get or can get from the high sea; and he explains it upon the reason that the products of the sea are inexhaustible. Well, that may or may not be a metaphysical foundation for the law, but it is clearly not a reason of the law. When nations began to exercise their rights on the high seas, they never asked one another, in settling their mutual rights, if the things they were pursuing were or were not inexhaustible? They pursued them on the high sea because those things were the common property of mankind, and because there was no exclusive right of any one in the sea: because upon the great Ocean all were equal. That I think is a fair illustration of the value of Puffendorf's statements.

Then on page 109 there is a citation from Bracton which I think my friend did not read.

The dominion over things by natural right or by the right of nations is acquired in various ways. In the first place, through the first taking of those things which belong to no person, and which now belong to the King by civil right, and are not common as of olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air; wherever they may be captured and wherever they shall have been captured, they begin to be mine because they are coerced under my keeping, and by the same

reason, if they escape from my keeping, and recover their natural liberty they cease to be mine, and again belong to the first taker. But they recover their natural liberty, then, when they have either escaped from my sight in the free air, and are no longer in my keeping, or when they are within my sight under such circumstances, that it is impossible for me to overtake them.

Occupation also comprises fishing, hunting, and capturing; pursuit alone does not make a thing mine, for although I have wounded a wild beast so that it may be captured, nevertheless it is not mine unless I capture it. On the contrary it will belong to him who first takes it, for many things usually happen to prevent the capturing it. Likewise, if a wild boar falls into a net which I have spread for hunting, and I have carried it off, having with much exertion extracted it from the net, it will be mine, if it shall have come into my power, unless custom or privilege rules to the contrary. Occupation also includes shutting up, as in the case of bees, which are wild by nature, for if they should have settled on my tree they would not be any the more mine,—

1011 on his land still—on his tree:

until I have shut them up in a hive, than birds which have made a nest in my tree, and therefore if another person shall shut them up, he will have the dominion over them. A swarm, also, which has flown away out of my hive, is so long understood to be mine as long as it is in my sight, and the overtaking of it is not impossible, otherwise they belong to the first taker; but if a person shall capture them, he does not make them his own if he shall know that they are another's, but he commits a theft unless he has the intention to restore them. And these things are true, unless sometimes from custom in some parts the practice is otherwise.

What has been said above applies to animals which have remained at all times wild; and if wild animals have been tamed, and they by habit go out and return, fly away, and fly back, such as deer, swans, sea-fowls, and doves, and such like, another rule has been approved, that they are so long considered as ours as long as they have the disposition to return; for if they have no disposition to return they cease to be ours.

I have already pointed out that Savigny expresses the true meaning of the word "habituated" to return, or "accustomed" to return, when he describes it as the taming of the animal artificially.

Then, on page 110, there is a citation from Bowyer, a most respectable gentleman but not admitted amongst the highest authorities, I think, but entirely in our favor. Sir George Bowyer is known to some of the Arbitrators, I know. He is known to Lord Hannen I am sure, and known to me very well, and to my friends. In the second paragraph of the citation he says:

When you have caught any of these animals it remains yours so long as it is under the restraint of your custody. But as soon as it has escaped from your keeping and has restored itself to natural liberty, it ceases to be yours and again becomes the property of whoever occupies it. The animal is understood to recover its natural liberty when it has vanished from your sight, or is before your eyes under such circumstances, that pursuit would be difficult.

Then in the middle of the next page 111, he says:

The general principle respecting the acquisition of animals, *feræ naturæ*, is that it is absurd to hold anything to be a man's property which is entirely out of his power. and so on.

Then the edition of the Institutes of Justinian, of Cooper, is referred to at page 112.

Section 12. *De Occupatione Ferarum*.—Wild beasts, birds, fish, and all animals, bred either in the sea, the air, or upon the earth, so soon as they are taken, become by the law of nations, the property of the captor.

I ought to say, I think, with great deference, it is hardly correct to say there "the law of nations." It really is, *jus gentium*. I suppose what really is meant there is the law of particular nations.—It is not the *jus inter gentes*, which is referred to; it is the *jus gentium*.

The PRESIDENT.—I believe from my recollection of Roman law *jus gentium* meant natural law.

Sir CHARLES RUSSELL.—The laws common to those nations which were known to the Romans.

1012 The PRESIDENT.—The Romans, of course, were not considered as having any international law.

Sir CHARLES RUSSELL.—Then the Case of the Swans—(7 Coke, 15 b.), is pointed on page 113. The swan being one of the animals reckoned a royal bird, the keeping of it required a royal franchise. The technical phrase is the keeping of a “game” of swans. As we all know, swans are marked, and this case really goes further in one sense against the contention of my friend than he seems to suppose, because at the top of page 114 it is said:

It was resolved that all white swans not marked, which have gained their natural liberty, and are swimming in an open and common river, might be seized to the King's use

But how?

by his prerogative, because *Folatilia (quæ sunt feræ naturæ) alia sunt regalia, alia communia*; . . . as a swan is a royal fowl; and all those, the property whereof is not known, do belong to the King by his prerogative; and so whales, and sturgeons, are royal fish, and belong to the King by his prerogative.

But it was resolved also that the subject might have property in white swans not marked, as some may have swans not marked in his private waters, the property of which belongs to him and not to the King; and if they escape out of his private waters into an open and common river, he may bring them back and take them again. And therewith agreeth Bracton.

Then he goes on:

But if they have gained their natural liberty, and are swimming in open and common rivers, the King's officer may seize them in the open and common river for the King; for one white swan without such pursuit as aforesaid can not be known from another; and when the property of a swan can not be known, the same being of its nature a fowl royal, doth belong to the King.

I do not think I need trouble by reading that authority further. Then on page 115 there is a reference to the case of *Child v. Greenhill*, (3 Croke, 553).

Trespass for entering and breaking plaintiff's close and fishing and taking fish in his several fishery. Contended for the defendant that he could not say “his” fishes, for he hath not any property in the fish until he takes them and has them in his possession. Attorneys for plaintiff maintained that they were in his several fishery, and that he might say “his” fishes, for there was not any other that might take them, and all the court was of that opinion.

Now this is a matter which, Lord Hennen will forgive me for saying so, requires a word of explanation, for I doubt if it would otherwise be intelligible to those members of the Tribunal who are not acquainted with the technical rules of pleading. The question arose on demurrer; that is to say, the plaintiff was complaining that he, being the owner of a several fishery, the defendant broke and trespassed and took and carried away his fish, whereupon the defendant pleaded—You cannot say they are “your” fish, because they are not in your possession; they were merely in your pond, or your fishery; and, therefore, you cannot say—it is erroneous to say, as a matter of law and pleading—they are

1013 “your” fish at all. The complaint being trespass on the fishery, the Court thereupon decides that, if they were nobody else's fish, they certainly were not the defendant's who is breaking and entering; and on the question of pleading, that the pleading is not bad which complains of trespass of the several fishery, merely because it states these fish are the property of the plaintiff. That is the whole case.

The case of *Keeble v. Hickeringill* is next cited. This I shall refer to, because it is not set out in the citation at page 115 quite fully, and I

have, therefore, the report before me. The report is in the note to 11 East's Reports, at page 573. It was decided in the year 1809.

Now this was the case and it is an important case. The Plaintiff had erected at his own expense upon his own land, or upon the water in his own land, a decoy:—decoys were at one time a considerable industry in various places—in order to attract ducks to that decoy; and his complaint was that the Defendant, intending to injure him, and maliciously, not in exercise of a right of his own, or for purposes of his own, but maliciously, had fired guns in the neighbourhood of that decoy, in order to frighten the ducks away from it, and the question was whether that was or was not a good cause of action. The ducks attracted to the decoy were, of course, wild ducks in which the Plaintiff could claim no property, and did claim no property till he had actually shot them or captured them. His complaint was not that, but that the Defendant had done that maliciously to injure him not in the exercise of any right, but with a view to disturbing him, the Plaintiff, in reaping the benefit of his decoy: and the question was whether that gave him a cause of action.

There is so much to say, and I am anxious to get over the ground, that I will read only enough to bring out that point.

Action upon the case. Plaintiff declares that he was, on the 8th of November in the second year of the Queen, lawfully possessed of a close of land and a decoy upon it, to which wild fowl used to resort; and the Plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them. The defendant, knowing which and *intending to damnify the Plaintiff* in his vivary, and to fright and drive away the wildfowl used to resort thither, and deprive him of his profit, did, on the 8th of November, resort to the head of the said pond and vivary and did discharge six guns laden with gun-powder, and with the noise and stink of the gunpowder did drive away the wildfowl then being in the pond; and on the 11th and 12th days of November the Defendant, *with design to damnify the Plaintiff* and fright away the wildfowl, did place himself with a gun near the vivary.

And so on, and Chief Justice Holt, a Judge of great authority, deals with the matter thus—

When a man useth his art or his skill to take them to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so?

1014 And so on;

But therein is the difference to be taken between a liberty in which the public hath a benefit, and that wherein the public is not concerned. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the Plaintiff's, and that had spoilt the custom of the Plaintiff, no action would lie, because he had as much liberty to make and use a decoy as the Plaintiff.

The action was simply brought against the Defendant for an act not purporting to be done in exercise of a right of his, but *maliciously* done in order to injure and damnify the Plaintiff.

Lord HANNEN.—At page 116 in the "Modern Report", the antithesis is brought out very clearly.

Suppose the Defendant had shot in his own ground, if he had occasion to shoot, it would be one thing, but to shoot on purpose to damage the Plaintiff is another thing and a wrong.

Sir CHARLES RUSSELL.—Quite so. The appositeness is clear enough, because the Tribunal will see, whatever else has been said about pelagic sealers, there is one thing that has not been said, and could not be said, and that is this: that these pelagic sealers, largely American and largely Canadian, were pursuing pelagic sealing maliciously intending to injure anybody. They were pursuing what they considered to be a right, and they were pursuing this mode of capture or industry in order to earn the profit which accrued to them from its pursuit.

Now I turn to the case of *Amory v. Flynn*. But, why these cases have been cited, I do not know. It sometimes has come into my mind that my learned friend, with the multiplicity of affairs which no doubt occupied him, turned some intelligent student into a library to copy wholesale passages and pages which have some remote bearing on the case.

Lord HANNEN.—But some of them have a considerable bearing, and may have been put in out of fairness as being authorities against them.

Sir CHARLES RUSSELL.—Well, my Lord, I withdraw what I said. My learned friends have been good enough to supply us with them, and I withdraw what I said, and I ought not properly to have said it.

What is this case? It is a case in which one Amory brought an action of trover against Flynn before the Justice for two geese: It is an American case and is reported in 10 Johnson's Reports.

The plaintiff proved a demand of the geese and a refusal by the defendant unless the plaintiff would first pay 25 cents for liquor furnished to two men who had caught the geese and pledged them to the defendant for it.

The geese were of the wild kind, but were so tame as to eat out of the hand. They had strayed away twice before, and did not return until brought back. The plaintiff proved property in them, and that after the geese had left his premises, the son of the defendant was seen pursuing them with dogs and was informed that they belonged to the plaintiff.

1015 In other words, they were tame geese, and that is what the Court said.

Per curiam. The geese ought to have been considered as reclaimed so as to be the subject of property. Their identity was ascertained; they were tame and gentle, and had lost the power or disposition to fly away. They had been frightened and chased by the defendant's son, with the knowledge that they belonged to the plaintiff, and the case affords no colour for the inference that the geese had regained their natural liberty as wild fowl and that the property in them had ceased.

Again, on page 117 is the case of *Goff v. Kilts*; that is also an American authority, reported in 15th Wendell's Reports.

The owner of bees which have been reclaimed

mark the word "*reclaimed*"—

may bring an action of *trespass* against a person who cuts down a tree into which the bees have entered on *the soil of another*, destroys the bees and takes the honey.

Where bees take up their abode in a tree, they belong to the *owner of the soil*, if they are *unreclaimed*, but if they have been *reclaimed*, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession, although he cannot enter upon the lands of the other to retake them without subjecting himself to an action of *trespass*.

The only point on that which I should have thought was a little doubtful, but which I think is not material here, is where he says it belonged to the owner of the tree. I do not think myself that that would be quite so. It merely means, I think, they belonged to him in the sense that he would have the right to take them.

Mr. CARTER.—The case does not decide it.

Sir CHARLES RUSSELL.—No. I am much obliged to my learned friend; it is really a mistake. It is the headnote by the reporter of the

case, and not the Judgment. I have the reports here, and they are at the service of any Members of the Tribunal who desire to look at them. Then it proceeds.

Error from the Madison Common Pleas. Kilts sued Goff in a justice's court in *trespass* for taking and destroying a swarm of *bees*, and the honey made by them. The swarm left the hive of the plaintiff, flew off and went into a tree on the lands of the Lenox Iron Company. The plaintiff kept the bees in sight, followed them, and marked the tree into which they entered.

This was obviously a swarm which the Plaintiff had hived; he was able to identify them; he keeps them in sight, follows them, and marks the tree into which they enter.

Two months afterwards the tree was cut down, the bees killed, and the honey found in the tree taken by the defendant and others. The plaintiff recovered judgment, which was affirmed by the Madison Common Pleas. The defendant sued out a writ of error.

By the Court, Nelson, J.: Animals *feræ naturæ*, when reclaimed by the art and power of man—

That is the true doctrine of reclamation:

are the subject of a qualified property; if they return to their natural liberty and wildness, without the *animus revertendi*, it ceases. During the existence of the qualified property, it is under the protection of the law the same as any other property, and every invasion of it is redressed in the same manner. *Bees* are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature, as well as the civil law. Occupation, that is hiving or inclosing them, gives property in them. They are now a common species of property, and an article of trade, and the wildness of their nature, by experience and practice, has become essentially subjected to the art and power of man. An unreclaimed swarm, like all other wild animals, belongs to the first occupant—in other words, to the person who first hives them; but if the swarm fly from the hive of another, his qualified property continues so long as he can keep them in sight, and possesses the power to pursue them.

That is all I think that I need read of that case.

Now, the case of *Blades v. Higgs* is on page 119; and I have the report of that case here also. It was decided by the House of Lords in 1865. You will find it reported in the 11th "House of Lords' Cases", at page 621. The sole question in the case was this;—Was the property in certain rabbits killed by a trespasser on the land of another person, in the man who killed, them or were the dead rabbits the property of the man on whose land they were killed? And I yesterday stated, subject to being corrected by the Marquis Venosta if I am wrong, that, according to the Roman Law, the actual taker, though a trespasser, would have the right of property; wherein the American and the English Law differ from the Roman Law. The sole question, therefore, in the case was, to which of two persons did the property belong? The rabbits were shot, and the question was, to whom they belonged?

Now, Lord Chancellor Westbury, at page 631, thus states the law.

My Lords, when it is said by writers on the common law of England that there is a qualified or special right of property in game, that is in animals *feræ naturæ* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word "property" can mean no more than the exclusive right to catch, kill and appropriate such animals, which is sometimes called by the law a reduction of them into possession. This right is said, in law, to exist *ratione soli* or *ratione privilegii*, for I omit the two other heads of property in game which are stated by Lord Coke, namely *propter industriam* and *ratione impotentie*, for these grounds apply to animals which are not in the proper sense *feræ naturæ*. Property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil.

Then further on he continues:

The question in the present case is whether game found, killed, and taken upon my land, by a trespasser becomes my property as much as if it had been killed and taken by myself, or my servant by my authority. Upon principle there cannot, I conceive, be much difficulty. If property in game be made absolute by reduction into possession, such reduction must not be a wrongful act, for it would be unreasonable to hold that the act of the trespasser, that is of a wrongdoer, should divest the owner of the soil of his qualified property in the game, and give the wrongdoer an absolute right of property to the exclusion of the rightful owner.

But in game, when killed and taken, there is absolute property in some one, and, therefore, the property in game found and taken by a trespasser on the land of A. must vest either in A. or the trespasser: and, if it be unreasonable to hold that the property vests in the trespasser or wrongdoer, it must of necessity be vested in A., the owner of the soil.

1017 Then he proceeds to the conclusion that it vested in the owner of the soil.

In this connection an erroneous reference I think is made by my learned friends in note in their printed Argument attributing I think to Lord Chelmsford what in point of fact I think Lord Chelmsford did not say. The note is on page 54.

Lord Chancellor Chelmsford made the proposition that every thing must be owned by some one, the ground of his decision in the House of Lords in the case of *Blades v. Higgs*.

I think that will not be found to be quite correct.

MR. CARTER.—I should say it was entirely correct from what you have read.

SIR CHARLES RUSSELL.—I have not yet read Lord Chelmsford.

LORD HANNEN.—He uses a phrase which Mr. Carter thinks is equivalent.

SIR CHARLES RUSSELL.—I quite agree, applied to the particular case it is the equivalent of it, and it is quite right, but the statement is attributed to Lord Chelmsford.

LORD HANNEN.—It is not a general proposition; it is with regard to the facts of the particular case.

SIR CHARLES RUSSELL.—Quite so, it is not worth dwelling upon. The general proposition that everything must be owned by somebody is attributed to Lord Chelmsford.

LORD HANNEN.—I have opposite to my note on that "page 119"; there may be something there.

SIR RICHARD WEBSTER.—That is where it is noted in the Appendix later on.

SIR CHARLES RUSSELL.—Yes that is the page I have now got to in the Argument. It is not worth dwelling upon. The Judges agree in saying the rabbits which were killed were wild: they were killed by a trespasser on the land of A. and the question was whose is the property? And contrary to the Roman law they arrived at the conclusion that the property was not the trespasser's, but that of the man on whose land it was killed.

THE PRESIDENT.—Before you leave that subject, will you allow me to put a question relating to one of the earlier cases because I should like to know your explanation.

SIR CHARLES RUSSELL.—On what page is it?

THE PRESIDENT.—It is about the white swans on page 114. There is this, that property vested in the King by reason of his prerogative because—

Volatilia (quæ sunt fera natura) alia sunt regalia, alia communia.

Well of course instead of "*volatilia*" you might use *animalia* in general. Would you consider that, in the case of the white swans, this

property vindicated by the King of England would go beyond the limits of the jurisdictional power of the King of England—would
 1018 you consider that as a right of absolute property, which might be vindicated even abroad out of the limits of the realm?

Sir CHARLES RUSSELL.—I should like to consider that, Baron, if you think it important; but I should have thought not.

The PRESIDENT.—Yes I should like to have some explanation of it. If you like to think of it by to-morrow please do so.

Senator MORGAN.—Do you mean, Mr. President, going outside the realm?

The PRESIDENT.—Yes, with reference to the question you put before.

Senator MORGAN.—If the Government has the right by its municipal laws to appropriate to itself all property that does not belong to anybody else it does not necessarily follow that that right must be recognized by other nations.

The PRESIDENT.—Well, Sir Charles, perhaps you will be kind enough to think of it.

Sir CHARLES RUSSELL.—Yes, I should say, as regards the nationals of the particular country, that the legislative power might decree anything it pleased as regards property in white swans or anything else wherever that property was, in any part of the world, as regards subjects or nationals; but so far as legislation could affect anything outside the territory, so far as foreigners are concerned, I should have supposed it could not affect them outside the realm.

Senator MORGAN.—The question, to my mind, arose more particularly in respect to that part of the three propositions submitted in Article I of the Treaty, relating to the right of pelagic hunting, as we call it, the right of taking seals. It includes and makes it incumbent upon the Arbitrators to decide as to the rights of the citizens and subjects of both countries, not one but both. Well, it is a material fact that the United States have asserted and acquired property by their municipal laws in the fur-seals within their recognized jurisdiction. When the seals are beyond that jurisdiction, then the Tribunal has to decide whether the citizens of the United States have the right to take those seals although they are appropriated to the Government of the United States, and their taking within the jurisdictional limits of the United States is prohibited under severe penalties. It is a peculiar attitude as the case is stated here, and one that has given me some concern.

Sir CHARLES RUSSELL.—May I point out, Senator, there seems to be a fundamental error of fact in the statement you have made, because the United States never has, by its legislation, asserted property in the fur seals.

Senator MORGAN.—We differ as to that, you see.

Sir CHARLES RUSSELL.—Well, I shall be glad to be referred to any place where they have asserted property. They have asserted an exclusive right of legislation in the eastern part of Behring Sea. They have, by that legislation, claimed to exclude all persons from the pursuit of pelagic sealing in that area; but they have never
 1019 by legislation, or by judgment in any of the Courts, affirmed property in the fur-seal either in the United States or in anybody else.

The PRESIDENT.—That is a question of fact which may be different from the other, but I would like to know your opinion on the question of right in the case of swans. It is not absolutely irrelevant, I think, and I should like to hear your observations about it.

Sir CHARLES RUSSELL.—Certainly, Sir.

I will only trouble the Tribunal by reading one more passage from the judgment of Lord Chelmsford, on page 638 of the Report.

With respect to wild and unreclaimed animals, therefore, there can be no doubt that no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed, or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed?

That is to say, when they are reclaimed the property is qualified and not absolute. If they escape again, the property is gone.

The next case is the very long case of Morgan and the executors of Lord Abergavenny against the Earl of Abergavenny. I have here the report of that case in full as it is reported in the 8th Common Bench Reports at page 768.

This case of Lord Abergavenny covers a good many pages in the printed Argument; but the point may be stated very briefly. The short point was this: If certain deer were wild and unreclaimed, they did not pass to the personal representatives of the late owner. If they were reclaimed so as to be in the category of domesticated animals, they did pass to the representative of the late owner. That is the short point. I will read first of all what the jury found. The facts are stated in various ways:

These deer were fed. They were described as to their habits as being to a large extent at least tame, some shy and timid. The report continues:

That they very rarely escaped out of the boundaries; that they were attended by keepers, and were fed in the winter with hay, beans and other food; that a few years back a quantity of deer had been brought from some other place and turned into Eridge Park; that the does were watched, and the fawns, as they dropped, were constantly marked, so that their age at a future time might be ascertained; that, at certain times, a number of deer were selected from the herd, caught with the assistance of dogs, and were put into certain parts of the park, which were then inclosed from the rest, of sufficient extent to depasture and give exercise to the selected deer, which were fattened and killed, either for consumption, or for sale to venison dealers; that the deer were usually killed by being shot; that there was a regular establishment of slaughter houses, for preparing and dressing them for use.

Those are all the facts I need trouble you with.

The jury found that the place was an ancient park with all the incidents of a legal park: Secondly, that the boundaries of the ancient park could be ascertained. They expressed a wish to abstain from finding for either plaintiffs or defendant; but upon being required to 1020 do so, they found a verdict for the plaintiffs, and stated that the animals had been originally wild, but had been reclaimed. Therefore the jury found that they were reclaimed animals—originally in the class of wild animals, but reclaimed.

Then the rule came on for argument. I read now from the judgment.

THE PRESIDENT.—Does it appear that those deer were selected and shut up to be fattened?

SIR CHARLES RUSSELL.—Oh no; the question arose as to all the deer, some of whom were shut up and fattened. The report continues:

The rule came on to be argued in Easter term, 1848; and it appeared, upon the discussion, that the objection that no sufficient verdict had been found by the jury, had been urged upon a misapprehension of what the jury had said.

The judgment of the court was delivered by Mr. Justice Maule, the argument having been heard before Chief Justice Wilde, Mr. Justice Colman, and Mr. Justice Creswell: and the learned Judge said.

The second objection [to the summing up of the Judge] was that the Judge had misdirected the jury; and it was contended, in support of that objection, that the

Judge must be held to have misdirected the jury in having omitted to impress sufficiently upon them the importance of the fact of the deer being kept in an ancient legal park. But the judge *did* distinctly direct the attention of the jury to the fact of the deer being in a legal park, if such should be their opinion of the place, as an important ingredient in the consideration of the question whether the deer were reclaimed or not, when he directed them that the question whether the deer had been reclaimed, must be determined by a consideration, among the other matters pointed out of the nature and dimensions of the park in which they were confined; and we do not perceive any objectionable omission in the Judge's direction in this respect, unless the jury ought to have been directed that such fact was conclusive to negative the reclamation of the deer.

Then he proceeds to deal with the facts, and he says:

It is not contended that there was no evidence fit to be submitted to the jury, and that therefore the plaintiff ought to have been nonsuited; but it is said that the weight of the evidence was against the verdict.

He deals with that question thus:

In considering whether the evidence warranted the verdict upon the issue, whether the deer were tamed and reclaimed, the observations made by Lord Chief Justice Willes in the case of *Davies v. Powell* are deserving of attention. The difference in regard to the mode and object of keeping deer in modern times, from that which anciently prevailed, as pointed out by Lord Chief Justice Willes cannot be overlooked. It is truly stated, that ornament and profit are the sole objects for which deer are now ordinarily kept, whether in ancient legal parks, or in modern inclosures, so called; the instances being very rare in which deer in such places are kept and used for sport; indeed, their whole management differing very little, if at all, from that of sheep, or of any other animals kept for profit. And in this case, the evidence before adverted to, was, that the deer were regularly fed in the winter; the does with young were watched; the fawns taken as soon as dropped, and marked; selections from the herd made from time to time, fattened in places prepared for them, and afterwards sold or consumed,—with no difference of circumstance than what attached, as before stated, to animals kept for profit and food.

As to some being wild, and some tame, it is said,—individual animals, no doubt differed, as individuals in almost every race of animals are found, under any circumstances, to differ in the degree of tameness that belongs to them. Of deer
1021 kept in stalls, some would be found tame and gentle, and others quite irreclaimable, in the sense of temper and quietness.

Upon a question whether deer are tamed and reclaimed, each case must depend upon the particular facts of it; and, in this case, the Court think that the facts were such as were proper to be submitted to the jury; and, as it was a question of fact for the jury, the Court cannot perceive any sufficient grounds to warrant it in saying that the jury have come to a wrong conclusion upon the evidence.

I therefore wish to point out that all that case really shows is that, upon certain evidence, it was submitted as a question of fact to a jury, who are, according to the English system of jurisprudence, charged with the determination of questions of fact, whether or not, in the circumstances of the particular case, the deer in question belonged to the category of wild and unreclaimed deer, or belonged to the category of tamed and reclaimed deer; whether in fact in the opinion of the jury they were tamed and reclaimed. The jury found that in fact they were tamed and reclaimed. That is the whole case.

Next we have the case of *Davies v. Powell*, which is reported in Willes' Reports. It was decided in 1737, long previous to the case last mentioned; in the middle of the last century. This was of the same class of cases for which I must be forgiven for uttering one word of explanation. This was also on demurrer. It is found on page 126 of the United States Argument:

Trespass for breaking and entering the close of the plaintiff called Caversham Park, containing 600 acres of land, etc., for treading down the grass, and for chasing, taking and carrying away *diversas feras, videlicet*, 100 bucks, 100 does and 60 fawns of the value of £600 of the said plaintiff *inclusas et coarctatas* in the said close of the plaintiff.

You will see therefore that the plaintiff was complaining that these 100 bucks, does, etc. which he said were his, were *inclusas et coarctatas* in the close of the plaintiff.

LORD HANNEN.—Can you explain the use of that Latin? It was long after Latin had been used in that way.

SIR RICHARD WEBSTER.—As late as the middle of the last century I think some words were still used in certain portions of the pleadings.

LORD HANNEN.—That is the explanation I had given of it, that certain phrases were used.

SIR CHARLES RUSSELL.—Yes; certain words of art were used in the Latin tongue. I think that is the explanation. But the question here was: Whether they were distrainable for rent which the plaintiff owed to his landlord, Lord Cadogan: and if they were the plaintiff's property they were distrainable for rent, but if they were not the plaintiff's property, if they were animals *feræ naturæ* and wild, then they were not distrainable; but he was complaining that they had been seized to pay the rent he owed, and he described them as his own bucks and his own fawns, as *inclusas et coarctatas* in his close.

This is again raised on demurrer. That is to say the plaintiff having made this complaint, the defendant pleads, "I seized them for 1022 rent. Admitting all your facts, I seized them for rent"; whereupon a demurrer to that defence. If you will turn to page 127, the matter explains itself pretty well. It is the second paragraph:

To this plea the plaintiff demurs generally, and the defendants join in demurrer.

The technical effect of that, Mr. President, is this: That the plaintiff says: Although I admit that the facts you set up in the defence are true in fact, I deny that in point of law they afford an answer to my claim.

That is the effect of the demurrer. Then the report goes on:

And the single question that was submitted to the judgment of the court is whether these deer under these circumstances, as they are set forth in the pleading, were distrainable or not. It was insisted for the plaintiff that they were not;

(1) Because they were not *feræ naturæ*, and no one can have absolute property in them.

(2) Because they are not chattels, but are to be considered as hereditaments and incident to the park.

(3) Because if not hereditaments, they were at least part of the thing demised.

(4) Their last argument was drawn *ab inusitato*, because there is no instance in which deer have been adjudged to be distrainable.

Then the argument is set out. The judgment of the Chief Justice is given. He says:

I do admit that it is generally laid down as a rule in the old books that deer, conies, etc., are *feræ naturæ*, and that they are not distrainable; and a man can only have a property in them *ratione loci*.

"*Ratione loci*" is only another way of saying *ratione soli*.

And therefore in the case of swans (7 Co. 15, 16, 17, 18) and in several other books there cited it is laid down as a rule that where a man brings an action for chasing and taking away deer, hares and rabbits, etc., he shall not say *suos*, because he has them only for his game and pleasure *ratione privilegii* whilst they are in his park, warren etc. But there are writs in the register (fol. 102), a book of the greatest authority, and several other places in that book which show that this rule is not always adhered to. The writ in folio 102 is *quare clausum ipsius et intravit et cuniculos suos cepit*.

The reason given for the opinion in the books why they are not distrainable is that a man can have no valuable property in them, etc.

Then comes the real ground of the decision, the second paragraph at the top of page 128:

And that this is the case of the deer which are distrained in this present case is admitted in the pleadings. The plaintiff by bring an action of trespass for them in some measure admits himself to have a property in them; and they are laid to be *inclusas et coarctatas* in his close,

“They are laid to be”, means “alleged to be”—

which at least gave him a property *ratione loci*; and they are laid to be taken and distrained there; but what follows makes it still stronger, for in the demise set forth in the plea and on which the question depends, they are several times called the deer of John Davies, the plaintiff.

. . . . The plaintiff therefore in this case is estopped to say either that he had no property in them or that his property was of no value.

1023 The case is a case decided on demurrer and it is only of interest technically. It decides nothing. It simply says—

You as plaintiff have alleged they were your property. If they were your property, they were distrainable. The Court therefore say it is a good plea, and it is a good answer to your claim.

I have come to the end of all the authorities cited on the question of property, with one exception, and that is an additional authority cited by my learned friend Mr. Phelps at page 180 of the printed argument. That is the only case which he adds to the authorities cited by my friend Mr. Carter, the case of *Hannam v. Mocket*. This is a case of rooks. I have got the report here for the use of my learned friends if they desire it, or for any member of the Court; but there is quite enough in this for me to refer to.

The facts there are these:

The declaration [that is to say the plaintiff's claim] stated that the plaintiff was possessed of a close of land with trees growing thereon, to which rooks had been used to resort and to settle and to build nests and rear their young in the trees. That is to say, they came there year after year to this same place; by reason whereof plaintiff had been used to kill and take the rooks and the young thereof, and great profit and advantage had accrued to him, yet that the defendant wrongfully and maliciously intending to injure the plaintiff and alarm and drive away the rooks and cause them to forsake the trees of the plaintiff, wrongfully and injuriously caused guns loaded with gun-powder to be discharged near the plaintiff's close, and thereby drove away the rooks; and thereby the plaintiff was prevented from killing and taking the young thereof.

I need not say that rook-pie is supposed to be an edible commodity; and the shooting of young rooks sometimes amuses youthful sportsmen at all events.

Plea not guilty.

The general issue, in fact.

“Plea not guilty” means I deny what you say; I did not do the thing. The Case is tried; decided in a particular way; and then after trial, motion in arrest of judgment: it was held that this action was not maintainable, inasmuch as rooks were a species of bird *feræ naturæ*, destructive in their habits, not known as an article of food, or alleged to be so, not protected by any Act of Parliament; and the plaintiff could not have any right in them or show any right to have them resort to his trees. I should like to read what Mr. Justice Bayley says in giving judgment:

A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. The injury in this case does not affect to be right of personal security or personal liberty, nor any property in possession or in action; and the question then is whether there is any injury to

any property the plaintiff had a special right to acquire. A man in trade has a right in his fair chances of profit and he gives up capital to obtain it. It is for the good of the public that he should. But has it ever been held that a man has a right in the chance of obtaining animals *feræ naturæ* where he has had no expense in inducing them to his premises, and where it may be at least questionable whether they will be of any service to him, and whether indeed they will not be a nuisance to the neighbourhood. This is not a claim *propter impotentiam* because they are young, *propter solum* because they are on the plaintiff's land, or *propter industriam* because plaintiff has brought them to the place or reclaimed them, but *propter usum et consuetudinem* of the birds.

In other words, the migratory habits, the *animus revertendi*, of the birds.

They of their own choice and without any expenditure or trouble on his part have a predilection for his trees and are disposed to resort to them.

The seals have a predilection for the Pribilof Islands and have a right to resort to them.

But has he a legal right to insist that they shall be permitted to do so? Allow the right as to these birds and how can it be denied as to all others.

Then he proceeds to point out the distinction in a claim of this kind between birds that are fitted for food and birds that are not fitted for food. He says:

It is not alleged in this declaration that these rooks were not fit for food; but we know in fact that they are not generally so used, etc.

Then follows a passage which is omitted in the Argument, but which is not unimportant. It follows after the word "established". He says:

So far from being protected by law they have been looked upon by the Legislature as destructive in their nature and as nuisances to the neighbourhood where they are.

Then follows the passage which is omitted.

It has been said that a man may acquire rights over other animals *similis naturæ* as affording him diversion, such as rabbits in a warren, doves in a dove-cote. But first it is to be observed that rabbits and pigeons are not only subjects of diversion but constitute an article of food. In the second Inst. 199, it is said that the common law gave no way to matters of pleasure (wherein most men do exceed) for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a park, chase, or warren, without a license under the great seal of the King. . . And even with respect to animals *feræ naturæ*, though they may be fit for food, such as rabbits, a man has no right of property in them.

Then he goes on to explain, in the way so many other authorities have done, what are the rights in respect to animals *feræ naturæ, ratione soli*, etc.

I have exhausted the authorities, I have considered every authority that has been cited by my learned friend on this point; and I am not justified in doing more than submitting to the Tribunal at this stage of the argument that there is not one of them which is not in favor of the propositions for which we are contending, the non-existence of property in the particular animal with which we are dealing in this case.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you.

Sir CHARLES RUSSELL.—My friend Mr. Phelps has courteously intimated to me that his impression is that in that case of *Goff v. Kilts* (which is at page 117 of the printed Argument of the United States), the learned Judge did affirm the proposition that when bees take up their abode in a tree they belong to the owner of the soil, if they are unreclaimed. I respectfully differ from my friend. What I first read is the head note of the case—not the reported words of the Judge. The head note ends with the word "trespass"; but if,

Mr. President, you will turn to page 118 of the printed Argument (which is the only foundation for that note in the judgment), I think it will be seen that it does not rightly construe what the learned Judge said. It is the sentence beginning:

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true, so far as respects on unreclaimed swarn. While it remains there in that condition, it may like birds or other game, (game laws out of the question) belong to the owner or occupant of the forest *ratione soli*. According to the law of nature, where prior occupancy alone gave right, the individual who first hived the swarn would be entitled to the property in it; but since the institution of civil society, and the regulation of the right of property by its positive laws, the forest as well as the cultivated field, belong exclusively to the owner, who has acquired a title to it under those laws. The natural right to the enjoyment of the sport of hunting and fowling, wherever animals *feræ naturæ* could be found, has given way, in the progress of society, to the establishment of rights of property better defined and of a more durable character. Hence no one has a right to invade the enclosure of another for this purpose. He would be a trespasser; and, as such, liable for the game taken. An exception may exist in the case of noxious animals, destructive in their nature. Mr. Justice Blackstone says:—If a man starts game in another's private grounds, and kills it there, the property belongs to him in whose ground it is killed, because it was started there, the property arising *ratione soli*. (2. Black Com., 419.) But if animals *feræ naturæ* that have been reclaimed, and a qualified property obtained in them, escape into the private grounds of another in a way that does not restore them to their natural condition, a different rule obviously applies. They are then not exposed to become the property of the first occupant. The right of the owner continues—

and so on.

I submit it is clear that the learned Judge there is referring to the argument in the course of the case, in which he says.

It is said the *owner of the soil* is entitled to the tree and all within it. This may be true.—

He is treating it as a point made in argument; but he goes on to show, in the very next words, that he is there referring not to the question of property strictly so called, but to the right of the owner *ratione soli*, that exclusive right to take, and there being no property without taking. As my friend was good enough to call my attention to it, I thought it right to make that observation.

Now, I have exhausted all the authorities cited by my learned friends in the course of their written Argument, and there were none others referred to in the course of the oral argument; but my friend Mr. Carter has been good enough to furnish us with a small volume,—I do not know whether the members of the Tribunal have had it or not,—it is entitled, "Citations from the Writings of Jurists and Economists illustrating and supporting certain propositions maintained in the Argument of the United States upon the subject of property". Well, I wish to pay every tribute to the erudition and labour of my friend; but when 1026 I cite the propositions in respect to which these authorities are collected together, unless I am invited to do it by the Court, I certainly do not intend to pursue the enquiry further.

Now, the propositions are these.

FIRST. That the earth and all its bounties were originally bestowed upon mankind in common.

SECOND. That the institution of *property*, and especially of *private property* exists only for the satisfaction of the great social necessities of mankind.

That such necessities may be generally described as two-fold:

1. The preservation of peace and order.
2. The *preservation* of the gifts of nature, and the making of them *more productive*, in order to support the increasing population of the earth which the advance of civilization necessarily involves.

THIRD. That the institution of property is governed by the *social necessities* which it is designed to satisfy; and will be extended to every subject to which those necessities require its extension.

FOURTH. That the extent of the dominion which is allowed by the institution of property, either to nations or to individuals, is always limited by the social duties which invariably accompany it.

1. It is the *use* only which is given.

2. They must be so used as to carry out the purpose of the original gift for the benefit of all mankind. What is not needed for the use of the nation or individual owning the gift must be offered on reasonable terms to the rest of mankind.

3. Nothing must be wantonly or needlessly destroyed.

FIFTH. Wherever a useful thing is not furnished by nature in quantities sufficient to satisfy the desires of *all*, and will be exhausted unless it may be preserved by making it the subject of property, it must be made the subject of property.

I really do, with the greatest deference to my friend, and not, I hope, using more vehemence of language, or pointedness of language than the occasion requires, say that this is an invitation to us very far afield from the question that you have to decide. You are not here framing laws; you are not here judges of ethics or of morals; you are here to declare what the law is; and you are not even to trouble to enquire into the foundation upon which the law rests, but you are to declare it as you believe it to be.

Now I have to supplement these authorities by certain authorities referred to in our Argument and Counter-Case. In the British Counter-Case, page 82, a number of authorities are cited, with which I do not intend to trouble you; but there is, on page 83, one authority I should like to cite because it is an American authority—the opinion of a writer of distinction—I mean Chancellor Kent. On page 83 there will be seen a citation from the Boston edition, the 9th edition of his Commentaries, page 1858, vol. II, p. 432:

Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases. While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner.

The difficulty in ascertaining with precision the application of the law arises 1027 from the want of some certain determinate standard or rule, by which to determine when an animal is *feræ vel domitæ naturæ*.

If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then clearly a subject of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kinds of fowl, then the animal is the subject of qualified property, and which continues so long only as the tameness and dominion remain.

Then at the bottom of that page in our Counter-Case, the argument which is at the basis of our case on property is suggested, thus:

It would seem useless to multiply authorities, as there is no suggestion throughout the United States Case that, even in their own law, the rule is not laid down by Kent.

Then there follows a statement which I think is not immaterial, especially in view of some observations made by Senator Morgan, but which I merely intend to refer to and not to dwell upon: it is pointed out that the effect of the law of the United States, beginning with the law of 3rd March 1869, by which the Islands of St. Paul and St. George were declared to be a special reservation for Government, is not an affirmation of any property in the fur-seals; and it is further pointed out, on page 84, that when the lessees assumed that position from the United States, all that was given to them by their lease was "the exclusive right to engage in the business of taking fur-seals on the Islands of St. Paul and St. George in the territory of Alaska." I do not, however, in this connection pursue this subject.

Now some further authorities are referred to, in the printed Argument of Great Britain; but inasmuch as all the authorities have been discussed by me at length, I do not think it necessary to do more than ask the Tribunal to bear in mind that there is that reference to further authorities at that place, and that there will be found what we submit is an accurate statement of the law, both as to that prevailing in the United States and that prevailing in Great Britain.

On page 31 of the English Argument you will find this:

The common law in force both in America and England as to animals *feræ naturæ* is identical.

This law recognizes no property in animals *feræ naturæ* until possession. Property, while the animals are alive, remains only so long as this possession lasts; when this possession is lost the property is lost. The law considers that they are then wild animals at large, and that the rights of capture revert to all alike.

The owner of land has what is sometimes called a qualified property in wild animals on the land, but this is no more than the exclusive right to take possession while they are there, and when they leave the land that exclusive right is gone.

There is one other American authority to be cited. I have already referred to him, but for another purpose—I mean Professor Angell—(I refer now to page 95 of the first volume of the Appendix to the 1028 Case of Great Britain).—In his article in the “Forum”, he states the argument of the United States as plausibly as it can be put. He says:

It may be argued that, since most of the seals which are taken by the British breed on our soil in the Pribylof Islands, we have an exclusive claim to them in the sea, or at any rate a right to protect them there from extinction. But some of them breed on Copper Island and Behring Island, both of which belong to Russia. How is it possible to maintain any claim to ownership in seals on the high seas under any principle of law applicable to wild animals? We can acquire no property rights in animals *feræ naturæ* from their birth on our soil, except for the time that we hold them in our possession. A claim by Canada to the wild ducks hatched in her territory, after the birds have passed her boundary, would seem to be just as valid as ours to seals in the open sea.

Then a little lower down he says:

On the whole, we find no good ground on which we can claim as a right the exclusion of foreigners from the open waters of Behring Sea for the purpose of protecting the seals.

Now I intend to supplement the authorities already referred to by only one or two more. I refer to the case of *Gillett v. Mason*, which is a United States case, decided in 1810, and reported in the 7th Volume of Johnson’s Reports. It is on the question of bees. I cite it merely to shew that the law of the United States, as regards bees, is the same as the law of Great Britain; and, indeed, that the judgment was based upon the citation, to which reference has already been made, from Blackstone.

Now the head note in that case is this:

Bees are feræ naturæ; and until hived and reclaimed, no property can be acquired in them. Finding a tree on the land of another, containing a swarm of bees, and marking the tree with the initials of the finder’s name, is not reclaiming the bees, nor does it vest in the finder any exclusive right of property in them; nor can the finder maintain trespass against a person for cutting down the tree and carrying away the bees.

In giving his judgment the learned Judge cites the opinion of Blackstone (2 Commentaries p. 392), and of Justinian, as the justification for the legal view that he takes as to property in bees.

Then, again, as regards rabbits, I refer to the case known as *Boulston’s Case*, which is in the 5th volume of Coke’s Reports, page 512:

Between Boulston and Hardy it was adjudged in the Common Pleas that if a man makes coney-boroughs in his own land, which increase in so great number that they

destroy his neighbour's land next adjoining, his neighbours cannot have an action on the case against him who makes the said coney-boroughs; for so soon as the coneyes come on his neighbour's land he may kill them, for they are *feræ naturæ*, and he who makes the coney-boroughs has no property in them, and he shall not be punished for the damage which the coneyes do in which he has no property, and which the other may lawfully kill.

In other words, if he had the property in them, and kept them on his land, he would be responsible for the damage that they did; but being no man's property—being the property of the first man who kills them—and the owner having the exclusive right to kill them while on his land and no more, he is not liable for the damage that they did.

1029 The last case I intend to cite is an interesting case, which perhaps, in this very dreary and dry subject is something to say for it. It is the case of *Ibbotson v. Peak*, which is reported in the 34th volume of the Law Journal Reports, New Series, page 118. It was decided in 1865. The action was a very curious one: the facts are these. There were two adjoining owners. One was the Duke of Rutland, who had upon his land grouse preserves, which he took great pains (to use an expression used by my friends in their argument), to "cherish". Adjoining him, was a neighbour who was not unwilling to get some benefit from the fact of his contiguity to these same preserves, and who had resorted to the most unsportsmanlike and unneighbourly means of enticing the birds to leave the Duke of Rutland's preserves and come upon his ground; and he had done that by seeking to decoy them by putting down food in particular places contiguous to the Duke's preserves, with the result that he did induce a considerable number of the grouse to come to him.

Thereupon the gamekeeper of the Duke, not to be out-done, thought he would endeavour to deprive the unneighbourly neighbour of the advantage, and he proceeded to fire off, in the neighbourhood where this provender was put as an inducement to the grouse, guns, rockets, fireworks, and things of that kind to drive them away from the lands to which they had been so enticed, and back again to their usual ground on the Duke's preserves. -

Thereupon the neighbour brought an action against the Duke's representative for injuring him by these means. The Duke in answer said, "As to so much of the plaintiff's case as alleges"—so and so—

the defendant says that before the time of the committing of the said supposed grievances in the first count mentioned, his Grace the Duke of Rutland was seised in fee of certain land abutting on and next adjoining the land of the plaintiff in the first count mentioned, and was entitled to the exclusive right of shooting, killing and taking grouse on his land; and the said Duke, before the committing of the said supposed grievances, had gone to great expense in getting up and preserving great numbers of grouse on his lands, as the plaintiff well knew; and the defendant says that just before the committing of the said supposed grievances the plaintiff fraudulently and wrongfully, and with intent to lure and entice the said grouse away from the said lands of the said Duke on to the lands of the plaintiff and to obtain for himself the benefit of the expense so incurred by the said Duke as aforesaid, laid and placed on the land of the plaintiff near to the lands of the said Duke, quantities of corn and other substances on which grouse feed, and thereby then lured and enticed the said grouse.

Thereupon he goes on to say that all he did by his fire-works was to get them away from the spot to which they had been enticed. The question was, Did an action lie? Held that an action, even in that case, lay against him. The Duke had no property in the grouse. They were only his so long as they were on his land, and he had the right to take them while on his land, and no more than a right to take them when they were on his land. And Lord Bramwell who interposed in the

1030 beginning of the argument of the case, illustrates his view of the matter by saying.

In *Chasemore v. Richards* the plaintiff was possessed of a spring underground which supplied his well. The defendant dug a well on his land, and the plaintiff's spring in consequence dried up. The only remedy the plaintiff had was to dig his well deeper and so retain the water if he could.

So, says Lord Bramwell, in the present case the remedy of the Duke is to offer greater attractions to the grouse, and induce them to come in that way, and because the plaintiff has done an unneighborly thing, he has got no right to frighten them away.

He says:

What is the reason given? The reason given is this: That the game which the defendant frightened away was game which the plaintiff wholly or partially got from off the Duke of Rutland's land,—say the Defendant's land—the Duke having attracted it there by providing food for it, or taking care of it, and then the plaintiff improperly attempted to get it on his land by putting down some grain on his land. Then, in order that the plaintiff may not shoot the game which the Plaintiff had so attracted and in order that the plaintiff may have no inducement to go on with such conduct—for that is the only meaning of preventing him from alluring the grouse aforesaid,—in order that he should be without inducement for such acts as that, the defendant did the thing complained of. It appears to me clearly that the plea is bad, because I see nothing in point of law, to prevent the plaintiff from doing that which the plea alleges he has done. If the plaintiff has done no wrong, how can there be a justification of the defendant's act. No one can pretend for a moment that any action would lie at the suit of the Duke against the plaintiff. The truth is this: without saying anything as to the propriety of such conduct as this between gentlemen and neighbours, the true remedy, I take it, where a person knows game is attracted away from his land, is to offer them stronger inducements to remain.

Now I have said that we have exhaustingly and exhaustively stated the municipal law of these two great communities, but I have yet to trouble the Tribunal with the law of another great community. French law as to wild animals. I mean the law of France; and at some trouble, and with some pains, we have endeavored to inform ourselves about this law; and it will be found that, with very slight exceptions, it is essentially the same in principle as that of the United States of America and of Great Britain.

I am glad to know that there is, in the President of this Tribunal, one who can check or correct, if any error be committed, our statement of the French law. I find as the result of this enquiry that there are recognized three main divisions of living animals; wild animals: *Fera*, who live in a state of natural freedom, or as the civilian expresses it *in laxitate naturali*. I find that there are domestic animals, *Mansucta*; and the third class is the half-tame or reclaimed animals, *Mansuefacta*, which is an intermediate class between the other two. But I find also that the existence of that third class is not admitted universally by text writers; but it is to be added that the existence of that class is a matter of small importance, for these animals are regarded by the law in the light of domestic animals when they are on the land, that is
1031 to say, the right to take them is recognized when they are on the land; and treated as wild, or no man's property, when they are off the land.

Senator MORGAN.—Does the Government of France assert a title in any wild animals for any purpose?

Sir CHARLES RUSSELL.—I am not aware, except on the same lines I have been endeavouring to explain; but I would respectfully refer to the President as a much more reliable authority.

Now as regards domestic animals, or the animals which belong to the first class, they are dealt with by various articles of the Code; and I

do not think I need trouble the Tribunal at all to refer to that. As regards wild animals, I will give a definite reference to authorities. A wild animal in a natural state of freedom belongs to no one. It is *res nullius*; the method of acquiring a right of property over it is by taking possession; and the reference to that is Aubry and Rau, *Droit Civil*, Vol. 2, paragraph 201.

The PRESIDENT.—That is the acknowledged principle of our French law.

Sir CHARLES RUSSELL.—Yes. The things which are recognized by French law as *res nullius* include these categories: Things which can never be the private property of any one: Things such as air, light, the high sea, and so on: Things which do not actually belong to anyone, but which, by their nature, become the object of a personal appropriation by possession. Such are wild animals, the fish of the sea, and so forth. As regards the products of the sea, such as amber, coral, and so on, a distinction might be made, which is a distinction made in Italian law also: If the things are taken from the bottom of the sea or caught upon the waves, they are the property of the first taker. If, on the other hand, they are simply found on the sands, a part belongs to the finder and a part to the State. And the authority for that is Busson, “*Des Établissements de Pêche*”, page 17.

The PRESIDENT.—The State is the legal owner of the shore, but a part of the find belongs to the finder as a general rule. The shore of the sea is considered as belonging to the State as it would to any private man.

Sir CHARLES RUSSELL.—Quite so, but as to the sea, everyone has an equal right to gather the riches which it contains, for these riches, up to the time of their being taken possession of by the individual are common to all; for which the authority is also Busson, “*Des Établissements de Pêche*”. Then I need not refer to an account which is interesting, but not directly *ad rem*, as to restrictions which in former times existed upon the pursuit of hunting and the way in which those rights were exercised.

The PRESIDENT.—Perhaps you would kindly give us the authorities about it.

Sir CHARLES RUSSELL.—Certainly I will read the whole authority. Hunting, says in effect the Court of Cassation, includes the whole series of operations which begin with the search for any wild animal for the purpose of ultimately effecting its capture. Hunting being the means of capturing and appropriating to oneself wild animals, 1032 it follows that hunting is only the exercise of a natural right.

Nevertheless this natural right has been for a long time appropriated in France by the feudal law to the profit of the Sovereign.

It was considered as a royal right. The Nobles alone had the power to hunt, but they did not exercise it even on their own lands except by royal license.

Then a reference is made to the royal Ordinance of Louis XIV in which Articles XIV and XXVIII are as follows:

We permit all Lords, Gentlemen, and Nobles to hunt in noble fashion with dogs and birds in their forests, thickets, warrens, and plains, provided that they keep a league distance from our plesaunces for buck and *bêtes noires* to a distance of 3 leagues.

Then Article XXVIII is:

We prohibit Merchants, Artizans, Commoners, and Inhabitants of towns, boroughs, parishes, villages, hamlets, peasants and yeomen of whatever condition and quality they may be, not possessing fiefs, lordships, and *haute justice* from hunting in

any place, condition or manner, or any furred or feathered game whatever under penalty of 100*l* fine for the first time, double for the second, and for the third, to be liable to three hours in the pillory of their place of residence on market day, and banished for three years from the jurisdiction of the *maitrise*, unless for some cause the judges can remit or diminish the penalty to prohibition.

The PRESIDENT.—The right of hunting was considered a regal right, and the Lords had it by tenure only as a derivative right.

Sir CHARLES RUSSELL.—Yes, as a seignorial right.

The PRESIDENT.—As a seignorial right; and that was all derived from the sovereign right.

Sir CHARLES RUSSELL.—Quite so.

Senator MORGAN.—If I understood it, Mr. President, you said it was a right derived from the Sovereign, and not inherent in the individual?

The PRESIDENT.—It was not inherent in the individual under our ancient law.

Sir CHARLES RUSSELL.—Quite so. It was the old feudal law, in which the King was supposed to be the source and origin, the head of the whole society—the Lord of all that was possessed, who granted out from his royal favour this, or that, or the other. That was the old original feudal idea, undoubtedly.

The PRESIDENT.—It was somewhat different from the right of property. The right of property was quite independent of any grant of the King. Feudal right was derivative, but allodial right was not derivative—the right of hunting was considered part of the power, and it was given in fee, just as the right of justice was given. You know that landlords were judges, and were entrusted with the care of judging in certain provinces and at certain times. They had the right of “*mint*”, and several other regal rights of that sort. The right of hunting was a derivative right from the sovereign power. It was not quite the same as property.

1033 Sir CHARLES RUSSELL.—Then there is a reference to the existing Police Law of 1844, which I do not think I need trouble about. It simply says that no one shall have the right to hunt on the property of another without the consent of the proprietor or of his assigns. The right of hunting is thus accessory to property; but it must not be confounded with right over the game. The right of the chase only allows the proprietor to legally possess himself of wild animals found on his land, and so forth.

Then Monsieur Demolombe, in commenting on the general provisions of Book 3 of the Civil Code—this is in his “*Traité des Successions*”, Volume I, sections 26 and 27—as to the different methods in which a man acquires property, puts the question, does the hunter who kills a head of game become the owner of it? This is our subject. The answer is simply, the property in the animal killed in hunting belongs to the hunter in virtue of the right of possession. This is one of the divergences from English Law, because this is not restricted to hunting upon his own land. It agrees there with the Roman Law.

This rule is perfectly clear when the animal has been killed by the hunter on his own land, or on the land of another with the permission of the proprietor. But ought this rule to be applied in the case where the hunter has killed or taken the game on the land of another without the permission of the proprietor, or in spite of his prohibition? This is a very old question, and Cujas has maintained the negative. But the contrary solution has always been generally insisted upon; and it is that which follows from the Roman Laws.

So that he adopts that view.

Then he goes on:

Pothier in our ancient law likewise maintained it (*de la Propriété* n° 24), and it is without any doubt the best according to our present law. The prohibition by the

proprietor against any person hunting on his land does not really change the nature of the game which is none the less always a thing *nullius*; "prohibitio ista" as Vin-nius well says "conditionem animalis mutare non potest." The owner of the land cannot bring an action to recover the game since he has never been the owner of it; all he can do is to sue for damages.

That is for the trespass. Then the Law of the 3rd of May, 1844, which I have already referred to, contains nothing contrary to this principle; but it does appear to provide that in the case of hunting during the prohibited time this law deprives the hunter of the game which he has killed or taken; and, further, in reference to killing out of season, it is not in order to restore it to the proprietor of the land on which it has been killed by a third person, for, as we have seen, the law gives it on the contrary to charitable societies.

Senator MORGAN.—Confiscates it.

Sir CHARLES RUSSELL.—Yes, if it can be called confiscation.

Senator MORGAN.—That is because it is killed in violation of law.

Sir CHARLES RUSSELL.—Then the next passage which is instructive is from the book by M. Villequez, doyen de la Faculté de Droit de Dijon, "Droit du chasseur."

1034 Game at large which is not confined in an inclosed area from which it cannot escape, belongs to no one, no more to the proprietor of the land on which it is harbouring, lying or perching or through which it is passing than to any one else. It becomes the property of the first who takes possession of it even on ground where he has not the right of chase or pursuit. This is a constant principle applied without dispute from the time of the Romans to our own days. It results from the very nature of the things. Natural law and reason alone would teach it, were it not everywhere written and acknowledged. A right in fact is not intelligible except so far as it is possible to exercise it. The exercise of the right of property consists in the use of the thing which is subject to it. The proprietor of a field uses it when he cultivates it, when he reaps it, or even when he walks over it. To use a hare which is lying there he must begin by taking it, or at least by having it in his possession in such a manner as to be its master and to prevent it from escaping. Up till that time it belongs to no one, is its own master, and often will only lose its liberty with its life, to the profit of whoever kills it for the purpose of appropriating it by taking possession.

The next clause is from Pothier *De la Propriété*, No. 57, and from the same author Demolombe, vol. XIII, No. 26.

The property which is established in wild animals by possession rests so clearly on the fact of effective possession that it is lost with that possession when the animals by escaping from us have regained their natural liberty, and have thus returned to the "negative domain" of the human race; thus differing from inanimate things and domestic animals in which we retain the property even when they are lost.

Then, upon the subject of fishing, fish of the sea and in running waters are also, as we have said, like wild animals, *res nullius*. The capture of fish is effected by means of a series of operations covered by the description of fishing. And then from the *Ordonnance sur la marine* of 1681, 5th book, title I, article 2, and also from Pothier's *De la Propriété*, No. 51, everyone can fish in the sea without permission. It is, in this sense, that one is accustomed to say sea-fishing is free; for, in other respects, it is subject to by-laws and police rules, which in the general interest, in order to prevent the destruction of the spawn and to encourage the reproduction of different kinds of fish, determine the seasons and hours during which fishing is forbidden, the method, the machines and instruments prohibited, and the size of the nets which may be used. These rules are not binding in the open sea except on the nationals whom alone the national law can follow outside their territory (Civil Code, article 3). They have no legal effect as regards foreigners, except in the limits of the territorial sea.

Then I could refer if need be, and I must refer to it in another connection, though I may mention it here as it is under my eye at this moment, to cases which are constantly occurring, where the interests of countries separated by water or contiguous by land are concerned: thus boundary questions have arisen between France and England as to fisheries, where France has seen the utility of admitting certain limitations and certain rights claimed by Great Britain, and Great Britain, on the other hand, has seen the equity and utility of conceding to

France, and Belgium and other Powers, the same limitations,—I 1035 must say something on this at some later period, probably at greater length; but all this goes to show that these Conventions or Agreements for mutual accommodation are effecting that which international law cannot effect, because it does not provide for it. They are outside the domain of that law; they are dealt with upon principles of mutual give and take and mutual convenience; and even in these cases, I need not say, the Conventions so made and the legislation of the respective countries intending to give effect to these Conventions only bind the respective nationals, and bind no outside Powers and the nationals of no outside Power whatever, and, therefore, it does not fall within the scope of international law.

Now I will only make one further reference, and that is to say that the law as to bees is the same as that which I have been already dealing with and there is a case decided by the Cour d'Appel de Toulouse as late as May 1876, where the principles are laid down by that Court in strict conformity with the authorities which I have already been citing:

When bees are in a wild state, they are *res nullius* and become the property of the first taker. If they have taken up their abode in the hives they are susceptible of private property. The recent law of the 4th April 1889 of the Rural Code in Article 7 indicates in what manner the property in bees ceases when the bees located on any land abandon it.

These are the words of the law of 1889:

The proprietor of a swarm has the right to retake it, and repossess himself of it as long as he has not given up its pursuit; otherwise the swarm belongs to the proprietor of the ground upon which it has settled.

He has the right to take it.

Senator MORGAN.—Is that a Statute?

Sir CHARLES RUSSELL.—Yes, the Rural Code of 1889.

Lord HANNEN.—There have been some decisions on that.

Sir CHARLES RUSSELL.—This decision could not have been on that; but it was on a similar law. This is in 1889, and it conforms to the previous decision of the Cour d'Appel de Toulouse, delivered in 1876.

Lord HANNEN.—There is a case somewhere with reference to silk-worms. Have you got that?

Sir CHARLES RUSSELL.—No, I have not got that case. The reasons given in the Cour d'Appel de Toulouse I might read.

Considering that according to the tests furnished both by principles and by jurisprudence, domestic animals are those which associate with man, live about him in his house, are nourished and bred by his care; that the bees still retain, after being taken possession of by man, their wild nature which the Roman law recognized; that they do not live near man and under his roof, and they are separated from his habitation by reason of the inconvenience and danger which their proximity involves; that the bees familiarize themselves so little with man that one is obliged to take precautions in approaching their hives and removing their honey, which the labour of these insects has stored in cells;

Considering further that if in a certain measure the surveillance and care of the proprietor is employed in the preservation and nourishment of the bees, that they

rely for their subsistence in taking from shrubs and flowers near the hives, and in carrying thither the substances that they have gathered.

1036 Considering also that these essential difficulties make it impossible to class bees in the category of domestic animals.

That is the short decision.

Senator MORGAN.—Was that before the statute to which you referred?

Sir CHARLES RUSSELL.—Yes I have said so. The decision was in 1876 and the Statute was passed in 1889.

Lord HANNEN.—It was a codification of the principles embodied in that decision.

Sir CHARLES RUSSELL.—Yes.

There is another decision also referred to of the Cour de Limoges to the same effect.

Mr. PHELPS.—These have not been quoted in your previous argument, and we have had no access to them or opportunity to see them.

Sir CHARLES RUSSELL.—I do not wish to say anything that would be at all irritating, but it is to be borne in mind that my learned friend Mr. Carter very early before commencing his argument deplored the loss of certain French authorities which he hoped to be able to recover or replace, and therefore my learned friend's mind, which was no doubt laboriously engaged in this matter, was addressed to the subject of French authorities, and indeed it was that which suggested to us that we should explore the same region with the result that I have put before the Court.

The PRESIDENT.—It is an argument of analogy.

Sir CHARLES RUSSELL.—Yes: I claim to have shown that the laws of France, the United States, and Great Britain, all concur; and so far as I know, but it is not safe to generalize, the municipal law of no country can be invoked in favour of the claim to property in the seals; and thus municipal law cannot be invoked in favour of this claim of the United States to property. Now I have dealt with the general propositions.

The PRESIDENT.—May I remind you with regard to what you said as to the Russian law, that the Russian law did not admit of *res nullius*.

Sir CHARLES RUSSELL.—I did say so.

The PRESIDENT.—Yes.

Sir CHARLES RUSSELL.—I do not think that contravenes the proposition I am now upon.

The PRESIDENT.—I merely remind you of what you have stated—the seal in Russia would not be *res nullius*.

Sir CHARLES RUSSELL.—The law would not give it to the proprietor of the land on which it was found. If it did not belong to the proprietor, it would belong to the State. I suppose that is the result of the Russian law.

The PRESIDENT.—What you stated this morning was quite novel to me, and I cannot form an opinion from a law I do not know.

Sir CHARLES RUSSELL.—I have seen it somewhere stated. I know that Russian law does form an exception to the general law of other countries in that regard, that nothing is said to be according to the Russian law without an owner, and if there is no private owner the State claims to be the owner. I thought it right to say that, because I had seen it, but the authority for it I do not recall.

The PRESIDENT.—It may be said that is one of the objects that are capable of appropriation.

Sir CHARLES RUSSELL.—Yes, matters which are capable of being the subjects of property; and, as regards animals *feræ naturæ*, there is

merely that right to take them and so acquire the property, and nothing more,—it may be so.

The PRESIDENT.—The fact is, we do not, either of us, know the law.

Sir CHARLES RUSSELL.—No; I do not trust myself to speak positively about it.

I am not at all sure, Sir, that it would not be a more correct thing to say of wild animals that they are *res communes* rather than *res nullius*. That may possibly be. I merely suggest it because anybody may take them. I should not like to pledge myself to any view about it.

Senator MORGAN.—They are *res*, at any rate.

Sir CHARLES RUSSELL.—They are *res*, certainly.

THE APPEAL TO INTERNATIONAL LAW.

But now, Mr. President, I have yet to deal with another view of this question, what law is to govern this Tribunal in determining this question. I submit that I have demonstrated that municipal law does not support this claim, but negatives it. I have further submitted that title in things must take its root in municipal law, and I have sought to illustrate that by pointing out to you what the case must be if, instead of the Pribilof Islands being the national property of the United States, they were, as they well might be, the private property of an ordinary individual. I gave as an illustration yesterday the Scilly Islands on the southwest coast of England, and many other islands along the coast. Suppose that, in such a case, the private owner of those islands asserts that his right of property in the seals is attacked by pelagic sealing in the adjoining ocean.

What must be his initial step? He is complaining of an invasion of his right of property in the fur-seals, by a neighbour, by a pelagic sealer from the adjoining coast. He sues him in trespass; he sues him in trover; he sues him in any form of action he chooses. The first step he must take, the first position he must lay down clearly and distinctly, is that according to the law of the place he has a title to the thing which he claims, and his right to which he says has been invaded. Can there be any difference—is there any ground conceivable for treating the question in a different way, because the United States happen to be the owners of the sovereignty over the Islands and have given to 1038 their lessees the right to take these seals on the Islands? Is the question any different because the claimant here is the United States, from what it would be if the lessees were the claimants: or if a private person, being the owner of the Islands, was the claimant? I say it is impossible that property should exist in one case, and not exist in the other, or that property should be non-existent in one case if it is not also non-existent in the other.

But then my learned friend says in effect:—Failing municipal law, deriving no authority from municipal law for my position, yet there is another law which gives me property, which gives me the right I claim, and which is the law in this matter to determine the right of these parties, and that is international law.

Let us see if my friend is well founded there. What must he do; must he not in order to derive support from international law establish—for the *onus* is upon him—that international law has laid down a rule or a principle treating fur-seals in a way different from the mode in which municipal law regards them, as animals *feræ naturæ*? or in other words, must he not support the proposition that, while by international law, all nations on the high sea are equal and have a right to

take from the sea what they can get from the sea, that international law has engrafted upon that general principle an exception which excludes fur-seals or any similar creature from that generally admitted right?

Surely I am right in affirming that one or both of those propositions must be established by my learned friend. Has he made an attempt to support either of them by reference to international law? I submit he has not; and here again I must recur to what I think must be from time to time, if I may say it with respect, borne in mind by the Tribunal as to what international law really is. I have already endeavoured to explain that nothing can be considered international law as to which it cannot affirmatively be shown that the consent of civilized nations has been given; and that nothing short of an affirmative answer to the question *placuitne gentibus*, applied to any proposition, will satisfy the test of what international law is. My learned friend says international law, moral law, natural law, are all practically interchangeable words, meaning the same thing. I would like to examine this briefly for a moment or two.

It is quite true that there are some writers of distinction who refer to natural law as the basis and source of international law, and whose language would seem to show that they regarded natural law as the same thing. Puffendorf is the most prominent amongst these; but such writers as Bynkershoek and Wolfe have an entirely different view. Heffter, with whom I have no doubt the President is entirely familiar, speaks of international law as founded on necessity developed by morals.

Calvo recognizes the idea of general justice as modifying for the common good the relations of States; but he himself prefers to rest international law upon the principles defined by various Treaties, and rules, natural and logical, to be deduced from many ingredients in 1039 many cases, carried into practice and generally recognized; he finally sums it up in the phrase "la jurisprudence consacré par la coutume."

There are two very acute criticisms upon this subject to which I should like to draw the attention of the Tribunal. One is the criticism of Bentham, cited, and cited with approval, by Ortolan in his "La Diplomatie de la Mer". I am citing from the second edition of 1853. He cites a passage from Bentham of a very incisive character, as nearly all of Bentham's were, in which he is speaking of natural law, and natural right as springing from natural law. He says:

Natural right is often employed in a sense opposed to law, as when it is said, for example, that law cannot be opposed to natural right, the word "right" is employed in a sense superior to law: a right is recognized which attacks law, upsets, and annuls it. In this sense which is antagonistic to law, the word "droit" is the greatest enemy of reason, and the most terrible destroyer of governments. We cannot reason with fanatics armed with a natural right, which each one understands as he pleases, applies it as it suits him, of which he will yield nothing, withdraw nothing, which is inflexible at the same time that it is unintelligible, which is consecrated in his eyes like a dogma, and which he cannot discard without a cry. Instead of examining laws by their results, instead of judging them to be good or bad, they consider them with regard to their relation to this so called natural right. That is to say they substitute for the reason of experience all the chimeras of their own imagination.

Another critic, a very able and acute one, Austin, speaks to the same effect. I am now reading from a book which has certainly had enormous influence on the mind of England, and the value of which I think has been almost universally recognized. I mean his "Province of Jurisdiction Determined": at volume I page 222, he says:

Grotius, Puffendorf and other writers on the so-called law of nations have fallen into a similar confusion of ideas.

What that confusion is you will find from the context.

They have confounded positive international morality, or the rules which actually obtain amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceived it would be if it conformed to that indeterminate something which they called the law of nature. Prof. Von Martens of Gottingen who died only a few years ago is actually the first of the writers on the law of nations who has seized this distinction with a firm grasp, the first who has distinguished the rules which ought to be received in the intercourse of nations or which would be received if they conformed to an assumed standard of whatever kind, from those which *are* so received, endeavoured to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.

Now, lastly, an American author, Mr. Woolsey. This is in the original text. This is in fact the first edition. It is the introductory chapter, page 13 of the first edition. He says.

Thus Puffendorf commits the faults of failing to distinguish sufficiently between natural justice and the law of nations, of spinning the web of a system out of his own brain, as if he were the legislator of the world, and of neglecting to inform us what the world actually holds the law to be, by which nations regulate their course.

1040 But now, apart from these weighty authorities, am I not justified in saying as to the natural law what I have already intimated in the previous part of my argument as to the moral law, that it is only so much of the rules of morals or the rules of the law of nature, as have received the *imprimatur* of nations—evidenced by the assent of nations expressed or implied—only so much as has been taken up by that consent into the body of international law is in truth international law.

I took occasion this morning to put to my learned friends the question argumentatively, and I now repeat it; can they refer to any controversy between nations which has ever been settled by a reference either to natural law direct, or to a supposed law of morals? I think they will find it difficult to find any such case.

But now I have to meet this suggestion of my learned friend, namely, that although he may be wrong in saying that natural and moral law are the same as international law, yet that although they may not *per se* be international law unless and until consent of civilized nations has been given, yet—and I think he put this affirmatively in his argument—yet that you are to presume that nations have assented as part of international law to all principles of morals, and all principles to be drawn from the law of nature, until you can show that they have dissented.

I first ask the question: Is there any authority for this statement that any such thing is to be presumed? I have already pointed out that, so far as the law of nature is concerned, it could give us no help whatever upon the question of property: for that the true view of all law, properly so called, municipal as well as international, is that it has substituted rules of right and equity for claims of property which originally, according to natural law, rested for their ultimate sanction upon force and upon force alone.

But, let me ask again, where are we to find these laws of nature? What nations have agreed upon them? Where are they codified? Where are they to be found? "What is the book, edition and page" to which reference has been made? No satisfactory answers can be given to these questions.

Again, what are the rules and laws of morality? Upon what points where they touch modern society, regarded either municipally or internationally, do societies of men, or do nations, agree as to them? Is it

not true to say that opinion, which is matured upon a particular point touching morals in one nation, is in a state of flux and uncertainty in another nation, even upon points where there is a general consensus in reprobating a particular course of conduct? I gave an illustration the other day—and what other illustration can be stronger—the slave trade; yet it cannot be affirmed that the slave trade is yet relegated by international law to the same category as piracy, or carries with it the same sanction. Or, again, take the illustration which the argument of my learned friends here supplies. According to their contention, it is—and the United States have made it, as far as municipal law can make 1041 it,—a crime against the law of nature or of morality, or of both, to kill a female seal. Is that a rule of morality which prevails the world over? Have nations agreed in regarding this as a crime? Has international law or a congress of international statesmen ever suggested that to kill a female of any species of animals, wild or domestic, aye, or even a gravid female—very reprehensible and regrettable, it may be—was to be regarded as an international crime?

I have said before that there are certain great principles of morals which have been used to test the relative value of conflicting usages or tendencies of opinion or doctrine, to give formal expression to growing custom, to support fresh theories placed before the world for consideration and acceptance; but no attempt can be made to directly impose such principles upon States as a direct obligation until the consensus of nations has first assimilated them as part of the international law.

If I am right in this—and I submit that I am—the conclusion is that it is not a question of presuming assent to ideas of international law, or morality, or anything else, as to which civilized nations, just as civilized men, take different, diverging views; but that to constitute international law, assent has to be affirmatively shown.

Finally, in this connection, I have to submit that modern international law has long passed the stage at which an appeal to any vague general principles can afford any safe, certain resting place or guide at all. It is now, and it has long been, a body of derivative principles and concrete rules, formed by the action and re-action of each other, of custom, moral feeling, considerations of convenience. It is only capable of modification and extension either by the slow growth of fresh customs, under the influence of these other factors, morals and convenience, or by general express agreement amongst nations,—matters involving new principles or new rules, or fresh, unrecognized practices. No speedy way exists of changing the concrete rules of existing law otherwise than by the general agreement of civilized States; and to nothing else than these concrete rules is obedience due.

I concede that these concrete rules do not cover all cases. Probably the law never will be found to cover all possible cases; but the law is supplemented by treaty, by agreement between particular States; and you are in this instance, in discharge of the important functions which you have assumed, standing in the place of these parties, in connection with the branch of the question which I have not yet approached. But now you are to declare as regards the branch with which I am dealing, what are the rights, legal rights, according to existing law, of the parties, not looking beyond that law, until you come to the second branch of the question; then indeed you are to say for the parties what they would have said for themselves had they entered into an agreement to settle the differences existing between them.

Senator MORGAN.—Is it to be determined according to existing international law, or existing municipal law, or both?

1042 Sir CHARLES RUSSELL.—I have already said that in my judgment international law, as regards property and things, has nothing to do with the questions in this case.

Lord HANNEN.—That is to say, international law does not speak on the subject?

Sir CHARLES RUSSELL.—It does not speak on the subject.

Senator MORGAN.—The Treaty does not refer to the subject as either municipal or international, or to any particular law, municipal or international.

Sir CHARLES RUSSELL.—Quite true, sir. It speaks, however, of rights which are to be ascertained by reference to law, as legal rights. I have dealt with the question of municipal law. I have attempted to show that there is no such right according to municipal law. I have also attempted to show—I hope you will think I have succeeded in showing—that there is no such right according to international law; but I have not exhausted that subject.

Senator MORGAN.—I have not yet heard any reference by anybody to writings in which we are to find either the general principles or the concrete rules by which we are to be guided in the determination of what is the international law, or how much of it applies to this case.

Sir CHARLES RUSSELL.—You will have the opportunity, Sir, before this case is over, of being referred to them.

Senator MORGAN.—I hope so.

Lord HANNEN.—Will you allow me to put a question to you?

Sir CHARLES RUSSELL.—If you please, my Lord.

Lord HANNEN.—You have argued that the municipal law of the United States has not made this property in the United States. Suppose there had been a law of the United States enacting that the seals on the Pribilof Islands should be the property of the State, would that have made any difference in the argument?

Sir CHARLES RUSSELL.—None at all, outside the territorial limits. Of course, as regards their own nationals, it would.

Senator MORGAN.—Outside the territorial limits?

Sir CHARLES RUSSELL.—Certainly.

The Tribunal then adjourned until Thursday, May 25, 1893, at 11.30 o'clock A. M.

TWENTY-SEVENTH DAY, MAY 25TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, I am now able to fortify by authority the correctness of the answer which I gave yesterday to the question you were good enough to address to me upon the question of how far the right of the King as to property in swans or in royal fish extended, and whether it extended, or was asserted to exist, beyond the territorial limits. The authority that I refer to is recognized as the principal authority upon the subject,—Chitty on the “Prerogatives of the Crown”—and I am reading from the edition published in 1820, page 144. It deals both with the question of royal fish and royal birds, swans. This is the passage:

The King has no general property in fish. It would be superfluous to specify and particularly designate whales and sturgeons alone, as being royal fish, if all fish were the King's property. *Exceptio probat regulam.* With respect however to whales and sturgeons, it was always a doctrine of the common law that they belong to the King. And by the statute *de Prerogativa Regis*, it is declared that the King shall have whales and sturgeons taken in the sea or elsewhere, within the realm, except in certain places privileged by the King. But to give the Crown a right to such fish they must be taken within the seas parcel of the dominions and Crown of England, or in creeks or arms thereof; for if taken in the wide seas or out of the precinct of the seas subject to the Crown of England, they belong to the taker. A subject may possess this royal perquisite; first, by grant; secondly, by prescription within the shore, between the high water and low water mark, or in a certain *districtus maris*, or in a port, creek, or arm of the sea; and this may be had in gross or as appurtenant to an honour, manor or hundred.

Under this head may also be mentioned the right of the King to *swans*, being inhabitants of rivers. By the statute 22 Edward IV, chapter 6, “no person other than the son of the King shall have any mark or game of swans, except he have lands of freehold to the yearly value of five marks; and if any person not having lands to the said yearly value shall have any such mark or game, it shall be lawful to any of the King's subjects having lands to the said value, to seize the swans as forfeits, whereof the King shall have one half and he that shall seize the other”. A subject may, however, be entitled to swans; first, when they are tame; in which case he has exactly the same property in them as he has in any other tame animal; secondly, by a grant of swan mark from the King; in which case all the swans marked with such mark shall be the subject's, wheresoever they fly; and, thirdly, a subject may claim a property in swans *ratione privilegii*, as if the King grant to a subject the game of wild swan in a river.

That I think answers the question you were good enough to address to me. Blackstone in his Commentaries, (Stephen's Edition, page 2), states the law to the same effect. I need not trouble the Tribunal by reading it. Indeed one sees at once that in the nature of things it must be so, because once outside the territorial jurisdiction of the State those who owe no allegiance to that State owe no respect to any rights, 1044 regalia or otherwise, which depend upon its laws. Of course the State might make any law to affect its own subjects, but as regards foreigners outside the realm it has no such right.

Lord HANNEN.—If a royal swan at large in the country where the King had the right to swans escaped to another country where the other King had the same right to swans at large, which King would the swan belong to?

SIR CHARLES RUSSELL.—Quite so, my Lord. For myself I should be prepared to back the right of the King in whose territory it was found.

THE PRESIDENT.—Well Sir Charles I thank you very much for the explanation. It has been very useful to me at any rate. I believe the law is the same law that formerly prevailed in France under the feudal system, by which the right of chase and hunting was derived from the regalian right; and I believe the regalian right was exactly the same as that defined in the law of England which you have just read.

SIR CHARLES RUSSELL.—This subject was mentioned yesterday at an advanced stage of our proceedings, and it may not be without interest to say that the discussion reached Ottawa, the seat of Government in Canada, in time to be digested there; and this morning Mr. Tupper received a telegram which I might be permitted to read, as a matter of some interest. An erudite gentleman, Mr. Griffin, telegraphs this:

Edward I of England, on knighting the Prince of Wales, swore to God on the swan that he would conquer Scotland. The swan was the heraldic sign for God, the Virgin, and Ladylove for all Knights. See Walter Scott's history of Scotland Volume 8, and also Brewer's Historical Handbook, page 861.

Now, Mr. President, I come to the last ground on which the pretensions of the United States are based in argument, namely the ground that pelagic sealing interferes with a legal right in the industry, as it has been called, said to be carried on on the Pribilof Islands; but before I call attention to the way in which this proposition is put by my learned and ingenious friend, Mr. Phelps, who has specially taken this proposition under his protection, I should like to remind the Tribunal of the hypothesis on which this question is to be considered. We are away from the question of property in the individual seals: we are away from the question of property in the seal herd. We are away also from the question of any exclusive right in the United States or the lessees of the islands, to kill the seals, or to take the seals, or to prevent others from taking the seals in the high sea, or in a given area of the sea.

Therefore the proposition is that, although there is no such exclusive right, and no such property either in the individual seal or in the seals collectively, yet there is a right to complain, as of a legal wrong, of the fact that seals are killed in the high sea, whereby they are probably prevented from reaching the island. That is the proposition. Now I

1045 have to remind the Tribunal that what has to be established in this connection is that sealing on the high sea is an invasion of some legal right connected with the industry on the Islands. I use the phrase "industry" for brevity. I shall describe presently what it is, and consider whether it deserves that appellation.

Now that is the broad proposition, which, stated in untechnical language, may be put thus: that if a nation has an industry on its shores which depends upon the resort to those shores of certain wild animals to take which such nation has no exclusive right, and in which it has no property, if it can nevertheless prevent the killing of such animals on the high seas by another nation, if such killing prevents the animals reaching the island and so interfering with the industry.

I shall have to point out the far-reaching consequences of such a proposition as that: consequences which I think if applied to the interests and actions of the United States authorities themselves upon the eastern shores of America, will be found to be exceedingly awkward for them. But I postpone for the moment the illustrations upon that subject which I intend to submit.

I will ask the Tribunal to turn to the argument of my learned friend Mr. Phelps as it is set out in the printed book. I do not refer to it for the purpose of going through it page by page. I have stated the main proposition which is laid down in it, but there are certain statements incidentally made in the course of that argument which I cannot pass without some notice. The first of these is on page 132. It is the sentence which runs thus:

Examination of Mr. Phelps' argument.
 The complete right of property in the Government while the animals are upon the shore or are within the cannon shot range which marks the line of territorial waters cannot be denied.

This the Tribunal will see is not relevant to the point as to the industry apart from property; but I cannot pass it by without pointing out, as I have already done in relation to Mr. Coudert's argument, and as I have already done in relation to Mr. Carter's argument (though it did not appear there so prominently as in Mr. Coudert's), that there is here, as it seems to me, a distinct misstatement of the law.

There is *no* complete property while the animals are upon the shore, or within cannon-shot at all! The only right that exists is the right upon which I have already, I am afraid with painful reiteration, again and again insisted—the simple right, *ratione soli*: the right to capture, the right to kill, the right thereby to take possession; but there is no complete right of property; and therefore there is this fundamental error, as I conceive, at the basis of the whole of that argument as to property. To that point, however, I am not again going to refer.

On page 134 again, at the bottom of the page, is another misstatement, as I conceive it to be, which I wish to correct.

The whole herd owes its existence, not merely to the care and protection, but to the forbearance of the United States Government within its exclusive jurisdiction.

1046 Now I wish simply to say that we know that that fact is not correct. If the United States had nobody there the seals would be there; if the islands were no man's land, the seals would be there—they would be there all the more because of the absence of man or human interference; and the very regulations which Mr. Coudert described, by which dogs were forbidden, lest their barking should disturb the seals or frighten them, or keep them away—the very remoteness of human dwelling from the places of the seals—the fact that even smoking is forbidden lest it should frighten away the seals, their sense of smell being so acute—all these things go to show that it is an entire mistake on the part of the United States to suggest that the herd *owes its existence* to them. The herd would be there all the more if they were not there; and if they even attempted artificially to do something to induce them to go there it would have a repelling effect, and not an inducing effect; and all they do is the one thing which I have again and again referred to, namely, that for their own uses, and for their own purposes, they prevent trespassers raiding on the island.

I pass on to the next page, the top of page 135. I do not dwell upon it, but there is this statement of Mr. Phelps:

While the seals are upon United States territory during the season of reproduction and nurture, that Government might easily destroy the herd by killing them all, at a considerable immediate profit. From such a slaughter it is not bound to refrain.

It conflicts with the contention of my friend Mr. Carter, and I leave them to settle their differences upon this point between themselves, venturing at the same time to express my preference for the law as laid down by Mr. Phelps. I think he is perfectly right in saying that the

United States may legally, if they can and choose, kill all the seals that come to the land; that there is no law which prevents such a slaughter; that they are not in any way bound to refrain.

Now on page 136 we come to the enunciation of a precise and definite proposition. The second sentence from the top proceeds thus:

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of that term. Let them be likened,—

My friend is logical, and does not shrink from this inevitable result;

Let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons, in such numbers as to render the fishing there productive.

That is my friend's proposition; and then he proceeds to argue that, under such circumstances, there is an industry, the legal right to which is invaded (because of course, that is what he must affirm), by sealing on the high seas. To that proposition, of course, I must come back.

1047 Now, on page 138, in the third sentence from the top, the character of pelagic sealing is referred to. I have already dealt with it, and do not recur to it; but, in the last sentence, he refers to the existence, in civilized countries, of laws (during the breeding season), protective of wild animals; in other words, he refers to the game laws.

Now, I must point out—I think I have already done so more than once, and, therefore, I will not dwell upon it,—I must point out that there could be nothing more significant to show that there is no property in game than the very existence of those game laws. The law steps in, and, in the interests of all who have a right to attempt to capture game, says that, during certain seasons, no attempt at capture shall be made. It in no sense affects property,—does not pretend to affect property. It simply says that that general right of taking animals *feræ naturæ*,—which is the equal right of all mankind, of all the subjects of the realm, with the difference, only, that there is greater opportunity for exercising the right where a man is the owner of land,—shall not be exercised during certain seasons of the year, shortly called "close time".

Now, at the bottom of page 139, my friend states what he calls the "inevitable conclusion" from the facts that he has mentioned.

The inevitable conclusion from these facts is, that there is an absolute necessity for the repression of killing seals in the water in the seas near the Pribilof Islands, if the herd is to be preserved from extinction. No middle course is practicable consistently with its preservation.

I do not discuss that point in this connection. My friends have thought it right to mix up the two things,—claims of property right and Regulations. I do not. That is an assertion which my friend will be entitled to urge with such force as belongs to it when the question of Regulations is being discussed by him. It is not relevant to the question of property.

Then, on page 149, in the last sentence, there is a statement in these words.

Such was the view of the United States Supreme Court in the Sayward Case, in respect to the operation of the Acts of Congress before referred to, for the protection of the seal in Behring Sea. In that case a Canadian vessel had been captured on the high sea by a United States cruiser, and condemned by decree of the United States District court, for violation of the regulations prescribed in those acts; and

it was claimed by the owners that the capture was unjustifiable, as being an attempt to give effect to a municipal statute outside the municipal jurisdiction. The case was dismissed because it was not properly before the court. But in the opinion it is intimated that if it had been necessary to decide the question the capture would have been regarded as an executive act in defense of national interests, and not as the enforcement of a statute beyond the limits of its effect.

I have already read the judgment to the Court.

Mr. PHELPS.—Perhaps I might say that the number of the Volume in which the case is to be found is misquoted by a printer's error. Perhaps, Sir Charles, you have noticed that.

1048 Sir CHARLES RUSSELL.—I have, thank you,—143 is the right Volume.

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—I have read that case, and I beg to say that this statement, as I read that case, is quite incorrect—in fact, one of the Judges is here, and he will no doubt tell the Court; but we have the authentic record. It would indeed be a very extraordinary thing if the Court had attempted to say any such thing. It would indeed be an extraordinary thing for the Judges of the Supreme Court, or indeed of any Court, under the circumstances in which the matter was presented to them, to have attempted to express an opinion upon so weighty a subject which was not before them, because, when I was discussing the action of the United States Government in relation to the seizures, I pointed to the judgment of the Court condemning the ship and imprisoning the men: and I pointed to the argument of the Solicitor General to the United States, Mr. Taft, in the Supreme Court of Washington: and I showed how the case was put on *one* ground and *one* ground only: namely that of exclusive jurisdiction based upon the territorial effect given to the municipal Statute. There was no suggestion in the libel in the case, or in any part of the record before the Court, of the justification now suggested for the seizures as an executive act of self-preservation or self-defence; and therefore it would have been indeed an amazing thing if Judges of the eminence and position of those learned Judges had stepped aside from the case presented to them to express or intimate in the faintest degree an opinion on a point which was not before them, or argued before them, or even suggested before them.

The PRESIDENT.—Perhaps you might read us the passage from that opinion.

Sir CHARLES RUSSELL.—If my learned friends will kindly give it to me, I will read it at once.

Mr. PHELPS.—We have not got it here this morning.

We will bring the volume of the Supreme Court, N^o 143.

Sir CHARLES RUSSELL.—I read the case with some care, and I found no such thing in the judgment. It is conceivable that I may have overlooked some passage in it, but my friend Sir Richard Webster has read it as well as myself, and we think there is no warrant for that statement at all.

Lord HANNEN.—If it were, it would be only what we call *obiter dicta*.

Sir CHARLES RUSSELL.—There is not even that.

Mr. PHELPS.—That is all I claim for it.

Sir CHARLES RUSSELL.—I should have referred to it if it had existed, but I do not find even an *obiter dictum*.

The PRESIDENT.—If we can have the proper wording of that opinion, it would be better—at a later stage perhaps.

Sir CHARLES RUSSELL.—Yes, I should be glad.—But as Lord Hannen has been good enough to intimate (and Mr. Justice Harlan I am

sure will recognize the accuracy of it), as that case was presented to the Supreme Court, it would not be *ad rem* for them to express any opinion of that kind at all. Judges sometimes do, no doubt, express opinions away from the point before them, and those are called, and sometimes contemptuously called *obiter dicta*—they are beside the question; they are quite away from the point; they are not necessary for the decision of the case. They, therefore, have more or less authority, according to the more or less important character of the Judge who pronounces them; but they are not cited as authorities, unless it is a judicial pronouncement on a matter in which it was relevant to the judgment of the Court that the opinion of the Court should be expressed.

The PRESIDENT.—As we have not the case of the *Sayward* before us we do not care if they are *ad rem* as to the “Sayward” Case; but they may be of interest to us as being an important opinion—a weighty opinion.

Sir CHARLES RUSSELL.—I do not at all mean to undervalue the opinion of any Judge of eminence or position—what I meant to say was, that it is no authority.

The PRESIDENT.—No, it is no judicial authority.

Sir CHARLES RUSSELL.—I conceive it to be difficult to suppose that there will be found to be even an *obiter dictum*, because, as I have said, of the argument of Mr. Taft, which I read pretty fully to the Court.

Mr. PHELPS.—I was wrong in supposing that we had not got the book here. There is a book here containing the opinion: I was not aware of it.

Sir CHARLES RUSSELL.—Which is the passage?

Mr. PHELPS.—The passage is one of some length.

It is *here* [indicating].

Sir CHARLES RUSSELL.—I will read it at once with pleasure.

The PRESIDENT.—Perhaps Mr. Phelps will be kind enough to read to us the part which he deems important.

Sir CHARLES RUSSELL.—What is the book?

Mr. PHELPS.—It is a collection of pamphlets, and it contains the opinion of Chief Justice Fuller.

Sir CHARLES RUSSELL.—I want the report.

Mr. PHELPS.—This is the whole report, I am quite sure of it. It is usual to quote from this in Washington, and it is a pamphlet issued by the office.

Sir CHARLES RUSSELL.—Perhaps you will kindly show it to my friend, Sir Richard Webster.

[Mr. Phelps handed the book to Sir Richard Webster.]

Sir CHARLES RUSSELL.—The volume of the report is 143.

The PRESIDENT.—Sir Charles, if you think it material it can be got a little later.

Sir CHARLES RUSSELL.—I do not think it the least material.

The PRESIDENT.—Perhaps you might reserve it for the afternoon.

Sir CHARLES RUSSELL.—Yes, except that my friend thought he could put his hand on the passage.—I was willing to read it at the moment.

The PRESIDENT.—Rather than read it in a hurry we had better wait until the afternoon.

Mr. PHELPS.—If my friend will excuse me, we have marked the passage, which occupies several pages in the opinion of chief Justice Fuller, which I shall contend more than bear out the statement that I have made in the argument, that although unnecessary to the decision

of the case, which went off as I have stated on other grounds, it did intimate an opinion to the effect stated in my argument. I have marked the passage for the use of my friend. I supposed it was not here, but I found it was.

The PRESIDENT.—Perhaps you will prefer to keep the reading of this passage for your own argument.

Mr. PHELPS.—Yes, unless my friends wish to read it for their own purposes.

Sir CHARLES RUSSELL.—I am perfectly willing to read it.

Mr. PHELPS.—I do not ask them to read it.

Sir CHARLES RUSSELL.—I care not; but it is not necessary for me to stop at this moment.

The PRESIDENT.—If it is not necessary to stop for the moment perhaps you will leave Mr. Phelps to refer to it, and if he will be kind enough to refer to it in his argument, we shall be glad.

Lord HANNEN.—Have you not read it?

Sir CHARLES RUSSELL.—I had thought I read all, my Lord, that had any bearing on the question—I read from the report that was given to us—the report of Chief Justice Fuller's judgment.

Mr. Justice HARLAN.—I have no doubt the document you have there is a correct report of the opinion. I thought you had the authority.

Sir CHARLES RUSSELL.—That is how I read it.

Mr. Justice HARLAN.—I have no doubt it is accurate.

Sir CHARLES RUSSELL.—I can find nothing to that effect: that is all I can say.

Sir JOHN THOMPSON.—It strikes me, Sir Charles, that perhaps the difference is in the interpretation of the judgment of the Court—not of the argument of Mr. Phelps as contained in this book. Do you controvert the version given by Mr. Phelps in this argument because you conceive the solution to be a statement that the seizure of these vessels was an executive act done in defence of the property in the fur-seals, for if that is your interpretation of Mr. Phelps' argument, my recollection of the "Sayward" case is that the judgment of the Court did not justify that, but that the judgment of the court did establish this position, in so far as it could establish anything by a dictum—that what had been done in relation to the seizures of these vessels was an executive act.

Sir CHARLES RUSSELL.—Clearly so.

Sir JOHN THOMPSON.—Done in pursuance of an interpretation by the Executive of its property rights; and therefore, the judicial branch of the Government would not interfere with this interpretation.

1051 Sir CHARLES RUSSELL.—I am very much obliged to Sir John Thompson for this interposition, because of course my whole argument goes to show that the condemnation of these ships was based on the executive action of the United States invoking their municipal law, and alleging that the extent of that municipal law, territorially regarded, embraced the place where the ships were seized: and that therefore they were subject to municipal law, which exacted a certain penalty for being engaged there in sealing. But that is not the proposition which my learned friend has stated here—nothing like it.

The PRESIDENT.—Mr. Phelps in his argument does not refer to the judgment. He refers to the opinion. He says: "In the *opinion* it is intimated".

Sir CHARLES RUSSELL.—That means the judgment, Sir.

Mr. Justice HARLAN.—No.

Sir CHARLES RUSSELL.—What does it mean then?

Mr. Justice HARLAN.—The judgment of the Court is something different from the opinion of the Court.

Lord HANNEN.—But when you speak of the *opinion* of the Court that commonly, with us, means the judgment.

Sir RICHARD WEBSTER.—The reasoned judgment.

Mr. Justice HARLAN.—It is not always the case in America. An opinion is often separate from a judgment, but as a general rule you find, in the opinion, all that is essential to the formal judgment. That is added as a record of the Court, and you refer to the opinion for the purpose of interpreting the mind of the Court on the question submitted.

Sir CHARLES RUSSELL.—The matter stands in America, and in England, upon precisely the same ground. A judgment, properly so called, is the result of the opinion arrived at by the Court.

Lord HANNEN.—And is a formal thing, drawn up by some officer of the Court.

Sir CHARLES RUSSELL.—Yes: "Judgment for the Plaintiff"; "Judgment for the Defendant"—that, technically, is the judgment; but the *opinion* is the reasoning of the Court upon which the technical judgment is based, and that opinion is called, in England, the *judgment* of the Court, and is cited as the judgment of the Court, and I think it is the same in America.

The PRESIDENT.—Is it considered to have the same authority as the judgment itself?—That is, in France, would it not be what we call *Les Considerants*?

What you call the "opinion" that precedes the judgment and justifies the judgment, is of no judicial authority; it is merely a moral authority.

Lord HANNEN.—It is, that the Court for the reasons given, has delivered such a judgment.

Sir CHARLES RUSSELL.—May I point out the difference Mr. President? The mere judgment, (if it were to be restricted to the technical verdict for the plaintiff, or judgment for the plaintiff, or judgment for the defendant), would be no authority at all except as between 1052 those two litigants; it is the *opinion* or the reasons, upon which that result has been arrived at, which is the authority cited for the guidance of future Courts of co-ordinate jurisdiction; and, if it be the judgment of a Superior Court, for the control of Courts of inferior jurisdiction.

Mr. Justice HARLAN.—The opinion is the authority—is a precedent in future cases, according to the inquiry whether the Court in so talking kept within the case? That is the point.

Sir CHARLES RUSSELL.—I quite agree.

Lord HANNEN.—Whatever leads up to the judgment is properly referred to as part of the opinion which is binding in the future; that which does not lead up to it, is not referred to as binding, but is simply, (to use a phrase which has been already used) the *obiter dicta*.

Mr. PHELPS.—If my friend will allow me it may be well that the Tribunal should understand precisely what I have undertaken to say in my argument.

Sir CHARLES RUSSELL.—To what page do you refer?

Mr. PHELPS.—The last words on page 149. Referring to the "Sayward" case I say:

In that case a Canadian vessel had been captured on the high sea by a United States cruiser—

Sir CHARLES RUSSELL.—I read the whole of it.

Mr. PHELPS:

by a United States cruiser and condemned by decree of the United States District Court for violation of the regulations prescribed in those acts; and it was claimed by the owners that the capture was unjustifiable as being an attempt to give effect to a municipal statute outside the municipal jurisdiction. The case was dismissed because it was not properly before the Court. But in the opinion it is intimated that if it had been necessary to decide the question, the capture would have been regarded as an executive act in defence of national interest and not as the enforcement of a statute beyond the limits of its effect.

Now if my learned friend will take the trouble to read the passage in the opinion which I have just marked and handed to Sir Richard Webster, he will find that I have correctly stated the intimation of the Court, as contained in the opinion, on the main question by which it was able to dispose of the case.

The PRESIDENT.—Do you mean to say that the passage you have mentioned implies that the act of the Executive would have been justified?

Mr. PHELPS.—No: it implies, in my judgment, that the Court would have held, that being an executive act it was not subject to judicial inquiry.

Sir CHARLES RUSSELL.—Oh!

Mr. PHELPS.—Not that they would have undertaken to decide as between Nations the diplomatic question, but that so far as the judicial question was concerned the judgment of the Court below would have been affirmed upon the merits, if the merits had been decided.

The PRESIDENT.—But Mr. Phelps, in your Constitution I believe the acts of the Executive come under the judicial power?

1053 Mr. PHELPS.—Not as to foreign Nations. Sometimes, as between the Executive and the citizens, they are subject to review by the Courts; but, as between the Government and a foreign Nation, the judicial power has nothing whatever to do with questions of that sort.

The PRESIDENT.—If the Executive does wrong, other foreign Nations appeal to the judicial power,—is that what you mean?

Mr. PHELPS.—If the Executive does wrong,—it is hardly for me to argue it at this time,—it is a matter for adjustment between the two Governments.

The PRESIDENT.—I must say that somewhat alters my own view about what was the action of your Constitution.

Sir CHARLES RUSSELL.—The President will see that that is a very different statement from the statement in the Case, because the statement in the Case is that there was an intimation by the Court, if it had been necessary to decide it, that the capture would have been regarded as an executive act in defence of national interests. I respectfully say that no such opinion is intimated.

My learned friend has now read the book which Mr. Phelps was good enough to hand him, and which is exactly, my learned friend says *verbatim*, the same as the judgment I read to you. I have now got it before me; and I will read the passage.

Before I read it, may I point out what the statement of my learned friend now is, as to which I agree? What he says is this, that the Legislature of the United States having by their Statute assumed territorial jurisdiction over a certain area of the sea, and having by their executive action put that Statute into operation, the Judicial Tribunal would not go behind what the Executive had done and what the Legislature had done, but would recognize the fact that they had claimed

de facto territorial dominion and no more. That is clear from the passage I read.

May I read it again? This is on page 16 of what I think is a regular Report, and *verbatim* the same as the passage my learned friend referred to:

If we assume that the record shows the locality of the alleged offence and seizure as stated, it also shows that officers of the United States, acting under the orders of their Government, seized this vessel engaged in catching seal and took her into the nearest port; and that the Law Officers of the Government libelled her and proceeded against her for the violation of the laws of the United States in the District Court, resulting in her condemnation. How did it happen that the officers received such orders? It must be admitted that they were given in the assertion, on the part of this Government of territorial jurisdiction over Behring Sea to an extent exceeding 59 miles from the shores of Alaska:

That 59 miles is mentioned, you will understand, because the vessel was caught at about that distance.

That this territorial jurisdiction, in the enforcement of the laws protecting seal fisheries, was asserted by actual seizures during the seasons of 1886, 1887 and 1889, of a number of British vessels; that the Government persistently maintains that such jurisdiction belongs to it, based not only on the peculiar nature of the seal fisheries and the property of the Government in them, but also on the position 1054 that this jurisdiction was asserted by Russia for more than 90 years, and by that Government transferred to the United States, and that negotiations are pending on the subject.

And then he proceeds, on the lines my learned friend refers to, to point out that in the Statute as finally enacted, the words "all the waters of Behring Sea in Alaska embraced within the boundary lines mentioned and described in the treaty with Russia of 1867" were omitted, and the expression "all the dominion of the United States in the waters of Behring Sea" was substituted.

Then he proceeds:

If reference could be properly made to such matters (for the act, as finally approved, must speak for itself) still we do not concur in the view that it follows that Congress thereby expressly invited the judicial branch of the Government to determine what are "the limits of Alaska Territory and the waters thereof", and what is "the dominion of the United States in the waters of Behring Sea", and think, on the contrary, that there is much force in the position that, whatever the reason for the conservative course pursued by the Senate, the enactment of this section with full knowledge of the executive action already had and of the diplomatic situation, justified the President in the conclusion that it was his duty, under Section 3, to adhere to the construction already insisted upon as to the extent of the dominion of the United States, and to continue to act accordingly. If this be so, the application calls upon the Court, while negotiations are pending, to decide whether the Government is right or wrong, and to review the action of the political department upon the question, contrary to the settled law in that regard.

Therefore my friend's latter statement is quite correct. I quite admit it, but it is not correct to say, as stated in the printed Argument, that the Court intimated an opinion that the capture could have been justified in law as a defence of national interest. That is the main dividing line between us.

Now, Mr. President, I come back to the question, and I repeat the hypothesis on which it is to be regarded,—the *datum* for the argument. I have to assume, and the proposition that my learned friend advanced assumes, that there is no property in the seal, and no property in the seal herd. I have also a right to assume that the general right of fishing acknowledged by the Treaty of 1824 between Russia and the United States, and the same general right of fishing acknowledged by the Treaty of 1825 between Russia and Great Britain, did not except any living thing in the sea. I have further to assume that that was but a

recognition, in the case of the waters of Behring Sea and the other waters, involved in the controversy which led up to those Treaties, of the general right of all mankind to fish in the sea and to take therefrom outside territorial waters whatever they are able to capture. These are the hypotheses, these are the data, in view of which this proposition must be approached; and I say it without any affectation, with the greatest respect for my learned friend Mr. Phelps and for his ingenuity, that I find it difficult to understand and to appreciate what it is that I have to meet on this part of the case. The lessees may be treated, for the purpose of this discussion, as the owners of the islands and the owners of the industry. What is their position? What 1055 is their industry? They wait until the seals come to the islands, and, when the favourable opportunity offers, they select such as they desire to kill, and adopt the best means they can for killing them. They are in this exercising their right as owners of the territory. Nobody disputes their right. They may extend that right still further, assuming them to be the possessors of the island, as I am doing for simplicity's sake, and if they choose they can supplement their killing on the island by killing within the three miles of territorial waters, and by claiming to exclude, and rightfully claiming to exclude, all others from that area; and, if they choose further, they may go out on the high seas and compete with others who are sealing upon the high seas. These are their rights fully and exhaustively stated: their right to kill the seals upon the land,—an exclusive right; the right to kill within the territorial waters,—an exclusive right; their right, on terms of equality with all whose interest or convenience may prompt them to resort to the high seas, to pursue and kill the seal.

Where is the right that is invaded by that pelagic sealing? Where is the legal right invaded? Because, to constitute an invasion of a right, you must first prove the existence of the legal right. It is not enough to prove that their industry (if I must use that phrase) may be less profitable to them because other persons, in the exercise of the right of sealing on the high seas, may intercept seals that come to them,—that may be what lawyers call a *damnum*, but it is not an *injuria*; and I have no doubt the legal minds I am addressing understand the distinction between the two.

Let me assume that the island is divided by a boundary line, between two owners, one half of the island, given to A., the other half given to B. Would A. have an action against B.—could he complain that B. had perpetrated a legal injury upon him, if B. not merely killed the seals that came to his own division of the island, but exercised his right of sealing on the sea and killed seals there which might have gone, or some of which might have gone, to the land of A: if B. had in other words exercised his right to kill on the high sea? That would have been a case in which the profits or the volume of A's business might have been diminished, and he would, therefore, have suffered a loss, a *damnum*; but a *damnum* does not give a legal right of action. There must also be the *injuria*,—the invasion of the legal right; There must be *injuria cum damno*; the combination of the two.

The PRESIDENT.—Unless done maliciously.

Sir CHARLES RUSSELL.—You are good enough, Mr. President, to anticipate the very next topic,—perhaps not immediately the next, but a topic to which I am going in a moment to advert.

Let me illustrate the position of things a little further by putting an imaginative case or two. Suppose there was no industry on the island

at all; it will not be denied that we could kill on the high seas; or, if it be denied, it will not be denied with very much efficacy; our right would be undoubted. Again,

Position of malice in the enquiry examined.

1056 suppose that from some cause or another (I care not what), the United States should find it beneath its dignity, or not conducive to its profit, to carry on this industry on the islands,—say, that it does not pay, for instance: they cease to carry on the industry. Should we still be without our right to seal on the high seas? Clearly not. Can it be said that our rights, or their rights relatively to us, shift and change according to the eventuality of whether there is or is not, according to their own interest for the time, an industry carried on there? It is impossible that legal rights can be of this shifting and varying character. No, Mr. President; their rights are strictly those which I have enumerated; the right to kill on the islands exclusively; the right to kill within the territorial limits exclusively; the right to compete on the high seas on terms of equality with all the rest of mankind: and that is the whole statement of their legal, positive rights.

But there is another right, I admit. They would have a right to complain (and this meets the whole of the illustrations which all the ingenuity of my learned friends have supplied) if it could be truly asserted that any class or set of men had, for the malicious purpose of injuring the lessees of the Pribilof Islands and not in regard to their own profit and interest and in exercise of their own supposed rights, committed a series of acts injurious to the tenants of the Pribilof Islands. I agree that that would probably give a cause of action; and, therefore, they have the further right (what I might call the negative right) of being protected against malicious injury.

Now I have stated, I conceive exhaustively, as a lawyer would state them, and as a lawyer I respectfully think ought to state them, what are the rights of owners of the Islands in relation to this so-called industry.

The point, Mr. President, to which you were good enough to refer is well illustrated by reference to the case I mentioned yesterday, *Keeble v. Hickeringill*; and the passage is at page 116 of the printed Argument the United States. In the Report of this case in the 11th Modern Reports, at page 75, Lord Chief Justice Holt says:

Suppose the defendant had shot in his own ground; if he had occasion to shoot it would be one thing, but to shoot on purpose to damage the plaintiff is another thing and a wrong.

That brings out clearly and neatly the distinction; that is to say, that when a man is exercising his right, a right which I assume that I have established by reference to the general law and by reference to the Treaties,—to kill seals on the high sea, and he pursues that avocation or industry for the purpose of making a profit to himself and making it legitimately for himself in that way, not thinking of injuring anybody but merely of enriching himself in the exercise of what he conceives to be his right, his act cannot be regarded as malicious: and there is, from beginning to end of this case, no suggestion that the action of the pelagic sealer could be properly regarded as malicious, or be attributed to any other motive than that of self-gain in the exercise of a supposed right.

1057 The PRESIDENT.—Would you consider, as having a certain maliciousness in itself, what has gone on during the last two years, where the *modus vivendi* has impeded the process of seal killing on the islands and left in the open sea, in the Pacific, at least, and on the North-west Coast, the pelagic sealing quite free. We have

witnessed, according to the statistics which were read to us, I might say an extraordinary increase of the pelagic sealing during these two years, during this sort of "close season,"—at all events, close season for the Americans:—is that quite free from maliciousness in your eyes?

SIR CHARLES RUSSELL.—Absolutely. Let me suggest this; or, rather, let me first make the ground perfectly clear. The first time that the suggestion of the word "malice" has occurred here comes from you, Mr. President. You will not find a trace or suggestion of it in the Case, or in the diplomatic correspondence.

THE PRESIDENT.—But malice may exist without suggestion.

SIR CHARLES RUSSELL.—You are dealing with this case, I presume, Sir, like every other Tribunal, according to the case presented, supplemented by such additional light as your own erudition may bring to bear upon it. The case is not presented as a malicious injury, but as the case of an invasion of a legal right. That is what I meant to urge upon you; but I would like to consider it a little more closely for a moment.

In the pelagic sealing which occurred after the *modus vivendi* many persons took part belonging to various nationalities. You will bear in mind, of course, that the people who engaged in this were not Canadian sealers only, but were American citizens also. It is a little strong to suggest that the American sealers were pursuing this pelagic sealing not to benefit themselves, not to put profit into their own pocket by the pursuit of what they conceived to be a right, but were doing it maliciously to injure the property of the nation to which they belonged. I think the suggestion, with great deference, will not be found to be sustained by any facts.

THE PRESIDENT.—I merely want to make the matter quite clear. I did not suggest anything myself, of course.

SIR CHARLES RUSSELL.—The point I wish to emphasize is this. My learned friends are acute lawyers, as of course you know, and men of eminence. They know how best to frame their case in the way that seems to them strongest. We have seen how they have departed in a large measure, as I conceive, from the original case put forward, and as I have endeavoured to demonstrate, in the diplomatic correspondence, and how, in this elaborate written argument, they have formulated in the best way they conceived it possible to formulate it.

They know as well as any of us that there is the greatest distinction in point of law as to the legal liability for acts done maliciously and for acts not done maliciously; and therefore, as they cite such cases as *Keeble v. Hickeringill*, if it had been intended to suggest that the pelagic sealers were doing this not to profit themselves, but to injure the tenants of the Pribilof Islands or the United States interest in the Pribilof Islands, we should have had, of course, some definite suggestion of that sort.

LORD HANNEN.—I follow your argument so far, but does that argument meet an illustration of Mr. Phelps? Suppose dynamite was used for the same purpose and resulted in the wholesale destruction of fish, that would not be malicious, because it was done for the purpose of immediate gain. What would you say to that case?

SIR CHARLES RUSSELL.—I have not forgotten that illustration, and as you mention it, my Lord, I will come to it at once. I am taking it a little out of order. The case my friend has put in that connection is this, that where the use of dynamite would cause a wholesale destruction of fish with a small and disproportionate gain to themselves it would be illegal: that is my learned friend's proposition. To begin

with, I should say that it might be very strong evidence, as one would say in our English Courts, to go to the Jury, of malice; but it is not every act which causes destruction, and even destruction which may be disproportionate to the gain derived, which constitutes an actionable wrong. Let me illustrate that in a way that will be familiar to each Member of the Court. Take, for instance, the mode of fishing known as trawling. I think you all realize what trawling is: that mode of fishing—dragging a heavy beam with a net along the bottom—has the effect of destroying enormous quantities of small fish and, still more, of disturbing spawning ground, and causing an enormous amount of mischief in the destruction of fish.

Has any international law ever declared, or has any nation ever asserted that that destruction outside its territorial limits,—because trawling goes on many miles out at sea and in very deep waters—would give a cause of international complaint as a matter of right against the trawlers of another nation? No, because on the high sea all are equal; and although that particular method is a destructive method, the case is met in the only way in which it can be met, by regulations, by conventions, but not by the assertion of a legal right to prevent the trawling, even although it cause that great mischief.

Lord HANNEN.—Are there conventions on that subject?

Sir CHARLES RUSSELL.—Oh yes, my Lord—conventions, as the President will tell you, between France and Great Britain on that very subject. I will mention later conventions between Canada and the United States with a view to preventing the use of dynamite by the nationals of either country on the high sea.

Then may I also put the question with reference to the use of dynamite from another point of view? One might use dynamite for the purpose of trying some very important experiment, or testing some important invention connected with war—torpedo experiments, or what not—these may be tried upon the high seas, outside territorial waters; and yet such experiments may be conducted in such a position as regards an adjoining nation that very considerable mischief may be done temporarily to the fishing interests of that particular nation. But that would be a perfectly legitimate use of the high sea. The nation conducting the experiment would be acting for a justifiable cause, and within its right; and if, acting within a right, it causes damage to another person, it gives that other person no cause of complaint, because no legal right of his has been invaded.

Senator MORGAN.—It seems to me we are getting into a difficulty here by failing to take notice of the well-established distinction between express and implied malice. The law implies malice from any wanton act done against the life or property of another, or from any act that is necessarily destructive of the life or property or business of another—when that is a requisite element in the right of action. The law implies it from the nature of the act.

Lord HANNEN.—But that implication may be met by showing it was done with an excusable cause.

Senator MORGAN.—Always; but if a process by which a certain species of property is destroyed, as by dynamite, is used in the neighbourhood of property which belongs to another person, that process would be considered malicious in law and the answer that it was done in pursuit of a legitimate object would not be good. For instance, if the sealers draw up a cordon of ships around the three mile limit, and take seals there as they come to and as they go from the Pribilof group of Islands during the breeding season, taking them indiscriminately—then it

would scarcely be held I think by any Court that that was an act from which malice would not be implied.

Sir CHARLES RUSSELL.—Surely Mr. Senator you are putting an impossible—an extravagant case; but I will tell you what the remedy would be; and here lies I think the confusion that has prevailed in the branch of the argument which deals with the rights of self-defence and self-preservation. In such a case as that the United States would say: whether we have a legal right or not, this is a matter so important to us that we will take our stand and make it, if need be, a matter of war. That is what they would say.

Senator MORGAN.—Or an Arbitration such as this.

Sir CHARLES RUSSELL.—No: this Arbitration has nothing to do with rights of war. This is to declare legal rights in time of peace.

But I must follow up this point, as the President has broached it for the first time, and I was not intending to do more than make a passing allusion to it. The suggestion of the learned President is that the sealing outside Behring Sea and under the *modus vivendi* of 1891, and of 1892, while they were in operation, might itself—of course he was not expressing any opinion—but he suggested whether that might not be regarded as malicious. Let me recall the facts. The United States has the power to control its own citizens everywhere. It had the power both before its acquisition of this territory and after its acquisition of this territory, to impose any restrictions it chose upon its own nationals wherever those nationals were. After 1867, the United States acquired

an interest in these islands: the nature of that interest we are now discussing. Is it not a little strong to say, or even to suggest, that they could have regarded the pelagic sealing of their own nationals, carried on from 1867, for a period of so many years, as a malicious injury to them? We have the extraordinary fact that according to the law of the United States, as it is to-day, pelagic sealing outside Behring Sea is a perfectly lawful thing; and yet it is to be suggested that pelagic sealing outside Behring Sea was a malicious thing done to injure the United States. So regarded, the suggestion becomes grotesque.

I do not know whether the learned President realizes the point I am now putting: that absolutely according to the law of the United States as it is to-day pelagic sealing is a lawful pursuit outside Behring Sea.

The PRESIDENT.—I perfectly realize what you state, and what the American counsel have argued, but we must keep in remembrance that all these matters are extremely recent—pelagic sealing has not been found fault with until 1886. Very few years have passed, and in all countries the action of legislation is always slow.

Sir CHARLES RUSSELL.—With great deference, I am dealing with the thing as it is. Pelagic sealing has gone on as the oldest pursuit of seals from time immemorial. Since the time that seals were first hunted, they were hunted *pelagically*, and it is no answer to say that it was then conducted upon a scale and at a time when it did not affect, in a material degree, the interest of the United States. But I am coming a little closer to the action of the United States. The learned President refers to the years 1891 and 1892, but is he aware that the books before him show that in 1891, engaged in pelagic sealing, outside Behring Sea, were 48 *American vessels*, and in 1892 outside Behring Sea were engaged 46 *American vessels*—lawfully, according to the law of the United States, engaged in this pursuit of pelagic sealing, and engaged in it ever since 1880; because although it increased, as the learned President quite rightly said, in later years, and increased considerably in later years, it

still was not without a certain volume of importance even during earlier years. The suggestion is worth following. In the first volume of the Appendix to the United States Case, there is a table giving the nationality of the vessels engaged in pelagic sealing.

Sir JOHN THOMPSON.—I thought the decision you lately read, Sir Charles, was to the point that if the defendant had had no occasion to shoot or kill birds or animals on his own land, it would have been malice prepense?

Sir CHARLES RUSSELL.—Yes, but as the learned President has mentioned the subject I think it respectful to pursue it a little further.

Sir JOHN THOMPSON.—Before you finish I should like to ask you to satisfy me upon what branch of this enquiry we have given us in charge the question of malice prepense.

Sir CHARLES RUSSELL.—I do not know, because it is not alleged. I hear of it for the first time.

Lord HANNEN.—You take the point that it is not amongst the *allegata*.

1061 Sir CHARLES RUSSELL.—It is not amongst the *allegata*.

Sir JOHN THOMPSON.—I am not upon that, but upon what branch of the Treaty is this? on what question—Jurisdiction, property interest, or regulations?

Sir CHARLES RUSSELL.—I do not know. I cannot say.

Mr. Justice HARLAN.—I suppose it arose from the distinction you were making between the destruction of the industry maliciously or by simple pursuit, and what you regard as a right.

Sir CHARLES RUSSELL.—Yes. The way, probably, it would be said to have some relevance is this. I was stating what were the positive rights attached to an industry; and I was stating what negative rights an industry had: the negative right I indicated was, to be protected against a malicious injury. They do not complain of malicious injury.

The PRESIDENT.—Supposing an allegation of malice had been made—it is not the case—it would refer would it not to question 5?

Sir CHARLES RUSSELL.—I find it difficult to say that it would; but I assume that it would for the moment.

The PRESIDENT.—Until the regulations come to be considered.

Senator MORGAN.—It seems to me it refers to the third question of Article I. The third question of Article I concerns the rights of the citizens of both countries to take seals in the open sea.

Sir CHARLES RUSSELL.—No, Sir, with deference.

Senator MORGAN.—“The rights of the citizens and subjects of either country as regards the taking of fur-seals in or habitually resorting to the said waters.”

Sir CHARLES RUSSELL.—That Article is “*The questions which have arisen,*” concerning, and so on. *Then the formulation of the questions to be answered is to be found in Article VI.*

Senator MORGAN.—*I do not so understand the Treaty. Those are the points in Article VI. Not questions, but subdivisions of questions.*

Sir CHARLES RUSSELL.—I was about to call attention to a Table which I have before me. First however I wish to note the fact that on page 108 of the first volume of the Appendix to the Case of the United States, it appears that as early as 1876 an American vessel called the “*San Diego*” was seized for sealing near Otter Island, which is close to the Pribilof Islands.

Mr. Justice HARLAN.—Is not that 1883?

Sir CHARLES RUSSELL.—No, Sir, 1876—she was an American vessel.

Mr. Justice HARLAN.—The “*San Diego*”?

SIR CHARLES RUSSELL.—The "*San Diego*". She was seized again later. That probably will explain it. There are several vessels of that name, but this one was seized in 1876.

Now the Table to which I was calling attention, and which faces page 590 of the same volume, shows that in 1880 there were 7 British and 9 American vessels.

In the year 1881 there were 7 British and 2 American.

1062 In 1882 there were 12 British and 3 American.

In 1883 there were 10 British and 3 American.

In 1884 there were 5 British and 6 American.

In 1885 there were 3 British and 11 American.

I need not follow it to the end. The columns are long, and will take some time to add up: but when you get on a little further they seem to be about equal numbers all through; and towards the end I think there are more British. I therefore treat this matter in this way.

MR. PHELPS.—The British Commissioners' Report increased the number of British vessels.

SIR CHARLES RUSSELL.—My friend Mr. Phelps says that the figures given by the British Commissioners increase the number of British vessels in later years. That may be so. It does not touch my argument.

The matter therefore stands thus: Pelagic sealing outside Behring Sea lawful by the law of the United States: no allegation that the pursuit of such sealing, although contrary to the United States law, which binds only its own nationals, inside Behring Sea, was contrary to the law outside Behring Sea, or was maliciously pursued either inside or outside. And lastly the point which Sir John Thompson has suggested, and which I have already endeavoured to make—that no suggestion of malice can be maintained when the thing is done in pursuance of what is claimed to be a right, and for the profit of the individual who pursues that right.

Further, if it is necessary to add anything else—if malice can enter into this question at all—it must be malice in the *individual*: you cannot attribute malice to a mass of individuals. Therefore I think I have given sufficient reasons why my friends have not made this point. It would be a bad one if they had made it. They have made some points which I cannot think are good; they have not made this point, which I submit would be utterly bad.

But now I have to call the attention of the Tribunal to what would have been the far-reaching consequences of this contention: I have stated, simply and I think correctly, the contention of my learned friend as follows—that when a nation has an industry on its shores which depends on the resort to its shores of certain animals which that nation has no exclusive right to take, and in which it has no property, it nevertheless may claim that the killing on the high sea is an invasion of its right, although such killing is itself done in the exercise of a right, if the result of that killing is to interfere with the animals reaching the land, and so to lessen the possible profit which may be made on the land.

We know what rights are attached to an industry. There is the right to carry on the business. If there is a good-will: there is a right to the good-will. If there are trade-marks in connection with the business, those trademarks may be protected. It may be defended against malicious attack. But this exhausts the statement of the rights, both positive and negative. There are no other rights in connection with it known to the law: the catalogue is exhaustive. Always bearing in mind that we are arguing upon the assumption of no property

The rights in an "industry" examined.

and no exclusive right, let us see what would be the consequences of this new principle which is asserted? Where will it land us?

Just let me put some of the cases. Take that large and increasing volume of industries carried on upon the west coast of America, and along the coast of British Columbia, and stretching further north along the Alaskan coast, known as the salmon canning industries. You, probably, Mr. President, hardly appreciate what an enormous industry that is. Unless you have visited the neighbourhood of the Willamette river, as I have had the opportunity of doing, and of Portland, in Oregon, you can form no idea of the extent and importance of that great industry as a means of food supply to mankind. Supposing by some modern system and improved method of catching salmon, neighbouring nations should be attracted to the fishing, and catching large numbers outside the territorial waters should intercept the salmon on their way up the rivers where they would be brought within the reach of this industry: is it to be said because the canning industry would be thereby injured, that there would be a *legal right* to prevent the fishers from operating outside the territorial waters on the ground that they prevented the salmon coming up the river to the place where they could be more conveniently caught? Once you have realized that exclusive right to take is out of the question, the parallel is complete.

Take another illustration: the case of the fishery on the coast of Newfoundland—a matter largely debated, for many reasons—an enormous industry carried on on the coast by reason of the possession of that territory of Newfoundland, not merely because the sailors are in a convenient position to go to sea and catch the fish, but because their ownership of that territory enables them to do an enormous trade, to carry on an enormous industry, in curing fish upon the land. Supposing that that industry is found to be greatly affected, because some enterprising American sailors and fishermen go outside the three-mile limit and catch enormous quantities which would otherwise have come within the three-mile limit, and so nearer to and within easier access of the Newfoundland fishermen: suppose that the interference were so great that their industry should droop and their commerce should be blighted: would that give them any legal right? None whatever.

Again, take the case of the Guano Islands in the south, where the deposits of countless myriads of birds, over many years, have caused some accretions of enormous value in the shape of guano. Supposing some change of fashion took place, which offered a fitting reward to the sportsman or to the hunter to kill these birds, in their tens and hundreds of thousands for the sake of their plumage, and that thereby this great and profitable guano industry on the islands were impaired, nay, brought to an end. Could the owners of the islands complain

1064 that because they were carrying on an industry on the islands, a valuable industry, an important industry, and because that industry was attacked by these men in shooting these tens of thousands of birds outside the islands, that *therefore* that shooting was wrong?

Or take again the illustration, which is an apt one, as it seems to me, where the collection of the eggs of the wild birds of the air is an important industry, as it is upon many islands, as it is in connection with some of these very islands in Behring Sea. I have got here before me a book which I should like to hand to the Tribunal to examine. It is a Report of Mr. Elliott in 1874, the one that is referred to by my learned friends in some parts of their case and argument, in which he refers—

Mr. FOSTER.—We discuss your reference to it.

Sir CHARLES RUSSELL.—Really I do not understand you.

Mr. PHELPS.—We do not refer to it. We do not understand it is in the Case. We have not seen it.

Sir CHARLES RUSSELL.—Not seen it? Not seen the report of 1874?

Mr. JUSTICE HARLAN.—Sir Charles is talking of the Report of 1874.

Mr. PHELPS.—Elliott's Report of 1874. It is not in *our* Case.

Sir CHARLES RUSSELL.—I am at a loss to know what the interruption means.

Mr. PHELPS.—It means that we were suggesting that the document from which my friend is about to read is not in the Case. It is not in evidence that I know of, and therefore I have not examined it.

Mr. JUSTICE HARLAN.—It is cited either in the British Case or Counter Case.

Mr. FOSTER.—That is what I said. It is cited by *them*—not by *us*.

Sir CHARLES RUSSELL.—It is cited again and again. Why I should be interrupted I do not know. I do not complain of the interruption, but I do not understand its cause. I think I am well founded also in saying it is referred to by Mr. Blaine in his earlier correspondence.

Mr. CARTER.—We have not referred to it ourselves in our Case. We have carefully avoided everything of Mr. Elliott's.

Sir CHARLES RUSSELL.—Well, that is rather an awkward admission, which my learned friend perhaps had been wiser not to make.

Mr. CARTER.—We are willing to admit it.

Sir CHARLES RUSSELL.—Because this is the gentleman whom they constituted a special Commissioner by a special Act of Congress in the year 1890. He was the creation of Congress to go out to make a report on the Pribilof Islands.

The PRESIDENT.—Is there any reason why the scientific authority of Mr. Elliott should be considered as not valuable?

Mr. CARTER.—We totally distrust him, and have carefully avoided him. He is a great favourite on the other side.

Sir CHARLES RUSSELL.—As a learned Judge once said, it sometimes happens that a witness who is called for the plaintiff turns out 1065 to be a very valuable witness for the defendant; therefore the plaintiff naturally distrusts him.

Mr. FOSTER.—We have not called him as a witness.

The PRESIDENT.—Do you say he was recalled by the Government? Is that your remark?

Mr. FOSTER.—I say we have not called him as a witness.

Sir CHARLES RUSSELL.—No, you have not; and that induces me to say what I thought was beyond dispute. You constituted him a special commissioner by Act of Congress in 1890, and you clothed him with a special authority, as the best person you could select for the purpose of enquiring into this very question, *after it had arisen* in controversy between Great Britain and America; and because his results do not suit the argument or the purposes of my learned friends, then he is rejected, and his evidence discarded.

Mr. CARTER.—The reason of it is another thing.

The PRESIDENT.—Is it a reason which you can state?

Mr. CARTER.—Our interruption was founded solely upon this: Sir Charles sought to impute him to us. We reject him. That is all.

The PRESIDENT.—What I took the liberty of asking you was whether you distrust him as a bad observer, or for another reason, a reason which might make his observations suspicious.

Mr. CARTER.—Oh, we distrust him because we suppose that he is an untrustworthy observer—a man who is given to theories, and not to an accurate dealing with facts. It is on this ground that we distrust

him. He is not a man from whom we conceive the truth can be well and suitably gathered.

The PRESIDENT.—I believe there were some contradictions, were there not, in his observations at different periods?

Mr. CARTER.—We think a great many. Mr. Phelps will probably have something to say about him.

The PRESIDENT.—Very well.

Sir CHARLES RUSSELL.—I would dismiss this subject in a word. I only intended to make a passing reference to it. If there is anything to be said about this gentleman, let it be said by members of the Tribunal, or let it be said by my learned friends, so that we may know what it is; because I find myself in a very strange position in regard to him. I find this gentleman, not once, but twice, instructed to report officially for the United States Government. The document which I was about to refer to is an *official document* printed by the Government Department at Washington in 1874, and it appears in the Tenth Census Report of the United States. I find that it was reprinted, in 1881. I find that in 1890 the author is appointed to report by an Act of Congress, which I have got here if there is any doubt about it.

Mr. CARTER.—None of those things are questioned. It is not the first time the United States has had an objectionable man in its employment.

1066 Sir CHARLES RUSSELL.—Very well. He is objectionable because his evidence does not suit your purpose.

Mr. CARTER.—We will discuss that hereafter.

Sir CHARLES RUSSELL.—Now finally, we have got Mr. Charles J. Goff, the Treasury Agent, in charge of the seal islands, writing on the 31st of July, 1890, "There is but one authority upon seal life, especially the seals of the Pribilof Islands, and this is the work of Prof. H. W. Elliott, who surveyed these rookeries in 1872 and 1874, and his work was verified by Lieutenant Maynard, and I am satisfied was as near correct when made as was possible for a man to make; but to-day there is a marked contrast between the conditions of now and then." That was as late as July 1890. All I was going to say—it was really very innocent matter—

Mr. CARTER.—Except that you imputed him to us. That is all we object to.

The PRESIDENT.—I think it is clear that you do not trust him. Sir Charles trusts him. Well, we have to decide.

Sir CHARLES RUSSELL.—I merely asked you, Sir, to take a note of the page. I was not even going to trouble to read it. It is on page 127 of the Report, which is in my hands, in which he refers to the industry of collecting the eggs of these wild birds as being an important one, upon these very islands: I was merely referring to it as an illustration of the theme I am upon, the rights which are attached to an industry.

Now precisely the same argument which has been advanced in respect of this industry of seal-skinning would apply to this industry of collecting eggs.

Or again, take the case of a game preserver, and there are such in England, who does not preserve game merely for the sake of shooting the game, but who makes a *trade* of preserving game. They shoot the birds and thereby they get sport out of them; but they send their game regularly to market, making the best profit they can out of their business. I have already dwelt upon how much greater care and expense and cultivation, or, to use an expression dear to my learned friends, how much more "cherishing" the action of the game preserver in the matter

of pheasants is than it is possible for the action of the United States or their lessees to be; how the game preserver takes the eggs away from the nest to induce the bird to lay more than it otherwise would; how he places them under an ordinary fowl, and in that way rears them; how he feeds them and keeps them until they grow up, and he kills them; and yet when the birds go off his land upon the land of another, has it ever been heard, could it even be suggested, that this industry of sending his pheasants to market was injured in point of law because his unneighbourly neighbours in the open common adjoining waited until his birds escaped from his land, or were on the way back to it, and shot them there, thereby lessening his profits? The cases are absolutely analogous, but the case of the pheasants is much stronger.

Take again the case of a rabbit warren. A great many rabbits
1067 are imported from this country into England. They are cultivated as an article of commerce. They are also cultivated in England as an article of commerce. There are such things as rabbit farms where everything is given up to the rabbits, and they are sent to the market as regularly as you send barn-door fowls to market, or as you send eggs to market, or butter to market, or any other article of farm produce. Is it to be said that when these rabbits leave the land of the man where they are in the habit of burrowing, and go on the adjoining open common or into another man's land, and are shot, and thereby his chances of shooting them in his own warren are diminished, and thereby the volume of his business are diminished,—is it to be said that that gives him a right of action? No.

These are apposite illustrations which, always bearing in mind that the absence of property in the animals is the hypothesis on which the argument of property in the industry is based, show how fallacious that argument is.

The PRESIDENT.—Would you say that in the case of the Earl of Abergavenny, which you mentioned yesterday, if the deer had been shot out of his park, it would have been lawful?

Sir CHARLES RUSSELL.—No; because the jury found that the deer were tame. That is the difference. If there be any doubt about that, I will refer to it.

The PRESIDENT.—Oh no.

Sir CHARLES RUSSELL.—The jury found that the deer were tame; and of course I took it for granted that that point was present to the mind of the Tribunal. I am arguing this question upon the assumption that the seals are *feræ naturæ*; that is the assumption upon which my learned friend Mr. Phelps rests.

The PRESIDENT.—Would you consider the rabbits in the rabbit farms you spoke of as wild rabbits, as *feræ naturæ*?

Sir CHARLES RUSSELL.—They are so considered. I have never known any allegation of property in rabbits except in the case of tame rabbits, raised in hutches.

The PRESIDENT.—In France, you know, we cultivate tame rabbits.

Sir CHARLES RUSSELL.—In hutches you mean?

The PRESIDENT.—Yes in hutches. That is another thing?

Sir CHARLES RUSSELL.—That is a different thing altogether: I was not of course dealing with that case.

But on this point I hope I am followed by the Tribunal: I read the argument so that there should be no mistake about it. The proposition which my learned friend advanced assumes that the animals are *feræ naturæ*. Let me read it again, in order to make my ground clear.

The PRESIDENT.—Perhaps it is best to read it again.

Sir CHARLES RUSSELL.—It is on page 136:

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed, for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded outside of territorial waters as *feræ naturæ*, in the full sense of that term.

I have been arguing, of course, upon the assumption of this proposition.

The PRESIDENT.—That is an assumption. That is not the general statement of the United States.

Sir CHARLES RUSSELL.—No, Sir.

The PRESIDENT.—It is an assumption merely for the sake of argument.

Sir CHARLES RUSSELL.—May I point out that I have been endeavouring, I thought, with the closest attention to the order of the points, to follow out this assumption. I have argued, first, the question whether there was a right of property, and in discussing this question, I endeavored to establish—I hoped I had established—that seals were *feræ naturæ*. I had passed away from that, and I had therefore assumed as the datum of this part of the discussion, as Mr. Phelps logically assumes, that they are *feræ naturæ*. His position is that, assuming them to be *feræ naturæ*, assuming no property in the seals or in the herd, yet that there is a property in the industry; that is the point I am now arguing.

The PRESIDENT.—There is no misconception about that.

Sir CHARLES RUSSELL.—No, Sir. Now, Sir, I have said all I have to say upon those general illustrations of the fallacy of this proposition. The Tribunal here adjourned for a short time.

Sir CHARLES RUSSELL.—Mr. President, recurring to the proposition which I said at the commencement of my argument on this point must be established by my learned friends, I have now to submit that that proposition has not been and cannot be established. That proposition is that what must be shown is, that pelagic sealing is an invasion of a legal right attaching to the industry. I have dwelt at some length upon the matter, because of the respect that I unfeignedly feel for anything my learned friend Mr. Phelps feels justified in gravely advancing; but I have finally to say, first of all, that I find no authority either in municipal law or in international precedent to warrant the claim that is here made; secondly, that I have pointed out by illustrations that I have given, that if any such idea were to be accepted, novel as I submit it is, it certainly would apply to many other cases; and, when it is remembered that there is no property right in the thing or no exclusive right to take the thing, it would have a far-reaching importance.

There are two other subjects that were referred to incidentally in some observations which fell from you, Sir, as to certain rights, which might be likened to industrial rights, which had not a tangible existence, but which might be considered in the nature of property or property right, and the special illustration that you gave was in relation to copyright. Now I think that that was perhaps a reference not without its use, because it does present an illustration of a case in which there exist in the popular, ordinary acceptance of the phrase, natural rights of property which may take the form of a useful invention for the benefit of the world, or of a creation of the brain, either in the shape of works of imagination, the result of long labour and research, or works of history or science,

or may take the shape of inventions to lessen labour and advance in that way processes useful to mankind—and would suggest that, in the case of the individuals, they were eminently deserving of protection and recognition; and, taking the productions of a nation in the aggregate, might well be said, without any extravagance of language, to constitute a national property or a national interest, speaking in popular language. Yet what is the fact in relation to both those subjects of copyright or patent right? I said a day or two ago that some English judges had declared that our earliest Statutes upon the subject of copyright were but an affirmance of a principle which was embodied in the Common Law. That has not been generally accepted. The earliest of our Statutes dates back to the time of Queen Anne. But though those opinions have been entertained by some Judges as to the existence of a common law right of protection to copyright, certainly they were not generally held, and certainly they were not views that were ever held to have any operation in the sense of establishing property outside the municipal law of England. I think the law of France is the same. I do not know any country which has protection except by comparatively recent legislation either for copyright or for invention. I do not think there is any trace of it—and I speak subject to the correction of the eminent Jurists I am addressing—in the earlier systems of law, especially the Roman law.

The PRESIDENT.—The first trace in France was in the form of a royal license for printing.

Sir CHARLES RUSSELL.—Quite so. Now I will state what the condition of things is internationally upon both these subjects. A good many of the civilized Powers have by international arrangement—I use international arrangement as distinguished from international law—sought to bring their mutual relations on the subject into consonance with municipal law.

Now, first as to copyright. One of the earliest International Conventions to which Great Britain was a party dealing with copyright was as recent as the year 1886; and up to that time it had been a matter of great complaint, as regards many foreign countries, on the part of English authors that their books were re-published under circumstances which gave them no reward whatever for their labour. And great complaints were made, especially of one great English-speaking community,—I mean, of America, though it also had its complaints, and well-founded complaints, which I shall presently refer to—but one great complaint was that in America English books were reproduced,

and the profit of their reproduction went into the pocket not of
1070 the original author, but into entirely different channels; and to

the general Convention I am about to refer to, America was no party. The part the United States of America played in the matter I will mention later; but, in 1886, Great Britain, Germany, France, Italy, Spain, Portugal, Belgium, Switzerland, Hayti and Tunis were parties to the International Copyright Convention of that year; and, under that Convention, authors of any of the countries, parties thereto or representatives of those authors, enjoy in the other countries for their works, whether published in one of those countries or not, the rights which the respective laws of those countries, either then or thereafter, give to the nationals of the particular country.

The enjoyment of these rights is made subject by the Convention to compliance with the conditions and formalities prescribed by the law of the country of origin of the work, and does not extend in other countries beyond the terms of protection granted in the country of origin.

As I have said, the United States was not a party to this Convention; but quite recently, I think in 1891, the United States passed a law granting security of copyright in the United States to the authors of any country which gives copyright to the productions of the citizens of the United States on the same terms as it gives protection to its own nationals in respect of any work printed and published first or, at least, simultaneously, in the United States; and, upon an official intimation from the Government of Great Britain that Great Britain in fact gives copyright protection to United States citizens on the same terms as she does by her law to British subjects, the President, under the authority of the law of the United States, may issue a Proclamation extending the benefits of the Act to British subjects.

Senator MORGAN.—Will you permit me to say that that Act of Congress was based upon the fact that the Constitution of the United States creates property in intellectual productions and also in inventions. It creates property.

Sir CHARLES RUSSELL.—That is my point. My point is, that while it creates or recognizes that for its own citizens and nationals, it did not recognise that property when it was the creation of British law.

Senator MORGAN.—It might have been so in practice; nevertheless, the Government of the United States assumed the right in virtue of its sovereignty to create property in intellectual productions and also in inventions, just as if they were material substances.

Sir CHARLES RUSSELL.—I assure you, Sir, I am not concerned to dispute that. I began by saying that the Copyright Act of Queen Anne was, by some of our Judges, supposed to be an assertion of a common law principle, which would be a recognition of property. The point I am upon, the learned Senator will see, is that, while municipally regarded there was property, there was no international recognition of that property.

Senator MORGAN.—That depends on international considerations; but the fact of property in intellectual efforts and productions, 1071 and property in inventions, was established by the Constitution of the United States.

Sir CHARLES RUSSELL.—I do not doubt it. I have said the fact was so as regards Great Britain. That is not the point I am upon. The point I am upon is that it was not internationally so regarded; namely, that the author producing an important work in England, the result of the labour of years or of a lifetime, had that work reproduced, pirated, in the United States and other countries. Do not let the learned Senator suppose I go into it for the purpose of recrimination, or anything of that kind, for I certainly do not. I only seek to show that internationally the property was not regarded, and that this Convention does not make international law; it is a step towards international law, but it does not make it. It is simply an agreement binding upon the Powers who are parties to it, and carrying with it an obligation upon the part of those Powers to take the necessary steps to give effect to it.

Now as regards inventions the United States, on the other hand, had very serious ground of complaint. The United States has added greatly to the wealth of the world in that field of invention especially which tends to the simplification of processes of labour, to which invention the spur had been given largely owing no doubt to the absence of a dense population to supply the full demands for manual labour. The state of the English law in that regard is this: Prior to 1883 it had been for many years the law in England that the person who introduced into the United Kingdom for the first time a new inven-

tion, whether it was his own invention or not, was considered the first and true inventor. I think I am right in saying that the same was the law in the United States of America, as regards inventions of other countries. The result was that many inventions created in America, when they became known there, were communicated by telegram or by post to Great Britain, and in Great Britain they were registered and patented: provisional specifications were filed, and so forth, and the person who so specified it, and patented it, although he might not have been the producer of the idea, and often was not, was, according to English law, the "first and true inventor".

This difficulty formed the subject of frequent discussions, and ultimately a convention was signed in Paris on the 20th March 1883, to which, in the first instance, Belgium, Brazil, Spain, France, Guatemala, Italy, and Portugal, amongst others, were parties: by which it was agreed in Article 4 that any person who had duly applied for a patent, design, or trade mark, in one of the contracting States should for a period of six months, and in some cases for a longer period, have the priority to the right of application for the patent or trade-mark in any of the other countries parties to the convention. The actual terms of the original convention were subsequently modified but not in any material respect upon this point. The United States subsequently

joined in the convention, and thereby, in common with the other 1072 contracting countries, established a rule for the protection of designs, trade marks, and letters patent, which were called industrial property. Prior to this convention, and apart from the countries that are parties to it, no right of property in letters patent was recognized as between nations at all; and the law at this moment stands in this way, that though the concurrence of the most conspicuous Powers of the world goes a long way towards a general international copyright law and a general law in relation to patents, still, the law which affects internationally these two important subjects of copyright and of invention, rests solely upon the agreement embodied in the convention, and is binding solely on the parties to it.

Senator MORGAN.—That would become international law if we wait long enough and nobody objects.

Sir CHARLES RUSSELL.—In process of time I sincerely hope it will.

Now Mr. President, the next branch of the argument that my learned friend Mr. Phelps proceeds to is the consideration of the question, assuming that he has established an industry which he says is injuriously affected by something done, what by international law are the rights which a Power in time of peace may exercise for the protection of that right, or of that industry.

Now, of course, Mr. President, it is obvious that if I have succeeded in establishing that there is no right to protect, it becomes quite unnecessary to consider what are the rights of protection. I certainly should be quite content to leave the argument at this stage resting upon the ground that no right has been shown to exist, and therefore, where there is no right to protect, it becomes immaterial to consider what may or may not be done under international law, with a view to protection; but I do not wish to pass by in a contemptuous way any argument my learned friend has advanced; and I think it may throw some light on the general consideration of this question and upon the fallacies which, I conceive, creep into this part of the case, if I call attention to the cases which my learned friend has cited in support of this supposed right of protection in time of peace, and the acts which may by international law be done in defence of that right.

Examination of the argument as to the right of protection.

But first, and in order that the Tribunal may, when I am calling attention to these cases, appreciate the distinction which I make in reference to them, and the criticism which I shall take the liberty of addressing in reference to them, I should like to be permitted to point out in general language what I submit are the fallacies of the arguments based upon them. The fundamental fallacy in this connection is found in the proposition advanced in the Argument of the United States that a State has in time of peace a right under international law, and in its full rights of self defence and self-preservation, to do on the high seas whatever it may conceive to be necessary to protect its property or its interests. That I conceive to be an unsound proposition.

It makes the rights in time of peace the same as the rights in
1073 time of war. It confuses, I conceive, a variety of actions upon the part of States, and treats them as if they were all of the same character, to be explained and to be defended upon the same grounds, although, in fact, as I have to submit, they are different in character and are defensible or are explicable by very various reasons.

It will be found that in these illustrations my learned friend, as I submit, has confounded acts done in a state of belligerency with acts done in time of peace, and confounded acts which a nation *will* do in defence of what it conceives to be its interest with what it *may* legally do under the sanction of international law. Now, still speaking generally, I would ask to be allowed, without referring for the moment to text books, which I shall do hereafter, to state generally the view which we desire to present upon this subject. I think, it will help to clear the ground, and to make the subject more intelligible, if we consider the case in which the rights of self-protection and defence, or self-preservation as they are called, are recognized by international law, and the grounds on which that recognition is based.

Now, by far the greatest number of instances apply to the state of belligerency, yet even here there are very strict rules. It will be recollected that belligerent rights rest on the genuine emergency of danger, which is the true basis of all exceptional acts of self-defence, or of self-preservation, and upon the consent which in consideration of that danger is given by neutral States. But even in the state of belligerency, and as to belligerent rights, there are very clear limitations. Take the case of contraband of war. The law of contraband of war does not extend to every commodity which a belligerent Power may choose to declare contraband: and, therefore, if something which international law does not recognize as contraband of war is seized by a belligerent, and brought into a Prize Court for condemnation, although the belligerent might have been morally justified, according to its view of the emergency at the moment, in seizing that particular thing, a Prize Court could not condemn it, according to international law, unless it fulfilled the conditions which are recognized by international law as being essential to contraband.

Again, take the case of blockade. There was an attempt in years gone by to establish what was known as paper blockade, but that is not recognized by international law. A blockade, according to existing international law, in order to carry with it the subsequent sanctions for attempts to break it, must be an effective blockade. And if a ship is seized by a belligerent Power, the International Prize Court would have to consider whether or not the condition of blockade existed which justified the seizure of a particular vessel as attempting to run that blockade. Again, the belligerent Power might have thought itself justified in doing it on moral grounds; but, still, invoking international

law, it could not get a condemnation in a Prize Court unless it was shown that the offence had been committed contrary to the canons of international law.

1074 The nation might consider itself justified in seizing the ship going to run the blockade, though the blockade was not effective,—though the international conditions were not complied with; but it does so at its own risk. It does so at the risk of having to defend itself; and it does so with the consequence that, if it invokes the aid of an international Tribunal to condemn that ship, it cannot invoke it successfully. The nation seizes because it is thought the occasion justified it; because it is important that it should be done; but it is not a thing which, by international law, they are justified in doing.

Now, there is a good illustration of the distinction between what a nation *will* do and what a nation *may legally* do, in the well-known case of the "Trent", which occurred at the time when the United States was engaged in the great struggle of its Civil War. I would like to remind the Tribunal of what the circumstances of that case were. Certain gentlemen, among others a Mr. Mason and a Mr. Slidell, were on board the "Trent". These gentlemen were on board a neutral ship, an English ship, carrying the mails, not however that that gave any particular importance to it. They were bound on a mission to Europe, I think to England and France, to seek the aid of those Powers in their attempted revolt against the Federal Government of the United States. The "Trent" was seized, and possession of these gentlemen taken by the authority of the United States; and I have before me the Parliamentary Papers, which set out the whole of the correspondence in relation to this matter. The whole of it I do not intend, as you will conjecture, to trouble the Tribunal with; but what I do wish to call attention to is the position taken by the United States Minister Mr. Seward. He argues at very great length that these gentlemen might be treated as contraband of war; they were not soldiers, they were not carrying arms, but that nevertheless they might be treated as contraband of war. But that subject being treated by him at very great length in a despatch of the 26th of December, 1861, which extends to a great many pages, he finally, upon the remonstrances of Lord John Russell (who was then Foreign Secretary of Great Britain), feeling that he could not defend his position upon any international legal principle, agrees to release the men; and he adds that, as to this release, he does it the more willingly because he says all danger which might arise from their not being further detained had practically passed away.

To make this clear, I must go back a little. On the 9th of November, 1861, the announcement of the seizure is made; and Lord John Russell writes to the British representative at Washington on the 30th of November, 1861, announcing that intelligence of a very grave nature had reached Her Majesty's Government; and he proceeds to mention the facts, and he concludes by making a demand for the release of the men: he says:

It thus appears that certain individuals have been forcibly taken from on board a British vessel, the ship of a neutral Power, while such vessel was pursuing a
1075 lawful and innocent voyage, an act of violence which was an affront to the British flag and a violation of international law.

Her Majesty's Government, bearing in mind the friendly relations which have long subsisted between Great Britain and the United States, are willing to believe that the United States naval officer who committed this aggression was not acting in compliance with any authority from his Government, or that if he conceived himself to be so authorized, he greatly misunderstood the instructions which he had received.

For the Government of the United States must be fully aware that the British Government could not allow such an affront to the national honour to pass without

full reparation, and Her Majesty's Government are unwilling to believe that it could be the deliberate intention of the Government of the United States unnecessarily to force into discussion between the two Governments a question of so grave a character, and with regard to which the whole British nation would be sure to entertain such unanimity of feeling.

Her Majesty's Government, therefore, trust that when this matter shall have been brought under the consideration of the Government of the United States, that Government will, of its own accord, offer to the British Government such redress as alone would satisfy the British nation, namely, the liberation of the four gentlemen, and their delivery to your Lordship, in order that they may again be placed under British protection, and a suitable apology for the aggression which has been committed.

Then a communication of the facts was at the same time made to the French representative by some of the persons taken on board this vessel, two, I think, being French subjects; and Mr. Thouvenel writing to M. Mercier a communication which is afterwards communicated to Lord Russell, takes the same ground of its being an offence against international law. I need not trouble to read that.

Then follows, also, a communication from the Austrian Minister in the same sense as that from the French Minister. Also one from the German Minister, Count Bernstorff, to Baron Gerolt in the same sense.

Then comes the long communication from Mr. Seward to which I have already referred, but with which I do not think I need trouble you at length. He argues the question out; tries to suggest that these men might be regarded as contraband of war; points out the difficulties of so regarding them, and makes the best answer he can. That claim to treat them as contraband of war he afterwards withdraws; and, finally, when he writes, announcing the release of the men, he says that if the safety of the Union required the detention of the captured persons, it would be the right and duty of the Government to detain them. "*The right and duty*", you will observe is the language used. "Right" is one of those words very often ambiguously employed. This correspondence demonstrates there was no right to seize or detain them by international law; and when Mr. Seward used the word "right" in that connection, he meant what I have already adverted to—that it was something which *would be done, right or wrong*, whether internationally defensible or not, if the emergency of the situation and the interests of the United States required that it should be done.

Now Lord Russell replies to that despatch on the 23rd January 1863 (I am reading from page 37 of this correspondence) in these words.

Mr. Seward asserts that "if the safety of this Union required the detention of the captured persons it would be the right and duty of this Government to detain them." He proceeds to say that the waning proportions of the insurrection, and the comparative unimportance of the captured persons themselves, forbid him from resorting to that defence. Mr. Seward does not here assert any right founded on international law, however inconvenient or irritating to neutral nations; he entirely loses sight of the vast difference which exists between the exercise of an extreme right and the commission of an unquestionable wrong. His frankness compels me to be equally open, and to inform him that Great Britain could not have submitted to the perpetration of that wrong, however flourishing might have been the insurrection in the South, and however important the persons captured might have been.

My object in referring to this case, Mr. President, as I hope you will perceive, is to point to it as an illustration of the case in which a nation puts itself outside international right, and where the only defence of its position must be that it considers itself morally justified in doing the thing, and is prepared, if necessary, to fight in defence of having done it. That is not within the domain of international law, it lies entirely outside.

Again, take the case of the Revenue Laws—the Hovering Acts, which are referred to in the argument, as if they afforded some justification for the position of the United States as to self defence or self preservation. Upon what principle do those Acts rest? On the principle that no civilized State will encourage offenses against the laws of another State the justice of which laws it recognizes. It willingly allows a foreign State to take reasonable measures of prevention within a moderate distance even outside territorial waters; but all these offences, and all offences of the same class and character relating to revenue and to trade, are measures directed against a breach of the law contemplated to be consummated within the territory, to the prevention of an offence against the municipal law within the area to which the municipal law properly extends. But it does not follow that all Acts of this kind will in all cases meet with assent. It certainly would not, and could not be expected to meet with assent, if the right were attempted to be exercised—I use the word “right” in the laxer sense of the word: I would prefer to say “if the Acts were attempted to be enforced”,—at a considerable distance from land, and I affirm that in no such case by international law, could it be maintained as of right against an objecting nation.

As was said in the case my friend referred to in his Argument of *Church v. Hubbart*, by Chief Justice Marshall, if the right is extended too far, it will be resisted; in other words, he considers that it is a quasi-right exercised by concession, and depending for its continued existence upon consent and upon the moderation with which it is used. And, indeed, as I read my friend Mr. Phelps' argument upon this point, he seems to admit that that is the true view; because on pages 170 1077 and 171 my friend dealing with one of the contentions advanced on the part of Great Britain, says:

An effort is made in the British Counter Case to diminish the force of the various statutes, regulations and decrees above cited, by the suggestion that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of those countries outside the territorial limits of such jurisdiction.

Then my friend proceeds:

In their strictly legal character as statutes, this is true. No authority need have been produced on that point. But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not.

That is true: Then he goes on to say “without”, that is to say, outside the territory:

Without, they become defensive regulations, which if they are reasonable and necessary for the defense of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the government at its discretion.

You see, Mr. President, once you criticize and appreciate the language in which this is stated (which is in strict conformity with *Church v. Hubbart*), you will see my friend is there referring to exactly the principle of the Hovering Acts, about which I shall have something to say in a moment, that he is referring to something, not which the nation has a legal right to do by a recognized rule of International law, but to something which, so long as it is reasonable and necessary, “will be submitted to by other nations, and, if not, may be enforced by the Government at its discretion.”

I need not say, therefore, that my friend's proposition consists of two branches—first of all, that a defensive regulation which is reasonable and necessary will be submitted to; secondly, that if it is not submitted

to, the nation has, in order to compel assent, the resort to force alone—which is war. But I would like to say one thing, as I have drawn attention to this, although it is not strictly to the point upon which I am, but it is nevertheless sufficiently *ad rem* to justify my now alluding to it. You will observe that in this paragraph my friend Mr. Phelps has recognized that the *territory* is the limit within which a municipal statute operates; and, therefore, he provides for the case of the United States failing to establish territorial dominion, or territory over the area to which their statutes have been adjudged to apply, and he is in effect saying that, although *quâ* statute it has no operation outside the territory, yet failing operation outside the territory it becomes a good, effective, defensive regulation.

Now I have, upon that, to make two observations. I have to ask in the first place: Is there any precedent in any book of authority or in any international controversy in which a statute assuming to exercise authority over a territorial area has ever been regarded as a protective or self-defensive regulation? That is the first question to which I would invite, when the proper time comes, my learned friend's answer—Is there any such case? Nay, I will suggest further that the very idea of defensive regulation, or defensive act, or self-preservative act, repels the idea of cut and dried, formulated rules? The occasions for acts of self-defence, or self-preservation, are occasions of emergency—sudden emergency—occasions when there is no time (to use the expressive language of an eminent Statesman of the United States, to which I shall hereafter refer),—when there is no time for deliberation, no time for contrivance, no time for warning, no time for diplomatic expostulation. That is the very idea at the bottom of all these exceptional acts of self-defence or self-preservation. But to say that a statute which fixes its own penalties, including imprisonment, and which is applied and intended to apply territorially, that is, within the dominion, is to be regarded, when the occasion of the State requires the argument to be turned that way, as a defensive regulation applicable to the case of emergency, or falling within the principle of acts of self-preservation, is, as far as I know, entirely and absolutely without any kind of authority.

Besides, let me remind you of a further difficulty, as I have touched upon this point. The very constitution of an international Court implies that there is a question to be settled upon international principles—upon the principle that the Court is not the Court of the captor only, but a Court which is charged with the care of, and the just adjudication upon, matters affecting the rights of all nations, entirely and wholly apart from the municipal law; and one of the first things which the Judge of such a court would be called upon to consider would be the circumstances of the case, the character of the emergency, and the character of the sanction which by international law would follow upon the act done if it were not justified by the circumstances of the case. But here is a cut and dried statute, which tells the Judge that the consequences of the act on which he has to adjudicate are confiscation of the ship, imprisonment of the men—imprisonment not exceeding a definite term—or imposition of a fine not exceeding a definite amount. This argument of self-defensive regulation is an ingenious afterthought: creditable to the subtlety of the minds which have invented it, but not a defence which was present to their minds when this question was diplomatically in controversy between Great Britain and the United States.

I have been drawn a little away, Mr. President, from the point which I was upon, although I think what I have said is still quite necessary to the line of the argument which I am pursuing.

I have already referred, Mr. President, to this question of the Hovering Acts, and I do not intend to repeat myself upon them except to make this comment: that—although many Powers have adopted Acts which may be called Hovering Acts, and although other States, especially those that have similar Acts, have recognized, have not
1079 complained of, have acquiesced in, acts done outside the territorial limits in defence of trade or revenue, acts done by other Powers under those Acts even where they involve the seizure of their own ships and subjects—yet I think it would be too much to say, even at the present day, that the principle of the Hovering Acts can properly yet be said to be part of international law: it really does rest now upon that principle of acquiescence which I have mentioned, and that acquiescence in its turn rests upon the principle that a nation will not interfere to throw the mantle of its protection over one of its nationals when that national has, for his own private ends, been running counter to a just and reasonable law of a friendly Power.

And I observe that that is the way in which these Hovering Acts are treated by text writers of authority. I refer to Dana's edition of Wheaton, the 8th edition published in 1866, and especially to the note 108, following upon the beginning of section 180; but I will not read the passage for the moment.

Now I will still pursue the question raised, as to certain things which are done with permission and acquiescence, whether or not they may be said to be strictly conformable to international law.

Take again the pursuit of vessels out of the territorial waters, but which have committed an offence against municipal law within territorial waters—which is a case which my learned friend and myself (and I have no doubt my learned friends on the other side), have had frequent occasion to consider. Here, again, there is a general consent on the part of nations to the action of a State pursuing a vessel under such circumstances, out of its territorial waters and on to the high sea.

Senator MORGAN.—You mean a consent by acquiescence?

Sir CHARLES RUSSELL.—A consent by acquiescence.

The PRESIDENT.—And not in every case?

Sir CHARLES RUSSELL.—No, certainly not in every case. I will state—although not perhaps exhaustively—some of the leading conditions. For instance, one condition is it must be a *hot* pursuit—that is to say, a nation cannot lie by for days or weeks and then say: "You, weeks ago, committed an offence within the waters, we will follow you for miles, or hundreds of miles, and pursue you". As to that, it must be a *hot* pursuit, it must be *immediate*, and it must be *within limits of moderation*. In other words, we are still considering the character of the act which is not defined by International law, *which is not a strict right by International law, but which is something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the laws of a friendly Power*.

Senator MORGAN.—That relates to the morality of the act.

Sir CHARLES RUSSELL.—To some extent, undoubtedly. The particular nation would undoubtedly be guided in its acquiescence or non-acquiescence according to its view of the morality or immorality of the particular conduct pursued—according to its view of the justice or injustice, reasonableness or unreasonableness, of the particular law.

1080 I am of course here endeavouring to show that these various cases, quite dissimilar in their character, but all grouped together by my learned friend, are explicable upon different reasons. Some of the instances in the later cases which he gives, to which I am going to refer, are cases that fall within an entirely different category. They are acts either quasi-belligerent or actually belligerent, and fall within no rule of international law at all; they are acts which the nation does at its peril, taking the risk of having to defend them by force if they are challenged. They do not fall within any (what I may call) peace principle of international law.

Then again, take the case of sudden emergency, where there is something that may properly be considered as requiring instant action; as, for instance, those which are given by Azuni, where to avoid a greater danger, for example, the spread of fire, you may even destroy the property of another under the urgent necessity of the moment, where there is no time for precautionary measures, and the spread of the fire must be prevented: there you may act on the instant though by your act you destroy the property or invade the right of another. The case rests upon an entirely different principle.

But as regards those cases, as Mr. Webster, the American Minister, said in the case to which I shall presently refer, what a Government in such a case has to do in defending or excusing an act which is an invasion of the rights of another sovereign Power, is to "show a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation."

That is the language of one of the most distinguished of the Ministers of the great American community.

Now in time of peace it will be found that the liberty conceded by consent of nations to maritime Powers as to exceptional acts of self-preservation is very closely restricted indeed; and here the simple inquiry is, how far can it be shown that civilized States have agreed to the exercise of a jurisdiction on the high seas under the plea of self-defence or self-preservation.

And I submit that it has never been suggested, still less agreed to by nations, that a particular Power may judge for itself of the inconvenience it is suffering from the action of another Power on the high seas, and put down that action with a high hand. Any such general proposition is unsound. It may do it; but if it does it it does it as an act which it must defend by force if challenged; it is not in the exercise of a legal right. It is a resort to the early sanction of force, and must be justified, if it be necessary, by force. And the restricted proposition which we state, and by which we stand, is, that in such a case as the present, where there was *no* such instant overwhelming necessity of self-defence, where there *was* time for device of means, where there *was* time for deliberation, where there *was* time for diplomatic expostulation and representation, that it is idle to try to treat this case as

1081 a case of necessary self-defence or self-preservation. For be it recollected that beyond the fact of the legislation, which was professedly a territorial legislation, and a territorial legislation only: and beyond the fact of the seizures, which were made upon the basis of the assertion of that territorial legislation, there was, before these seizures began, no representation made to Great Britain by the United States that she regarded this as a matter of national interest by which, right or wrong, they were determined to stand. And up to the present time even there has been no such representation.

Their case has been based upon alleged right, and based upon right mainly and primarily upon the ground of extended territorial jurisdiction over the waters of Behring Sea. We say therefore the true proposition, the true limitation, in such cases, in times of peace, as between friendly Powers, is that there is no right by international law to seize the ships of another nation—I am excluding cases within the Hovering Acts, which I have already dealt with—that in time of peace there is no right to seize the ships of another nation on the high seas except for piracy.

The true limit of self-defence in time of peace. I may be asked, finally, may there not be cases in which, although it may not be possible to formulate the interests of a nation under any recognized head of law, municipally or internationally regarded: yet may there not be cases in which there may be great interests of a nation which yet call for and morally justify that nation in acting, and acting in assertion of those interests and in defence of them? Yes; there are such cases; but what are they? They are cases which rest upon the very same principle upon which nations have been driven, sometimes justly, sometimes unjustly, to defend territory which they have acquired, or to acquire territory in which they have by international law no right, but which, either in pursuit of a great ambition, or in the gratification of racial antipathy, or under the influence of the ambition of a great potentate, they choose to think is necessary for the well-being and safety of the nation. But that is not international law, or international right. That is war, and is defended as war, and justified as war alone.

And I do not hesitate, Mr. President, to follow out this illustration to its conclusion. I do not hesitate to take the concrete case of these seals. It would be remarkable if they did it, they would be very unwise if they did it—extremely foolish if they did it—if I may respectfully say so. But the United States might choose to say:—We regard the interests of fur-sealing as of so great a magnitude, as of so much importance to the well-being of our great community, as so important to the advancing interests of civilization the world over, that we will assert, right or wrong, our claim against the world to protect the fur-seals in Behring Sea, or miles away from the Behring Sea.

But that would be war.

And there is another side to the question. Great Britain might choose to say:—We consider the interests involved in this question as very great and very important—not merely to the interests of the

1082 Canadians, to the interests of a rising colony; but in view of the broader and greater principle which we conceive to be involved, the interference with the equality of all nations on the high sea, the attempt by one nation to usurp special privileges and special powers on the high sea. We consider that question to be of so great importance that we will defend it by force.

But that again is war.

That is not international law; that is not international right; and that is not the character of the question which this Tribunal has been invoked to determine. In this at least we are agreed: that as regards these questions which I am discussing (I have nothing to do with regulations at this moment) as regards these questions of legal right, we are to address you as lawyers would address judges, as advocates would address jurists.

In view of, and after, this general statement upon this matter, I now ask your consideration of the authorities cited by my learned friend: and you will see that they fall within one or other of the categories to which I have adverted, and

Examination of examples of acts of self-defence cited by United States.

are not cases of acts of defence or in the nature of acts of self preservation, as suggested.

The first of these is at page 152, the case of Amelia Island, which occurred in the year 1810. This will be found to have been in effect belligerency. These are the facts; and I take them as they are put in the printed Argument of the United States.

Amelia Island, at the mouth of St. Mary's river,

Which I may say is off what is now the State of Florida

and at that time in Spanish territory, was seized in 1817 by a band of buccaneers under the direction of an adventurer named McGregor, who, in the name of the insurgent colonies of Buenos Ayres and Venezuela, preyed indiscriminately on the commerce of Spain and of the United States. The Spanish Government not being able or willing to drive them off, and the nuisance being one which required immediate action, President Monroe called his Cabinet together in October, 1817, and directed that a vessel of war should proceed to the island and expel the marauders, destroying their works and vessels.

Why, the mere statement of the case, as it is put here—not unfairly at all—by my learned friends, shows what the character of the case was.

I have before me the message of the President of the United States to Congress, in which he explains and justifies the action that is referred to in that case; and having read that, I shall not need to say more about it. Of course if I am relieved, as I should be delighted to be relieved, of any of these cases by the Tribunal, I shall pass on.

The PRESIDENT.—Not at all.

Sir CHARLES RUSSELL.—But I must deal with each of them unless I am so relieved.

1083 This was the message of President Monroe, delivered on the 13th of January, 1818. He says:

I have the satisfaction to inform Congress that the establishment in Amelia Island has been suppressed, and without the effusion of blood. * * * By the suppression of this establishment and that of Galveston, which will soon follow, if it has not already ceased to exist, there is good cause to believe that the consummation of a project fraught with much injury to the United States has been prevented. When we consider the persons engaged in it, being adventurers from different countries, with very few, if any, of the native inhabitants of the Spanish colonies;—the territory on which the establishments were made, one on a portion of that claimed by the United States, westward of the Mississippi; the other on the part of East Florida, a province in negotiation between the United States and Spain;—the claim of their leader, as announced by his proclamation on taking possession of Amelia Island, comprising the whole of both the Floridas, without excepting that part of West Florida which is incorporated with the state of Louisiana;—their conduct while in the possession of the island, making it instrumental to every species of contraband, and in regard to the slaves, of the most odious and dangerous character;—it may fairly be concluded that if the enterprise had succeeded on the scale on which it was formed, much annoyance would have resulted from it to the United States.

Other circumstances were thought to be no less deserving of attention. The institution of a government by foreign adventurers in the island, distinct from the colonial governments of Buenos Ayres, Venezuela, or Mexico, pretending to sovereignty and exercising its highest offices, particularly in granting commissions to privateers, were acts which could not fail to draw after them the most serious consequences. It was the duty of the executive either to extend to this establishment all the advantages of that neutrality which the United States had proclaimed and have observed in favor of the colonies of Spain, who, by the strength of their population and resources had declared their independence, and were affording strong proof of their ability to maintain it, or of making the discrimination which circumstances required. Had the first course been pursued we should not only have sanctioned all the unlawful claims and practices of this pretended government in regard to the United States, but have countenanced a system of privateering in the Gulf of Mexico and elsewhere, the ill effects of which might and probably would be deeply and very extensively felt. The path of duty was plain, from the commencement; but it was painful to enter upon it while the obligation could be resisted. The law of 1811, lately abolished, and which it is therefore proper now to mention, was considered applicable to the case, from the moment that the proclamation of the chief

of the enterprise was seen, and its obligation was daily increased by other considerations of high importance, already mentioned, which were deemed sufficiently strong in themselves to dictate the course which has been pursued.

Early intimations having been received of the dangerous purposes of these adventurers, timely precautions were taken by the establishment of a Force near the St. Mary's, to prevent their effect, or it is probable that it would have been more sensibly felt.

Then on the next page:

For these injuries, especially those proceeding from Amelia Island, Spain would be responsible, if it was not manifest that, although committed in the latter instance through her territory, she was utterly unable to prevent them. Her territory, however, ought not to be made instrumental through her inability to defend it to purposes so injurious to the United States. To a country over which she fails to maintain her authority, and which she permits to be converted to the annoyance of her neighbors, her jurisdiction for the time necessarily ceases to exist. The territory of Spain, will, nevertheless, be respected, so far as it may be done consistently with the essential interests and safety of the United States. In expelling these adventurers from these posts, it was not intended to make any conquest from Spain, or to injure in any degree the cause of the colonies. Care will be taken that no part of the territory contemplated by the law of 1811 shall be occupied by a foreign Government of any kind.

You will see at once what the case was.

LORD HANNEN.—Is not the substance of it this: There being no responsible Government to which recourse could be had for redress, direct war was made upon these people?

SIR CHARLES RUSSELL.—Certainly; and they were adventurers, usurping authority in two places, part attached to American territory, part attached to the State of Louisiana, with regard to which they were in negotiation with Spain, at the very time, for the acquirement of the territory, and which they afterwards acquired. They were, if I may use that expression, land pirates.

MR. JUSTICE HARLAN.—Sir Charles, it may be worth stating that under the Constitution of the United States only Congress can declare war.

SIR CHARLES RUSSELL.—That I had also recollected. It is important, undoubtedly, in that connection. I supposed it had declared war, though I do not know for certain.

MR. JUSTICE HARLAN.—I do not remember that it had.

SIR CHARLES RUSSELL.—It did not treat this party as a real belligerent. It treated it rather as a case of land pirates.

THE PRESIDENT.—It was rather an act of military execution than of belligerency, I should say.

SIR CHARLES RUSSELL.—That may be so—quasi-belligerency, in point of fact, I suppose.

What I wish to point out is this. I am obliged to Mr. Justice Harlan for reminding me of what I in fact knew, that the assent of Congress is necessary to the conclusion of a Treaty and to a declaration of war; but whether it was war formally declared or not, I wish to point out that my learned friends, in citing this case, have themselves treated it as belligerent, because the sentence on page 152, begins with these words: "*A belligerent may*"—

THE PRESIDENT.—That is a quotation from Mr. Wharton, I believe.

MR. PHELPS.—All those quotations are from Mr. Wharton. They should be in quotation marks.

SIR CHARLES RUSSELL.—Very likely that is so. I accept it. What I am calling attention to is this:

A belligerent may under extreme necessity enter neutral territory and do what is actually necessary for protection.

And he cites the case of Amelia Island, in respect to which he says:

The PRESIDENT.—The last line is by Mr. Phelps, but I believe the two preceding lines are not.

1085 Mr. PHELPS.—Mr. Wharton's proposition is the first one, beginning,

Intrusion on the territory or territorial waters of a foreign state, etc.

Sir CHARLES RUSSELL.—Then Mr. Phelps, I think, agrees that these words are his.

A belligerent may, under extreme necessity, enter neutral territory and do what is actually necessary for protection.

Mr. Justice HARLAN.—Is that yours, Mr. Phelps, or Mr. Wharton's?

Mr. PHELPS.—Mr. Wharton's.

Sir CHARLES RUSSELL.—Are you quite sure, Mr. Phelps?

Mr. PHELPS.—I am quite sure.

Sir CHARLES RUSSELL.—It is enough then to say I have not the weight of the authority of my friend Mr. Phelps; I have only the authority of Mr. Wharton, and he treats it as a belligerent act. I am sorry I have not both; but I shall be content with one.

But whether war was formally declared or informally declared, the acts were in the nature of belligerent acts, directed to putting down the persons who were assuming, without authority, jurisdiction, and who were committing acts, as I have said, of land piracy. That is practically all that one can say of it.

The next case cited is the case of the *Caroline*, on page 153. That was a case where there was, or had recently been, an actual rebellion in Canada. What happened was this: It appears from the correspondence, which I shall presently refer to, that this vessel, the *Caroline*, was armed by a number of persons acting in sympathy with the rebellion. These persons got the vessel to the river which connects Lake Erie with Lake Ontario.

The flow of the water is from Lake Erie into Lake Ontario, and Lake Erie divides Canadian from United States territory. They got this vessel, intending to use it as an offensive weapon against Canada, into the river which unites Lake Erie with Lake Ontario, and they got to the side of the river next to American territory. In that condition of things the Canadian authorities sent down an armed force, took possession of the vessel, and being unable to take her away, they destroyed her as being an engine of offence directed against her. My friend Mr. Box has been good enough to give me a short note which he has extracted from a parliamentary paper which I have here, and which I have read, but the note gives the facts. The case of the United States is set out in a despatch from Mr. Stevenson to Lord Palmerston, dated the 22nd of May 1838.

According to this despatch, there was an insurrection in Canada. The *Caroline* was an unoffending United States vessel. She was seized in a United States port, set on fire, and sent over the falls of Niagara.

That is the statement of Mr. Stevenson.

The British case, on the other hand, is set out in a despatch from Lord Palmerston to Mr. Stevenson, dated the 22nd of August, 1086 1841. According to Lord Palmerston's account of the facts, a small band of Canadian refugees, who had taken shelter in the state of New York, formed a league with United States citizens for the purpose of invading British territory, not to aid in the civil war, which did not exist, as Lord Palmerston contended, but to commit in British territory robbery, arson and murder. At the United States port of Schlosser, with the connivance of the authorities there, the *Caroline*

obtained munitions of war from the public stores, some of which were conveyed to Navy Island, in British territory, for the above uses. The British boat surprised the vessel in Schlosser harbor at night, removed the crew, set it on fire, and let it drift over the Falls. Mr. Webster, who then was the Minister of State, writes in reference to this matter the language which I have quoted; at a later stage of the diplomatic discussion, and repeating his view of the facts, says:

Under those circumstances, and under those immediately connected with the transaction itself, it will be for Her Majesty's Government to show upon what state of facts and what rules of international law the destruction of the Caroline is to be defended. It will be for that Government to show a necessity of self defence, instant, over-whelming, leaving no choice of means and no moment for deliberation.

It is set out at page 186 of the printed Argument, in which this case is referred to.

I have only finally to read the justification which Lord Palmerston put forward for the act, with which explanation the United States was content, and did not pursue the matter further. The despatch from Lord Palmerston is dated the 27th August, 1841, and is set out at page 56 of the correspondence relating to this matter. He gives the statement and facts which I have endeavored to summarize.

The PRESIDENT.—We have not got that.

Sir CHARLES RUSSELL.—No, I shall hand this to the Tribunal if they so desire it. It is upon a matter upon which there is no dispute as to fact. I am reading historical documents. Lord Palmerston goes on, after stating the facts very much as I have described them, and says:

In this state of things a small band of Canadian refugees, who had taken shelter in the State of New-York, formed a league with a number of citizens of the United States for the purpose of invading the British territory, not to join a party engaged in civil war, because civil war at that time in Canada there was none, but in order to commit within the British territory the crimes of robbery, arson, and murder.

Her Majesty's Government, and Her Majesty's Minister at Washington have called these people pirates, and the American secretary of State in a recent note to Mr. Fox observes, that this name cannot properly be applied to them. The Undersigned is ready to admit that technically, the word "pirate" is applied to persons who, without authority or commission, commit upon the high seas the crimes which this band of offenders determined to commit upon the land; but if the term is in this case inappropriate, it is so, not on account of the nature of the acts which these men were about to perpetrate, but on account of the element on which those acts were to be committed—

And then he concludes:

That there was no fortification at Schlosser—

1087 That is the place where the ship was seized.

Her Majesty's Government are ready to admit; for though the place is called Fort Schlosser. Her Majesty's Government believe that no fortified building at present exists there. It is also perfectly true that no hostilities had been commenced on the American side, if by that expression Mr. Stevenson means the American side of the river; but that hostilities had been commenced by the Americans is now an historical fact, and those hostilities consisted in an invasion of British territory by an armed force from the state of New-York. In fact, the people of New-York had begun to make war against Her Majesty's Canadian Provinces. They had done so apparently with the connivance of the Authorities of the State; not only the New-York territory at Schlosser had lost its neutral character, and had become enemies' land, but other portions of the territory of that State had assumed the same condition.

One or other of two things must be. Either the Government of New-York knowingly and intentionally permitted the band of invaders to organize and equip themselves within the State, and to arm themselves for war against British territory, out of the military stores of the State; or else the State Government had lost its authority over the border districts; and those districts were for the moment in open defiance of the power of the State Government, as well as at war with the opposite British province.

In the first case the British Authorities in Canada had a right to retaliate war for war; in the second case they were no longer bound to respect as neutral that portion of territory which, by shaking off its obedience to a neutral Government, had ceased to be neutral, and could certainly not be entitled to the privilege of protecting persons who were actively engaged in making war upon Her Majesty's territory:

Whether that view was right, or whether it was wrong, I am only concerned in showing that the justification of the proceedings was a justification based upon a belligerent right, and as Lord Palmerston declared, it was an act of defence against an act of war; and it is enough to conclude this story to say that after some correspondence the authorities of the United States accepted that explanation, and did not press any claim for reparation.

Mr. PHELPS.—The correspondence on which this matter was concluded was between Mr. Webster and Lord Ashburton, and was of a very different character from that.

Sir CHARLES RUSSELL.—I do not think it is of an essentially different character from that. My learned friend is so courteous, that I am sure he would not make that observation unless he thought it was well founded. We have the correspondence of Lord Ashburton at page 186, and I do not admit that it differs in any sense. I do observe this, that Lord Ashburton takes up the language which Mr. Webster formulates, and says that you have to show that the necessity for what you did was instant and overwhelming, leaving no choice of means, and no moment for deliberation; and Lord Ashburton proceeds to show that it came within that principle. But I am not aware that there is any other difference between them.

Mr. PHELPS.—The difference was not put upon the ground of being an act of war or of the United States having lost its character of neutral territory; but simply as an act of self-defence against a band of robbers.

1088 Sir CHARLES RUSSELL.—Be it so. I think I have in effect already said so, because I pointed out that in answer to Mr. Webster, who says "can you in justification of this show that the necessity was instant, overwhelming, leaving no choice of means, and no moment for deliberation", Lord Ashburton proceeds to accept that and justify it.

Now, before the Tribunal rises, as my learned friend has been good enough to call attention to this point, let me refer to the bottom of page 186. Lord Ashburton says:

Give me leave, sir, to say, with all possible admiration of your very ingenious discussion of the general principles which are supposed to govern the right and practice of interference by the people of one country in the wars and quarrels of others, that this part of your argument is little applicable to our immediate case. If Great Britain, America, or any other country, suffer their people to fit out expeditions to take part in distant quarrels, such conduct may, according to the circumstances of each case, be justly matter of complaint, and perhaps these transactions have generally been in late times too much overlooked or connived at.

That is very much what Lord Palmerston had said:

But the case we are considering is of a wholly different description, and may be best determined by answering the following question: Supposing a man standing on ground where you have no legal right to follow him, has a weapon long enough to reach you, and is striking you down and endangering your life, how long are you bound to wait for the assistance of the authority having the legal power to relieve you? Or, to bring the facts more immediately home to the case, if cannon are moving and setting up in a battery which can reach you, and are actually destroying life and property by their fire; if you have remonstrated for some time without effect and see no prospect of relief, when begins your right to defend yourself, should you have no other means of doing so than by seizing your assailant on the verge of neutral territory?

The PRESIDENT.—It is not necessary for your case to settle whether that is an act of legitimate self-defence.

Sir CHARLES RUSSELL.—That is what Lord Ashburton said.

The PRESIDENT.—I think that is perfectly right. I believe he is more moderate and appropriate in his terms than Lord Palmerston was.

Sir CHARLES RUSSELL.—Lord Palmerston was a man who used strong language, or at all events had the credit of doing so.

The PRESIDENT.—Well I suppose if you say so there was no harm in my saying what I did.

Adjourned till to-morrow at 11.30.

TWENTY-EIGHTH DAY, MAY 26TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, I wish to recall to the minds of the members of the Tribunal the subject we are discussing, and the position that it holds in the main argument in the case. I have dealt, as the Tribunal will remember, with the alleged claims of property in the seals and of an alleged invasion of right as regards the industry; and I have endeavoured to establish, and I hope have established, that there was neither property in the seals, nor any right to the industry invaded by pelagic sealing; and, therefore, I have stated that if there were no rights which called for or authorized protection or justified protection, it was not necessary to discuss, or essential to discuss, what would have been the rights of protection had property in fact existed, or had the rights of the industry in fact been invaded. But it is, nevertheless, not without importance to follow my learned friend's line of argument and illustrations as set out in this Argument, in order to see whether it affects in any way the truth of the proposition that the pacific rights of nations, that is to say the rights of nations in time of peace, against ships of a friendly Power on the high seas, are of an exceedingly restricted and narrow kind. We must assume that the industry exists, and that my learned friends have produced in argument the cases which they believe are most in point to establish their view of what the rights of self-preservation and of defence will justify nations in resorting to in time of peace. Therefore, it cannot be said, I think, that the time is wasted in discussing, as I must do, these cases.

I had referred to the case of the "Caroline"; I have only further to say, in relation to it, that from the standpoint from which I am asking you to consider the question, it is entirely unimportant whether you are to take the ground upon which Lord Palmerston, in the early part of the correspondence, based the action of the British Government, namely that it was an act done to put down a body of marauders who were contemplating offensive operations on British territory, or whether you are to adopt, as Lord Ashburton did, the formula put before him, or suggested to him, by Mr. Webster when he used that emphatic language pointing out that the strict emergency of the case could alone justify any exceptional measures.

I conclude my reference to the subject by citing the fact that Lord Ashburton finally made a kind of apologetic statement, and that is rather significant in regard to the matter, showing that he regarded it on the border line. Chancellor Kent in his "International Law" referring to the matter (at page 148 of the 2nd edition by Mr. Abdy) says this:

Her Majesty's Government having stated their regret at the violation of territory complained of, and at the omission, or neglect, to explain and apologize for that violation at the time of its occurrence.

1090 And so forth.

The matter was then allowed to drop.

Mr. PHELPS.—Were you reading the language of Chancellor Kent or Mr. Abdy the editor?

Sir CHARLES RUSSELL.—This is the original text. It is noticeable also that Lord Campbell who filled very high judicial offices in England—at one time he was Lord Chief Justice after having been Attorney General, and he was afterwards Lord Chancellor—that he, in reference to the case, (and this is noted at page 187 of my learned friend's Argument) refers to the affair of the "Caroline" as being a difficult matter, and he then goes on to say:

Even Lord Grey told me he thought we were quite wrong in what we had done.

And he goes on to say, assuming the facts to be as he states, that he, Lord Campbell, thinks it was justifiable. I read this for this purpose. It makes very little for my learned friend's contention to cite isolated cases in which things have been done by particular Governments and in particular circumstances, and to show that those Governments sought to justify what they had done under international law: the fact that they sought to justify it under international law would not prove that it was international law.

A large number of cases of that kind, acquiesced in by different Governments, might go, according to the extent and the number of instances and the period of time over which they extended—the general acquiescence and consent would go, according to the volume and importance of the cases, a certain way to prove what was international law: but isolated instances would not.

The next case my learned friend refers to is at page 153 of the printed book. That is the case of the fort on the Appalachicola river. This was a case, shortly stated, of putting down a band of marauders. I should have said that in every one of these cases we have tried to get at the original documents; if it be a United States case, at the United States documents; if it be a British case, at the British documents. This was a United States case, and I will refer for a moment to what is said in the argument about it. I will first read the account in the United States Argument.

In 1815, under orders of Mr. Monroe, measures were taken for the destruction of a fort held by outlaws of all kinds on the Appalachicola River, then within Spanish territory, from which parties had gone forth to pillage within the United States. The governor of Pensacola had been called upon to repress the evil and punish the marauders, but he refused; and on his refusal the Spanish territory was entered and the fort attacked and destroyed, on the ground of necessity.

Now I take the original United States documents; and I refer first to the communication from the acting Secretary of War, George Graham, to General Gaines. I am reading from page 1140 of the United States Official Papers:

The papers have been submitted to the President, and I am instructed by him to inform you that he approves of the movement of the troops from Fort Montgomery to Fort Scott. The appearance of this additional force, he flatters himself, will at least have the effect of restraining the Seminoles,

1091 those are the Seminole Indians, with whom the United States was at that time at war,

from committing farther depredations, and perhaps of inducing them to make reparation for the murders which they have committed. Should they, however, persevere in their refusal to make such reparation, it is the wish of the President that you should not on that account pass the line and make an attack upon them within the limits of Florida until you shall have received further instructions from this Department.

And, on page 1141, there is a further communication to the same gentleman commanding the United States forces:

Should the Indians, however, assemble in force on the Spanish side of the line and persevere in committing hostilities within the limits of the United States, you

will in that event exercise a sound discretion as to the propriety of crossing the line for the purpose of attacking them and breaking up their towns.

The proclamation of General Jackson on the 29th of May, 1818, completes all I need trouble you with in this connection. This is the Proclamation:

Major-General Andrew Jackson has found it necessary to take possession of Pensacola.

He has not been prompted to this measure from a wish to extend the territorial limits of the United States, or from any unfriendly feeling on the part of the American Republic to the Spanish Government. The Seminole Indians inhabiting the territories of Spain have, for more than two years past, visited our frontier settlements with all the horrors of savage massacre. Helpless women have been butchered, and the cradle stained with the blood of innocents. These atrocities, it was expected, would have early attracted the attention of the Spanish Government and, faithful to existing Treaties, speedy measures adopted for their suppression. But so far from being able to control, the Spanish authorities were often compelled, from policy or necessity, to issue munitions of war to these savages; thus enabling, if not exciting, them to raise the tomahawk against us.

That is his justification. I need not point out that that is a state of war.

Mr. PHELPS.—You do not mean that that is the transaction that is referred to in my Argument; that is three years later—the occupation of Pensacola for a different reason.

Sir CHARLES RUSSELL.—Yes, this is the occupation of Pensacola that I have been reading.

Mr. PHELPS.—But it is some years after. I do not object to your reading it, of course.

Sir CHARLES RUSSELL.—I assure you it is part of the story and the same transaction. It begins on October 17th, or at least the earliest communication I have read is then, and the proclamation of General Jackson, after the attack, is on the 29th May, 1818. The mistake that my learned friend has fallen into, with great deference is, that it is not 1815 but 1817. I think that my learned friend will find we are right in that.

1092 We have had a careful search made through the whole of the American papers of the time, and that is the only one which we can identify as being referred to in this Argument. But whatever the time may be, my learned friend, I think, will not deny that the statement in his Argument that it was “held by outlaws of all kinds on the Appalachicola River, then within Spanish territory, from which parties had gone forth to pillage within the United States” relates to the Seminole Indians to whom I have referred. About that there can be no doubt.

Now the next case which my learned friend refers to is at the bottom of the same page:

A similar case was that of Greytown. It was a port on the Mosquito coast, in which some United States citizens resided. These citizens, and others interested with them in business, were subjected to gross indignities and injuries by the local authorities, who were British, but who professed to act from the authority of the king or chief of the Mosquito Islands. The parties then appealed to the commander of the United States sloop of war *Cyane*, then lying near the port, for protection. To punish the authorities for their action he bombarded the town. For this act he was denounced by the British residents, who claimed that the British Government had a protectorate over that region. His action was sustained by the Government of the United States, the ground being the necessity of punishing in this way the wrong to the citizens of the United States, and preventing its continuance.

Now, here again, we have the Official Papers. The United States President, at that time Mr. Franklin Pierce, in his Message to Congress explains this occurrence. He says, after referring to the position of

American interests in Central America, and to the necessity for establishing inter-oceanic communication across the Isthmus—

A Company was organized under the authority of the State of Nicaragua, but composed for the most part of citizens of the United States, for the purpose of opening such a transit way by the River San Juan and Lake Nicaragua, which soon became an eligible and much-used route in the transportation of our citizens and their property between the Atlantic and Pacific.

Meanwhile, and in anticipation of the completion and importance of this transit-way, a number of adventurers had taken possession of the old Spanish Port at the mouth of the River San Juan in open defiance of the State or States of Central America, which, upon their becoming independent, had rightfully succeeded to the local sovereignty and jurisdiction of Spain. These adventurers undertook to change the name of the place from San Juan del Norte to Greytown; and though at first pretending to act as the subjects of the fictitious Sovereign of the Mosquito Indians, they subsequently repudiated the control of any Power whatever, assumed to adopt a distinct political organization, and declared themselves an independent Sovereign State.

Then he goes on:

At a later period, they organized a strong force for the purpose of demolishing the establishment at *Punta Arenas*; but this mischievous design was defeated by the interposition of one of our Ships of War at that time in the Harbour of San-Juan. Subsequently to this, in May last, a body of men from Greytown crossed over to

Punta Arenas, arrogating authority to arrest on the charge of murder a 1093 captain of one of the steamboats of the Transit Company. Being well aware that the claim to exercise jurisdiction there would be resisted then, as it had been on previous occasions, they went prepared to assert it by force of arms. Our Minister to Central America happened to be present on that occasion.

And he proceeds to state how he was threatened upon American territory; and thereupon they proceeded to bombard the town in which these people took refuge; and he says finally:

This pretended community, a heterogeneous assemblage, gathered from various countries and composed for the most part of blacks and persons of mixed blood, had previously given other indications of mischievous and dangerous propensities. Early in the same month, property was clandestinely abstracted from the depot of the Transit Company and taken to Greytown. The plunderers obtained shelter there, and their pursuers were driven back by its people, who not only protected the wrongdoers and shared the plunder but treated with rudeness and violence those who sought to recover their property. Such, in substance are the facts.

And so on.

And, finally, he describes it as a place which they were justified in bombarding,

it was in fact a marauding establishment too dangerous to be disregarded, and too guilty to pass unpunished, and yet incapable of being treated in any other way than as a piratical resort of outlaws, or a camp of savages, depredating on emigrant trains or caravans and the frontier settlements of civilized States.

The bearing of their illustration upon the question of seizing and confiscating a ship because it caught or was about to catch a seal, half a dozen seals or a dozen seals,—I suppose the number makes no difference—seems somewhat remote.

The PRESIDENT.—Have you official statements of the view of the British Government on that business?

Sir CHARLES RUSSELL.—I am not sure.

The PRESIDENT.—It was invoked as a protector; and it would be interesting to know what was the view of the British Government as to that.

Sir CHARLES RUSSELL.—I will see if I have the document. We have a despatch which I have not read, and I will go through it.

The PRESIDENT.—It may be of interest in their view of the question.

Sir CHARLES RUSSELL.—Yes. I should think it exceedingly likely

that they thought that the United States Government had gone a great deal too far; but I will read the despatch in a moment.

Now on page 154 you will find a reference, which will be easily appreciated, to the Orders in Council of 1809. This is touching on a very sore subject, though its soreness has been somewhat mitigated by time. One great Power was at war, practically, with a combination of other European Powers, and the Emperor Napoleon had prohibited British commerce with certain neutral ports; and, as a retaliatory measure of war, British Orders in Council were issued exactly in the same way as had been done by Napoleon: there was a similar interdiction: it was act against act: the Powers were involved in a 1094 struggle for mastery, each doing what it could to minimise the enemy's powers of resistance and attack. What light it throws on this matter I confess I do not know, but I do observe that when the Orders in Council were brought before prize courts for adjudication, the exceptional character of these Orders in Council was recognized; for I see at page 155 of the Argument of the United States my friend cites, with great fairness, from Lord Stowell, then Sir William Scott:

Again, speaking of those retaliatory measures as necessary for the defense of commerce, he says in another case:

In that character they have been justly, in my apprehension, deemed reconcilable with those rules of natural justice by which the international communication of independent States is usually governed.

And immediately before that he says:

When the State, in consequence of gross outrages upon the laws of nations committed by its adversary, was compelled by a necessity which it laments, to resort to measures which it otherwise condemns, it pledged itself to the revocation of those measures as soon as the necessity ceases.

And this again was war. They were engaged in what may be described as a death struggle.

Now, Mr. President, I come to a reference on page 155 which is of quite a different character, introduced here strangely out of its order as it seems to me. It is a statement, and, as we conceive, an entirely misleading statement as to the views asserted by Great Britain in relation to rights of fishery off the coast of Newfoundland and Nova Scotia. At best it would be an *argumentum ad hominem*; but it is so seriously in error in point of fact that I think it is well that the matter should be fully, clearly, and chronologically put before this Tribunal. I say so all the more because, in relation to this matter of the Newfoundland fishery, Mr. Phelps on page 157 of his argument says:

If the countries now contending were right then, that is to say, in reference to the fishery claims on the east coast of America, and on the coasts of Newfoundland and Nova Scotia.

in the views entertained by both governments and by all who were concerned for them, in cabinets, diplomacy, Congress, and Parliament, and in the claims then made, conceded and acted upon ever since, the precedent thus established must be decisive between them in the present case. There cannot be one international law for the Atlantic and another for the Pacific. If the seals may be treated, like the fish, as only *feræ nature*, and not property, if the maintenance of the herd in the Pribilof Islands is only a fishery, how then can the case be distinguished from that of the fisheries of Nova Scotia and Newfoundland? Why would it not be, until conceded away by treaty or thrown open to the world by consent, a proprietary right belonging to the territory to which it appertains, and which the Government has a right to defend?

I have to say, in the first instance, that I accept the challenge 1095 which is covered by that statement. We do not insist, and I shall prove we have not insisted, on a different law, or upon

different principles of law in relation to the subject-matter here referred to, from those that we are insisting upon in this controversy to-day; and that we should be quite content to have the law which applies and exists, and the rights that are claimed in respect of the fisheries of Newfoundland and Nova Scotia, applied to the controversy which we are here engaged upon.

Now, I would like to remind the Tribunal shortly (for I must be pardoned for dealing with this a little exhaustively), how this matter arises. When America (that which is now the United States, or part of it), was a Colony of Great Britain, Great Britain had entered into certain Treaties with Spain and with France, under which Treaties unquestionably there were conceded to Great Britain fishing rights over a considerable extent of the sea beyond the 3-mile territorial limit. It is not *ad rem* to go into the history of those Treaties. It is enough to say that those extended rights as between those Powers, parties to the Treaties, were given by the Treaties, in other words, by Convention and Agreement of the parties. In 1776 the American Independence was declared; and, following that Declaration of Independence and after the War of Independence, the Treaty of 1783 was entered into between Great Britain and the new independent Sovereign Power, now the United States. I first call your attention to what that Treaty was.

I wish to remind you, before I refer to it, that my friend Mr. Carter, no doubt with Mr. Phelps' Argument before him, asserted a contention based upon the statements contained in the Argument. On the 21st of April, on pages 492 and 493 of the printed report will be found my friend Mr. Carter's argument.

Now I have instanced the Pribilof Islands. Take the fisheries on the banks of Newfoundland, which are also another illustration of that. I will not say that they are a full and perfect illustration, but they will answer for the purpose of my argument. Great Britain asserted, at an early period, an exclusive right to the fisheries on the Newfoundland banks because she had created a national industry which was engaged in, and sustained, by her subjects resorting to those banks for the purpose of gathering fish. And she claimed that the carrying on of that industry was a property of hers. Upon the United States gaining its independence, the United States asserted a right to participate in those industries. They said, "We were a part of Great Britain originally, and, indeed, were the people who went there and created this industry; but, having gained our independence, we have not lost our right to carry on this fishery". That right was denied, and an attempt to exclude them was still maintained, it being admitted on both sides that it was an industry to which each nation had a peculiar claim, Great Britain insisting it was her own and that the United States had no right to it, and the United States going on the ground that it was a national industry, and that they had a right to participate in it, because they were one of the original creators of it. There are numerous other cases of laws passed by Great Britain for the purpose of protecting the Herring Fisheries, and so on.

THE PRESIDENT.—Are those fisheries exclusive of other nations than American and English?

MR. CARTER.—I do not think they are practically asserted now as being exclusive of other nations; but they were originally, and there were contests with other nations for the possession. They tend to illustrate my argument only; in the particular case they were not defensible, but they illustrate the view. The correspondence is printed in our Argument which fully supports it.

THE PRESIDENT.—But if the exclusive right was not maintained?

MR. CARTER.—It was maintained for a while; but I do not think it has been maintained down to now.

Thereupon, my learned friend, Mr. Phelps, interposes and expresses his dissent from that, and intimated, as I gathered from him (he will correct me if I am wrong) that he meant to say in some sense or other that assertion was doubted.

MR. PHELPS.—What I said was, our fishery rights now are derived under the Treaty of 1779.

Sir CHARLES RUSSELL.—That goes without saying; that is not the point.

Mr. PHELPS.—Not as a right; but as under the Treaty with Great Britain.

Sir CHARLES RUSSELL.—There are certain fishing rights, undoubtedly, that the United States have under the Treaty with Great Britain. That is true; I am going to show what they are, and that they are in territorial waters; and also that outside territorial waters the United States has those rights not under Treaty at all, but as a recognized part of the general right of mankind, and I will justify this by reference to the Treaty which is before me. I understand my friend Mr. Phelps did not mean to intimate that he was differing from Mr. Carter and that there was, now, asserted any right inconsistent with the general right of all mankind to fish in extra-territorial waters.

Mr. PHELPS.—What I meant to say was that the question having been decided by Treaty between Great Britain and the United States, this right of fishing in the open sea had never come up as an actual question since, that I know of.

There has been great discussion about territorial rights. The case is cited for the purpose of showing that it was claimed and conceded on both sides that the fishery to a great distance out into the sea belonged to Great Britain as an appurtenance to its territory.

Sir CHARLES RUSSELL.—That is a little different from the way in which it is put in the case; nor is it the historical fact. I will show what the exact case is in a moment, but my friend will see that in page 156 of his Argument he puts it differently.

He says at the bottom of page 156:

Upon this view entertained by both nations and by all the eminent diplomatists and statesmen who participated in making or discussing these treaties, the contention turned upon the true construction of the grant of fishing rights contained in the treaty of 1783. It was claimed by the British Government that this was a pure grant of rights belonging exclusively to Great Britain, and to which the Americans could have no claim, except so far as they were conferred by treaty.

I shall show that that is not so. Then my learned friend goes on:

It was contended on the other side, that the Americans, being British subjects 1097 up to the time of the Revolutionary War, entitled and accustomed as such to share in these fisheries, the acquisition of which from France had been largely due to their valour and exertions, their right to participate in them was not lost by the Revolution, nor by the change of government which it brought about, when consummated by the treaty of 1783. And that the provisions of that treaty on the subject were to be construed, not as a grant of a new right, but as a recognition of the American title still to participate in a property that before the war was common to both countries. Which side of this contention was right it is quite foreign to the present purpose to consider. It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815, to conceive, that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea. If that proposition could have been maintained, the right of the Americans would have been plain and clear.

Now that is an entire misconception, as I conceive. In the first instance, let me point out that so far as any special rights were conceded by France—I have told the Tribunal there were such—they were conceded by Treaty. So as regards Spain; but those Treaties only bound Spain and only bound France, and would not have interfered one iota with the right of any other nation over the area affected by them. It bound them and bound them only. But here is the Treaty of 1783 to speak for itself, and you will see that it recognizes the right

to fish in the non-territorial waters; but that it concedes to the United States certain rights in the territorial waters, and that the only dispute that has existed between the United States and the Government of the Queen has been, since those Treaties, as to the interpretation of portions of it which relate to bays and so forth—how they were to be construed and how their limits were to be defined. That arises under a Treaty of 1818, to which I shall come presently.

Mr. PHELPS.—I quite agree Sir Charles with your construction of the Treaty of 1783. What I cite is the opinions given on both sides at the time they were negotiating.

Sir CHARLES RUSSELL.—I do not understand really how my friend, consistently with what I have just read, can say that he agrees with it, unless he means to retract that argument as it appears in the printed Argument.

In order that what I am now about to read may be intelligible to the Tribunal—I am sorry to have to go into it in detail, but I wish to clear it up and make it quite apparent what the true position of things is,—I may say that after that Treaty of 1783, there was, as the Tribunal will recollect, at a later period, in 1812, a war with the United States, that war arising out of an attempt to take British sailors from American ships, which was resisted by the United States; the war ended by the Treaty of 1818, known as the Treaty of Ghent. I am going to refer now to the Treaty of 1783, after the Declaration of American Independence; article 3 is as follows:

1098

ARTICLE III.

It is agreed that the people of the United States shall continue to enjoy unmolested the right:

1. To take fish of every kind on the Grand Bank and all the other banks of Newfoundland.

2. Also in the Gulf of St. Lawrence.

3. And at all other places, in the sea, where the inhabitants of both countries used at any time heretofore to fish. And also, that the inhabitants of the United States shall have liberty:

You note the difference between the two.

1. To take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use (but not to dry or cure the same on that island).

In other words, the right is acknowledged to take the fish outside non-territorial waters. *Inside* the territorial waters the liberty is given, under this Treaty, to take fish of every kind and to use them as British fishermen may use them, except that they are not to have the right of landing on the island for the purpose of curing.

Then it says:

2. And also on the coasts, bays and creeks of all other of His Britannic Majesty's dominions in America.

3. And that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbours, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them, shall be settled, it shall not be lawful for the said fishermen to dry and cure fish at such settlement without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground.

Now how was this Treaty regarded by the United States people themselves? I refer here again, as I have always tried to do all through, to official documents as to which there can be no doubt, and for this purpose I refer to the Report of the Committee of Foreign Affairs of the

House of Representatives, of January 18th 1837; and referring to this Treaty, they say:

It will be observed that this Article, in continuing, confirming, and establishing the thirteen States and their inhabitants in the taking of fish on the banks, in the gulf, and in the sea, uses the word "rights"; but uses the word "liberty" in confirming to American fishermen the taking of fish on the coasts, bays, and creeks of every part of the British dominions in America. The word "rights" is thus applied to fishing in the open sea, which by public law is common to all nations, and was intended to affirm that Great Britain did not claim to hold by Treaty engagements, or in any other manner, any exclusive right of fishing therein. The word "liberty" is thus applied to taking fish, to drying and curing fish, on what was, anterior to the Treaty, within the jurisdiction, or territorial waters, of Great Britain, but an exclusive right of taking fish therein was not hers. "Liberty", as thus used, implies a freedom from restraint or interference in fishing along the British coasts.

The distinction you see, therefore, is plainly and clearly drawn
1099 by the American representatives themselves. Again, at a later page, page 38 of the same Report they say:

England contended that the word "right" in the Treaty of 1783 was used as applicable to what the United States were to enjoy in virtue of a recognized independence, and the word "liberty" to what they were to enjoy as concessions strictly dependent on the existence of the Treaty in full force, which concessions fell, as England asserted, on the declaration of war by the United States, and would not be revived excepting for an equivalent.

Therefore, so far away as 1812 the contest between the United States and Great Britain took this form. Great Britain said: so far as the fishing in non-territorial waters is concerned, you have the same rights at British subjects have, and as all the world has; but as regards these special liberties which were given to you under the Treaty of 1783, which enabled you to come into territorial waters, and into the creeks and places where you would not otherwise have a right—as regards those which are given to you by the Treaty, your title to which is by the Treaty; those rights are annulled by the fact of war, which has, by international law, put an end to the Treaty.

I might almost leave the matter there, but it is perhaps better that I should go through it. I have read what the Representative Committee of the United States said in 1787. In 1788 the Senate Committee on Foreign Relations, referring to the Treaty of 1783, reported in these words. My learned friends probably have the reference to the document. It is N^o 109 of the fifth Congress, first session, page 2, Miscellaneous Documents. They there report as to the open sea fishing. It was merely a recognition of a right common to all nations, and as to the fishing on the coasts, bays and creeks within the municipal dominion of His Majesty. It was an averment that these rights, theretofore existing in all British subjects, should have belonged as of right to those British subjects who by the rebellion had become the citizens of an independent nation. You observe therefore the recognition of the view which I am now putting before you. I am reading these out of order of date, because they refer back to the Treaty of 1783. There was the war of 1812, the Treaty of Peace of 1815, and the Fishery Treaty of 1818. The document is to be found in the 3rd volume of Wharton's Digest of International Law, at page 304. In 1814 Commissioners from Great Britain and the United States met at Ghent for the purpose of opening negotiations for peace. What I am about to read is an extract from the instructions given to the British Commissioners on the subject of the fisheries that will present the view on both sides of the question. These are of the 28th July, 1814, State Papers, volume 1, page 1543:

But the point upon which you must be quite explicit from the outset of the negotiations is the construction of the Treaty of 1783 with relation to the Fisheries. You

will observe that the 3rd Article of that Treaty consists of two distinct branches.

The first which relates to the open sea fisheries we consider of permanent obligation, being a recognition of the general right which all nations have to frequent and take fish on the high seas. The latter branch is, on the contrary, considered as a mere conventional arrangement between the two States, and as such to have been annulled by the war. You will see it is an entirely erroneous view to suggest that at any time and in any part of this discussion, Great Britain was asserting that the open sea was not open to all mankind as between the United States and herself, or that she was conferring upon the United States a privilege which she did not have as a general right.

The matter is important, but I am afraid I am wearying the Tribunal by reading too much.

The PRESIDENT.—Well, it is a weighty comparison and of great interest.

SIR CHARLES RUSSELL.—I read now from the communication from Lord Bathurst, the then Foreign Secretary of Great Britain, 30th October, 1815. I am reading from the volume of the American State Papers, Class 1, Foreign Relations, vol. 4, page 355. Mr. John Quincy Adams was then Secretary of State for the United States, and Lord Bathurst is addressing him on the position of affairs. The date of the title page is 1834.

Mr. PHELPS.—We have the book, I understand.

SIR CHARLES RUSSELL.—No doubt.

But the rights acknowledged by the Treaty of 1783 are not only distinguishable from the liberties conceded by the same Treaty, in the foundation upon which they stand, but they are carefully distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American Minister to the wording of the first and third Articles, to which he has often referred for the foundation of his arguments. In the first Article Great Britain acknowledges an independence already expressly recognized by the Powers of Europe and by herself in her consent to enter into provisional Articles of November 1782. In the third Article—

the one I read—

Great Britain acknowledges the *right*—

it is printed in italics—

of the United States to take fish on the banks of Newfoundland and other places from which Great Britain has no right to exclude an independent nation.

These banks are I think something like 100 miles from the coast of Newfoundland, but they were to have liberty to cure and dry fish in certain unsettled places; and he then goes on to another branch of the subject.

I find also that the Counsel for the United States in the case of the Halifax Commission 1877 refers to these Treaties, and says:

The Treaties of 1818, 1854 and 1871 related solely to fishing within the three miles. The Treaty of 1783 recognizes the right of American fishermen to take on the banks on the high seas, a right which had always belonged to American fishermen, never ceded to them by any Treaty, but which they held by the right of common humanity.

1101 Now, on the same occasion, Mr. Dwight Foster, who was then the Agent of the United States, treats the matter thus. I am reading here from volume II, page 591, of the report of that Fishery Commission.

He says:

Early in the diplomatic history of this case, we find that the Treaty of Paris in 1763 excluded French fishermen three leagues from the coast belonging to Great Britain in the Gulf of St. Lawrence, and fifteen leagues from the island of Cape Breton. We find that the treaty with Spain in the same year contained a relinquishment of all Spanish fishing rights in the neighbourhood of Newfoundland. The Crown of Spain expressly desisted from all pretensions to the right of fishing in the

neighbourhood of Newfoundland. Those are the two treaties of 1763, the Treaty of Paris with France and the Treaty with Spain. Obviously, at that time, Great Britain claimed for herself exclusive sovereignty over the whole Gulf of St. Lawrence and over a large part of the adjacent seas.

I have already pointed out that she claimed that under a Treaty, whether rightly or wrongly:

By the Treaty of Versailles in 1783, substantially the same provisions of exclusion were made with reference to the French fishermen. Now, in that broad claim of jurisdiction over the adjacent seas, in the right asserted and maintained to have British subjects fish there exclusively, the fishermen of New England, as British subjects, shared. Undoubtedly the pretensions that were yielded to by those Treaties have long since disappeared. Nobody believes now that Great Britain has any exclusive jurisdiction over the Gulf of St. Lawrence or the Banks of Newfoundland, but at the time when the United States asserted their independence and when the Treaty was formed between the United States and Great Britain, such were the claims of England, and those claims had been acquiesced in by France and by Spain. That explains the reason why it was that the elder Adams said he would rather cut off his right hand than give up the fisheries at the time the Treaty was formed, in 1783, and that explains the reason why when his son John Quincy Adams was one of the Commissioners who negotiated the Treaty of Ghent, at the end of the war of 1812, he insisted so strenuously that nothing should be done to give away the rights of the citizens of the United States in these ocean fisheries.

Now I have a further reference to make to the Committee of Foreign Relations of the United States Senate, coming down a little later. This refers to the Treaty of 1818, and I have already given the reference where that Treaty is to be found. This is the third volume of Wharton's International Law, Section 304. It recites that,

Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof, to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed between the High Contracting Parties that the inhabitants of the said United States *shall have forever, in common with the subjects of His Britannic Majesty*, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbors, and creeks, from Mount Joly on the southern coast of Labrador, to and through the straits of Belleisle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson Bay Company: and that the 1102 American fishermen shall also have liberty for ever to dry and cure fish in any of the unsettled bays, harbors, and creeks of the southern part of the coast of Newfoundland, above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included within the above mentioned limits: provided, however, that the American fishermen shall be admitted to enter such bays or harbours for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

This is solely conversant with the question of facilities and advantages in territorial waters, and has no reference to the question of open sea fishing.

Now in reference to that Treaty of 1818, the Committee of Foreign Relations of the United States Senate (a reference which is to be found in the United States Papers, No. 109), says:

Thus it will be seen that the matter to be dealt with was a claim in favour of the inhabitants of the United States to do certain things within the territorial dominion of His Majesty, and not a matter touching the right of the inhabitants of the United

Stated to crnize, fish, or do any other thing in waters that by the public law of nations did not belong to the territorial jurisdiction of His Majesty.

Then follows a discussion as to the meaning of the word "bays". I do not think I need read that. As a matter of fact, for years upon the banks of Newfoundland, and without any question, outside the territorial limit, the fishermen of France, of the United States, of Canada, and of Great Britain are to be found pursuing their calling.

Now I really must ask the Tribunal to allow me to read again this extraordinary statement beginning at page 156 of the United States Argument, in view of what I have now read to you.

It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815, to conceive that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea. If that proposition could have been maintained, the right of the Americans would have been plain and clear.

Now, I have demonstrated, I submit, that the Treaty of 1783 recognized the right in the open sea, and that it granted concurrently with the recognition of that right in the open sea certain rights within territorial waters in British territory. It never was suggested that the former right was affected or touched by the question of the war.

1103 It was not a Treaty right; it was a natural right. It was suggested that the war did put an end to the special privileges that were granted by virtue of the Treaty; but the special privileges in non-territorial waters alone were put an end to by the war.

The PRESIDENT.—Might not there be a difference in respect of time? The historical *exposé* of Mr. Dwight Foster which you have just read seems to me to be practically correct; that Great Britain may have asserted in previous times the doctrine of *mare apertum* in opposition to *mare clausum* which was not quite acknowledged,—they asserted an exclusive right over part of those seas and fisheries which by progress of time and progress of ideas were considered abandoned, though they did not want to abandon it in fact. Towards the end of the eighteenth century it was not abandoned; but, perhaps, at the time of the Treaty of Utrecht it was not quite clear.

Sir CHARLES RUSSELL.—I began by telling you, Sir, there were such claims made by Great Britain, and she professed to base those claims on Treaty rights conceded by France and by Spain. That is so. I did not stop to consider whether she would be justified under those Treaties in making that pretension at all. I have stated what was asserted, what was put forward. There were certain Treaty rights, but that is ancient history.

The PRESIDENT.—The Treaty rights were limited to about 100 miles.

Sir CHARLES RUSSELL.—As I have already pointed out, and you were good enough to assent to my statement I think, even if such powerful nations as France and Spain had conceded to Great Britain rights over an area of the sea, they would not have the power of giving to Great Britain that right as against the people of any other nation in the world on the high seas. Of course, when the United States became an independent Power, one of the family of nations, it would have, in virtue of its sovereignty, the right to claim the free use of the high seas; but the point is this: that, from 1783 down through the whole of this negotiation, Great Britain has never asserted, and the United

States has never alleged that she was asserting, that the right of fishery in the non-territorial waters was not a right that belonged to every independent nation. That is the point.

Senator MORGAN.—Do you mean she has abandoned it since 1783?

Sir CHARLES RUSSELL.—I do not know that that would be appropriate language. So far as I have read the history of it, there was no assertion of it: certainly not since 1783.

Senator MORGAN.—There was some mention of it.

Sir CHARLES RUSSELL.—I have read all the documents, and you have seen what mention there is of it. I have read that letter of Lord Bathurst, and I suppose I must read it again. That is going far enough back. Did you mean the United States abandoned it?

Senator MORGAN.—No; Great Britain.

Sir CHARLES RUSSELL.—Then I must read this letter of 1815.
1104 First of all, the Treaty of 1783 shows it, as it seems to me; but here is the official statement.

The PRESIDENT.—I think there is no doubt as to that time. What I hint at is that perhaps in former times, say in the seventeenth century towards the middle or end, — perhaps at that time England may have asserted rights over the sea which it did not maintain in the course of the eighteenth century, and certainly not in the course of the nineteenth. It is rather perhaps a progress of theory than of right.

Sir CHARLES RUSSELL.—I recognize an amiable effort to give an explanation of this paragraph, but I beg respectfully to say that this paragraph, is not capable of it, because the paragraph begins with 1783. It is not referring to anything antecedent to 1783. If it had, I should have begun earlier and examined it earlier, but it begins with 1783 and it begins with the erroneous statement that the right of fishing in the open sea was conceded by that Treaty to, or created by that Treaty in, the United States. That is the fallacy. Not only does it begin in 1783, but it absolutely goes on to say that the assertion was further made in 1815, because at the top of page 157, he says “it never occurred to any of these diplomatists in 1783 or 1815 to conceive that these fisheries” and so on, and yet in 1815 Lord Bathurst’s letter to the United States Minister (which I must read again) says:

But the rights acknowledged by the Treaty of 1783 are not only distinguishable from the liberties conceded by the same Treaty and the foundation upon which they stand, but they are chiefly distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American Minister to the wording of the first and third Articles to which he has often referred for the foundation of his argument. In the first article Great Britain acknowledges an independence already expressly recognized by the Powers of Europe and by herself in her consent to enter into provisional articles in November 1782.

In the third article Great Britain acknowledges the *right* of the United States to take fish on the banks of Newfoundland and other places from which Great Britain has no right to exclude an independent nation, but they are to have the *liberty* to cure and dry them at certain unsettled places within his Majesty’s territory.

I think, even if that right was asserted at some earlier period, Senator Morgan will see that that is a clear abandonment.

I leave this branch of the subject by expressing my agreement with the opinion stated on page 157 of the United States Argument, that there can not be one international law for the Atlantic, and one for the Pacific, and I agree the law is the same for each—that outside the territorial limits there is an unrestricted right and liberty for all mankind to take what it can from the bosom of the sea.

The next subject that is dealt with as to self-preservation in time of peace is the law of Quarantine, which is referred to on page 159:

“Upon this principle also”, he says, “was based the British act putting restrictions upon the passage of a vessel on the high sea, approaching Great Britain from a port where infectious disease was raging. Quarantine and health regulations are usually enforced within the jurisdictional limit, and so confined, are in ordinary cases sufficient for their purpose. But when in a particular case they are 1105 insufficient, and the necessity of protecting the country from incursion of dangerous disease requires it, no right of freedom of the sea stands in the way of putting proper restrictions on the approach of vessels, at any distance from the shore that may be found requisite.

I need not say that this is a subject as to which there would be a ready concurrence of all civilized nations to prevent the spread of dis-

The Quarantine ease, and any measures that required to be adopted are analogy.

not measures that would be likely to be called in question by any nation, or as to which it would be necessary to resort to the enforcement of any international principle at all. My learned friend has misconceived the effect and character of these laws. The British statute is the 6th of George the Fourth, chapter 78, passed in 1825, which I have before me, and I will furnish my learned friend with it, if he desires. For brevity, I will read a carefully prepared and correct summary of that statute. First of all, the Act deals with vessels coming to the shores of a particular nation in the same way as the Hovering Acts. It deals therefore solely with vessels coming to British ports. It does not profess to deal in any other way with vessels beyond the three-mile limit coming from infected places. The following only are subject to quarantine:—first, vessels coming to the United Kingdom from infected places; secondly, boats receiving persons and goods from vessels which have come from or touched at infected places; and, thirdly, persons or goods on board of such vessels coming from or having touched at infected places, or on board such receiving boats, in order to meet the case of trans-shipment from infected vessels.

What are the enacting provisions in relation to those classes of vessels or goods coming from vessels or boats which have come from infected places? Vessels liable to quarantine, that is, vessels or receiving boats coming to United Kingdom ports, because, of course, the quarantine is to be performed with reference to the port to which it is destined and in the port of the territory,—vessels liable to quarantine are to hoist quarantine signals on meeting any other vessel at sea or when they are within two leagues of the United Kingdom coast. Signals are to be continued so long as the meeting vessel continues in sight, or the vessel itself remains within two leagues of the coast of the United Kingdom, and until the vessel shall have arrived in a United Kingdom port; and, if it fails to do that, there is a penalty of £100 fixed for it; and that applies to all ships. How is this penalty to be recovered? It never can touch any vessel that does not come to the port, because, under section 35, the only remedy for the recovery of the penalty is by proceeding in a local Court against the Captain of the vessel; and, therefore, although it speaks of the penalty being incurred if the quarantine signal is not hoisted when it approaches within two leagues, it cannot be operative until the ship herself, with the Captain on board of her, has come within the territorial jurisdiction of the port.

Further, vessels having infectious disease on board are required 1106 to hoist a signal when they meet any other vessel at sea or are within two leagues of the United Kingdom coast; and the signal is to remain hoisted so long as the meeting vessel remains in sight, or the vessel itself remains within two leagues of the United Kingdom

coast while so in sight or within such distance, until it shall have arrived at the port where it has to perform quarantine. This is the whole of the Statute, I think.

The PRESIDENT.—I suppose that Statute is in application now,—is it still in vigour?

Sir CHARLES RUSSELL.—We have made the enquiry through the Privy Council Office as to whether there was any record of its ever having been put in force against foreign vessels, and this is the answer we got:—Section 8 of the Act enjoined certain formalities on vessels liable to quarantine as soon as they passed within two leagues of the British coast; but the Act provides no machinery for enforcing these Regulations on vessels that do not come within the ordinary limits, or communicate with the shore, and the Privy Council are aware of no instance of any attempt to interfere with any vessel simply passing outside the 3-mile limit, and, in fact, such interference would have been, as far as they understand, both unnecessary and illegal.

Mr. PHELPS.—Is the Act repealed?

Sir CHARLES RUSSELL.—No. It is, therefore, not a Statute which enforces any penalty *in rem* against the ship at all; it is one which simply imposes a penalty against the Captain, which is not enforceable till he comes within the jurisdiction of the Court, and comes with the ship into the port, and which can only be recovered in the local municipal Court.

Of course the performance of quarantine is an operation which must be gone through in the territory of the port. The observation of Lord Chief Justice Cockburn alludes to this in his Judgment in *the Queen v. Keyn*, and he treats it, and I think correctly treats it, thus. He says:

I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties, unless they have previously complied with Requisitions ordained by the British Parliament.

A proposition which is, as I submit, perfectly sound.

Let me just illustrate that. I am quite unable to appreciate what is in my friend's mind about this. Does he suggest that, under this law, we could go outside territorial waters and seize the ship—for instance, a ship that was passing through the British Channel, beyond the three mile limit, on its way to some European port? Does he suggest that we could under this Statute go outside the territorial limits and seize that ship, because she had not hoisted a signal? Such a thing would be impossible. The Statute creates a penalty, a penalty only recoverable against the captain, and only recoverable in a municipal court, when the ship arrives within the territory.

Now I come to the next question, which my friend treats as 1107 important, which covers some space in the printed Argument. I am referring to the last sentence of page 160, where my friend says:

Upon the same principle has been maintained the right of visitation and search, as against every private vessel on the high seas, by the armed ships of any other nationality. Though this vexatious and injurious claim has been much questioned, it is firmly established in time of war, at least, as against all neutrals. Says Sir William Scott—

And then he proceeds to give a citation. Then he says:

It has been said that the right of search is confined to a time of war.

Certainly it is, and will still be said, except under Treaty. Then my friend continues:

That assertion proceeds upon the ground that only in time of war can the necessity for it arise. No one has ever claimed that the right should be denied in time of peace, if an equal necessity for it exists. And when such necessity has been regarded as existing, the right has been asserted. Prior to the war of 1812, between the United States and Great Britain, the latter country claimed the right in time of peace to search American ships on the high seas for British subjects serving as seamen. Though the war grew out of this claim, it was not relinquished by Great Britain when a treaty of peace was made. It has been disused, but never abandoned.

Now I stop there for a moment, and I proceed to examine the question. And first I would like to make one general observation upon it. It is quite true that at that time an attempt was made by Great Britain to assert the right to take British seamen from the ships of the United States—perfectly true; and it is perfectly true also that at a later stage it was—I will not say asserted—but assent was sought to be obtained to the right to search vessels—to visit vessels—for the purpose of ascertaining their nationality; that is to say, it was not asserted there was a right to visit a United States or French vessel if it was merely a United States or a French vessel flying French or United States colours, the assertion was limited to the case where there was ground to suspect that the flag of France or the flag of the United States was used dishonestly or fraudulently in order to cover illicit trade in slaves. It is perfectly true that those two assertions were made, and now I proceed to show how they were dealt with, and to enquire whether this statement is correct, which my friend has thought right to put here in his Argument, that: “Though the war grew out of this claim, it was not relinquished by Great Britain when a Treaty of peace was made. It has been disused, but never abandoned”. That is the proposition that my learned friend puts forward.

Then he proceeds:

The objection to it on the part of the United States was the obvious one that it was founded upon no just necessity or propriety. Had it been a measure in any reasonable sense necessary to self-defense on the part of Great Britain, its claim would have rested on a very different foundation, and would have been supported by the analogy of all similar cases. The right of search is exercised without question as against private vessels suspected of being engaged in the slave trade.

1108 I beg to say that that is a further inaccuracy, and that I think my friend, if he examines it carefully, will find that that is not correct, and that it is only under Treaty that there is such a right of search.

Then he goes on:

And it is very apparent, that as the increasing exigencies of international intercourse of all kinds render it necessary, the principle that allows it in time of war will be found sufficient to allow it in time of peace.

That is looking into the future. It is not considering what the law is, but suggesting what, at some future time, it may be.

Then he proceeds:

The rule, as has been seen, grows out of necessity alone, and must therefore extend with the necessity.

And thereupon he proceeds to refer to the correspondence of Lord Aberdeen.

I shall now bring this matter (beginning with the correspondence that is there referred to, from 1840 until the last occasion when the subject was referred to, as far as I am aware, in public—in Parliament), down to the year 1858, but I need not do that at any very great length.

Now Lord Aberdeen, who was then Prime Minister, writes to Mr. Everett, who was at that time Secretary of State of the United States, on the 20th December, 1841; and I will ask you, Mr. President, when I read this, to see,—while it is as strenuous a demand on the part of the Foreign Minister for consent on the part of the United States to a course that the Minister of Great Britain is urging as eminently reasonable from his point of view,—whether it amounts to an assertion of it as a *right* at all, or whether it is not rather a demand for the reasonable assent on the part of the United States to what is suggested.

Now this is the language of Lord Aberdeen's letter:

The Undersigned, etc., has the honor of addressing to Mr. Everett, etc., the observations which he feels called upon to make, in answer to the note of Mr. Stevenson, dated on the 21st of October.

As that communication only reached the hands of the Undersigned on the day after the departure of Mr. Stevenson from London, on his return to America, and as there has since been no Minister or Chargé d'Affaires from the United States resident in this country, the Undersigned has looked with some anxiety for the arrival of Mr. Everett, in order that he might be enabled to renew his diplomatic intercourse with an accredited Representative of the Republic. Had the Undersigned entertained no other purpose than to controvert the arguments of Mr. Stevenson, or to fortify his own, in treating of the matter which has formed the subject of their correspondence, he would have experienced little impatience; but as it is his desire to clear up all doubt, and to remove misapprehension, he feels that he cannot too early avail himself of the presence of Mr. Everett at his post, to bring to his knowledge the true state of the question at issue.

The Undersigned agrees with Mr. Stevenson in the importance of arriving at a clear understanding of the matter really in dispute.

This ought to be the first object in the differences of States, as well as of individuals; and, happily, it is often the first step to the reconciliation of the parties. In the present case, this understanding is doubly essential, because a continuance of mistake and error may be productive of the most serious consequences.

Would you, Mr. President, kindly allow my friend Sir Richard Webster, to read this next passage for me.

SIR RICHARD WEBSTER.—He goes on:

The Undersigned again renounces, as he has already done, in the most explicit terms, any right on the part of the British Government to search American vessels in time of peace. The right of search, except when specially conceded by Treaty, is a purely belligerent right, and can have no existence on the high seas during peace.

The Undersigned apprehends, however, that the right of search is not confined to the verification of the nationality of the vessel, but also extends to the object of the voyage, and the nature of the cargo. The sole purpose of the British cruisers is to ascertain whether the vessels they meet with are really American or not. The right asserted has, in truth, no resemblance to the right of search, either in principle or in practice. It is simply a right to satisfy the party who has a legitimate interest in knowing the truth, that the vessel actually is what her colours announce. This right we concede as freely as we exercise. The British cruisers are not instructed to detain American vessels under any circumstances whatever; on the contrary, they are ordered to abstain from all interference with them, be they slavers or otherwise. But where reasonable suspicion exists that the American flag has been abused, for the purpose of covering the vessel of another nation, it would appear scarcely credible, had it not been made manifest by the repeated protestations of their Representative that the Government of the United States, which have stigmatized and abolished the trade itself, should object to the adoption of such means as are indispensably necessary for ascertaining the truth.

Then lower down on the same page he says:

The Undersigned has also expressed his belief that the practice was general, of ascertaining by visit, the real character of every vessel on the high seas, against which there should exist reasonable ground of suspicion. Mr. Stevenson denies this; and he asks, what other nation than Great Britain had ever asserted or attempted to exercise, such a right? In answer to this question, the Undersigned can at once refer to the avowed and constant practice of the United States, whose cruisers, especially in the Gulf of Mexico, by the admission of their public journals, are notoriously in the habit of examining all suspicious vessels, whether sailing under the English flag, or any other.

Sir CHARLES RUSSELL.—Then he says at page 618:

It is undoubtedly true, that this right may be abused, like every other which is delegated to many and different hands. It is possible that it may be exercised wantonly and vexatiously; and should this be the case, it would not only call for remonstrance, but would justify resentment. This, however, is in the highest degree improbable; and if, in spite of the utmost caution, an error should be committed, and any American vessel should suffer loss or injury, it would be followed by prompt and ample reparation. The Undersigned begs to repeat, that with American vessels, whatever be their destination, British cruizers have no pretension in any manner to interfere. Such vessels must be permitted, if engaged in it, to enjoy a monopoly of this unhallowed Trade; but the British Government will never endure that the fraudulent use of the American flag shall extend the iniquity to other nations by whom it is abhorred, and who have entered into solemn Treaties with this country for its entire suppression.

1110 I will now read the last paragraph of the letter:

Mr. Stevenson has said that he had no wish to exempt the fraudulent use of the American flag from detention; and this being the case the Undersigned is unwilling to believe that a government like that of the United States, professing the same object and animated by the same motives as Great Britain should seriously oppose themselves to every possible mode by which their own desire could be really accomplished.

I think I am justified, Mr. President, in saying that although the word "right" is used there, it is used in a sense in which even by writers upon law it is sometimes used; he uses it to indicate something claimed which ought to be allowed, ought to be assented to, by the other Power. He points out that it is not the right of search that he is insisting on, but the right to use means to ascertain whether or not a vessel is fraudulently flying a false flag. This right was resisted by the United States it was resisted, too, by France. That he was speaking of the right in that vaguer or lesser sense of the term, and not of something which he could do under the force of some existing law, is made apparent by the fact that he states that if, the circumstances being sufficiently suspicious to justify visitation, it turns out upon visitation that that suspicion is not warranted, then reparation is to be made to the vessel so visited; whereas, of course, if it were an absolute right, enforceable against the will of particular nations, you would not find it accompanied by such a provision for reparation.

The matter came up again in 1858; and it came up in a way that, if anything can be made interesting in this matter, will make it more or less interesting to the Tribunal. It came up in the House of Lords on the 26th of July 1858, and some very eminent jurists took part in the discussion; and Lord Lyndhurst, whose position is known, I should think, to all members of the Tribunal—at one time Chief Baron of the Exchequer, afterwards Lord Chancellor, and besides, an important political personage—rises to put a question, of which he had given notice to the Secretary of State for Foreign Affairs. America, I think, has the right to claim him as one amongst many of her distinguished sons. Lord Malmesbury was the Foreign Secretary. Lord Lyndhurst said:

Your Lordships, no doubt, have most of you read a speech which was made by Mr. Dallas, the American Minister, a short time since, at a meeting of his fellow-subjects, to celebrate the anniversary of American Independence. On that occasion the honourable gentleman stated that the question of the right of visiting American vessels in time of peace on the high seas had been finally settled. This is a subject, my Lords, of so much importance and such deep interest that it is material that we should receive a distinct and precise account of the terms on which that settlement is based; and I have therefore given notice of a question which I intend to propose to my noble the Secretary of State Foreign Affairs, in order that he may give us some explanation on the subject to which I have referred. Many persons—perhaps I

ought not to say "many persons", but several persons, and those in a high political position—appear to think that that proceeding was not justified, and that in point of fact we have surrendered a most valuable and important right. The
1111 answer which I make to that is, that we have surrendered no right, for that, in point of fact, no right such as that which is contended for has ever existed.

We have, my Lords, abandoned the assumption of a right, and in doing so we have, I think, acted justly, prudently and wisely. Now, my Lords, with your permission, I shall proceed to make a few observations upon the general question, and to refer to some of the most eminent authorities on the subject; but I assure you that I should not have troubled you were it not that I think it is of great importance that this question should be distinctly and finally understood and settled. The first proposition which I state is this: That in no writer on international law has that right ever been asserted; and, in the next place, that there is no decision of any Court of Justice having jurisdiction to decide such questions in which that right has been admitted. I wish, in making this assertion, to fortify myself by some authorities; and I cannot quote a higher or a better English authority than that of Lord Stowell, who states distinctly, in the words which I am about to read—in conformity with what I have stated—that no such right has ever been asserted by any competent authority. His words are these:

"I can find no authority that gives the right of interruption to the navigation of States in amity upon the high seas excepting that which the rights of war give to both belligerents against neutrals."

At present I am dealing with the assertion that this was a right claimed and exercised, or claimed to be exercised, by Great Britain, and not abandoned. But of course the Tribunal will see that this is a valuable authority, which I need not have to go back upon again, upon what the law itself is.

That is a distinct statement made by that noble and learned Lord. In addition, I beg leave to refer to Wheaton, the eminent American authority on International law, who states the proposition in these terms:

"It is impossible to show a single passage in any institutional writer on public law, or the judgment of any Court by which that law is administered, which will justify the exercise of such a right on the high seas in time of peace independent of special compact."

So that your Lordships perceive that both on this side of the water and in America, by the best authorities and by the highest jurists, that right, in the passages to which I have referred, is controverted instead of being admitted. It has been agitated long between this country on the one side and America on the other. The eminent jurist on the other side of the water makes his statement and assertion; our corresponding authority on this side of the water makes his assertion; and those assertions directly and distinctly agree. For myself, my Lords, I have never been able to discover any principle of law or reason on which that right could be supported. I will refer again to the same high English authority—Lord Stowell—upon this subject, and you shall hear what he emphatically states with respect to it. That distinguished jurist says:

"No nation can exercise the right of visitation and search on the high seas except on the belligerent claim. No such right has ever been claimed, nor can it be exercised, without the oppression of interrupting and harassing the real and lawful navigation of other countries, for the right, when it exists at all, is universal, and will extend to all countries. If I were to press the consideration further, it would be by stating the gigantic mischiefs which such a claim is likely to produce."

I may add that another very high authority—the American Judge Story—in the well-known case of the "Mariana Flora", expressed the same opinion in almost the same terms, and in language as emphatic. So here again is a coincidence of authority between the two parties agitating the question—the authority on this side of the water corresponding exactly with the authority on the other. But I do not

think it necessary to refer to any cases in support of the cases I am considering; I will refer only to the principle on which the question rests. What is
1112 the rule with respect to the high seas and the navigation of the high seas?

All nations are equal on the high seas. Whether they be strong and powerful, or weak and imbecile, all are on a footing of perfect equality. What is the position of a merchant ship on the high seas? A ship is part of the dominion to which she belongs, and what right has the ship of one nation to interfere with the ship of any other nation, where the rights of both parties are equal? The principle is so clear and so distinct that it will not admit of the smallest doubt. I am unwilling on a question of this kind to refer to any arguments of my own, or to any authority which I can possess on the subject; but hear what is said by Lord Stowell with respect to the navigation of the high seas. His language is this:

"All nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet on a footing of entire equality and independence, no one State or any of its subjects has a right to assume or exercise authority over the subjects of another."

That is a confirmation of the doctrine which I have stated, that the principle on which this question is to be decided, is the equality of all nations on the high seas. Admitting this principle, how can it be asserted that the ships of one nation can interfere in any way with the vessels of another? Then, having laid down this principle, the consideration next occurs that difficulties may arise out of frauds which may be practised on the high seas; and it is said that the flag of America may be assumed by another Power to cover the basest of purposes. But how can the act of a third Power, or of the subjects of a third Power, by possibility affect any right existing on the part of the United States? Take this case: By our Treaty with Spain, we have a right to visit and search Spanish vessels with a view to prevent the Slave Trade. But, how can that agreement between us and Spain, by any possibility, affect the rights of America? Clearly in no way at all. But, then, what are our cruisers to do?

He refers a little later to a discussion that took place after the Treaty of Vienna in 1815. I read a little further down in the same speech. He says:

Treaties have been entered into between England and foreign countries, giving the right of visit. But why enter into such treaties, if the right of visiting is a national right, founded on international law? What took place in the year 1815 after the Treaty of Vienna? Lord Castlereagh applied to the French Government to establish some mutual system by which cruisers could visit the vessels of either country: but the Duc de Richelieu replied that France would never consent to a maritime police being established over her own subjects, except by persons belonging to her own country. I think I have now gone far enough to establish the position with which I started, etc.

Then Lord Malmesbury, in reply, indorses categorically and distinctly the opinion of Lord Lyndhurst.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Charles, we are ready to hear you.

Sir CHARLES RUSSELL.—I was about to read the reply of Lord Malmesbury, who was then the Foreign Secretary. I will only read the part which shows his agreement with the statement of the law as made by Lord Lyndhurst. He says:

It is with great pleasure that we have heard the views of my noble and
1113 learned friend on this important subject, because they conform precisely to the opinion of the Law Officers, of the Crown, whom we thought it our duty to consult—

Lord Hannen may recall that the law officers of the Crown at that time were Sir Fitzroy Kelly, and Sir Hugh Cairns. Lord Malmesbury says:

because they conform precisely to the opinion of the Law Officers of the Crown, whom we thought it our duty to consult before we sent answer to the communications we received from the American Government.

I may say of the then Attorney General, Sir Fitzroy Kelly, that he was afterwards Chief Baron of the Court of Exchequer, and Sir Hugh Cairns, afterwards Lord Cairns, was first of all a Lord Justice of Appeal, and afterwards Lord Chancellor, and a lawyer of Great eminence.

Then Lord Malmesbury proceeds:

When we received General Cass's communication—

Which I shall presently read to you as showing the views of the United States upon the question of law.

When we received General Cass's communication, which was addressed to Her Majesty's Government, we immediately consulted the Law Officers of the Crown,

and they unanimously asserted that the international law in relation to this question was precisely as it has been just described by my noble and learned friend. Upon that opinion Her Majesty's Government at once acted, and we frankly confessed that we have no legal claim to the right of visit and of search which has hitherto been assumed. Her Majesty's Government therefore abandoned both those claims, but at the same time they placed before the American Government the paramount necessity of agreeing upon the adoption of some instructions perfectly identical in character to be placed in the hands of the officers of both Governments, and, indeed, in the hands of the officers of all maritime nations, by which all Powers should be ruled, so as for the future to avoid all obstruction to commerce, while at the same time the fraudulent use of national flags may be prevented.

Lord Aberdeen joined in this discussion, and you will recollect that it was Lord Aberdeen, when Minister for Foreign Affairs, who conducted the correspondence in 1841, to which I referred in this connection a few minutes ago. Lord Aberdeen says:

I was therefore astonished to hear my noble and learned friend (Lord Lyndhurst) quote the statement of the highly respected American Minister—that is Mr. Dallas—

who is now in this country, to the effect that we had given up frankly and finally the right of visit and search.

Twenty years ago—

Referring back to the period I have mentioned—

Twenty years ago the Government of that day repudiated the assertion of any such right, and therefore what the noble Earl the Secretary of State for Foreign Affairs can have given up I am at a loss to understand. Any such right was given

1114 up then as frankly and finally as it possibly can be given up at this moment. After my noble and learned friend's quoting the high authority of Lord Stowell, it may appear ludicrous in me to quote myself. At the same time, in order to show how the matter stood twenty years ago, I will just quote a note of my own. Though an humble authority, still I was speaking the language of the British Government, and that language was received by the American Government with acquiescence and satisfaction.

Then he gives the passage from his letter which I have read to you already. I will merely read enough of it to remind you what it was. Its words are these:

The Undersigned resigns all pretensions on the part of the British Government to visit and search American vessels in time of peace; nor is it as American vessels that such vessels are ever visited. But it has been—

and so on.

He then proceeds to repeat at length the letter which I have already read.

Now it will be convenient, I think, if I deal at once with the correspondence which led to this discussion in Parliament; and I invoke that correspondence, not merely because it shows that there was not the assertion as a matter of right at that time, or that if there was at any time such an assertion, it was definitely abandoned. In view of what I have so far read, and still more in view of what I am about to read, I will content myself with expressing my surprise that my learned friend, Mr. Phelps, having, as I cannot but think he had, all this matter under his eye, or at least having the opportunity considering it thoroughly, should have written, as he has written in his Argument, at page 161: "It has been disused but never abandoned".

The correspondence is correspondence presented to Parliament in 1859, and I read from the Parliamentary papers. I will begin by an important despatch from General Cass to Lord Napier.

General Cass, I believe, was at that time Secretary of State.

Mr. Justice HARLAN.—In what year?

Sir CHARLES RUSSELL.—1859.

Mr. Justice HARLAN.—He was.

Sir CHARLES RUSSELL.—It is rather long, but it is important, not merely for its value as an expression of the views of the United States Government, but for the authority which it cites upon the general question of the right of search. On page 5 of this correspondence, he cites an opinion of Lord Stowell in the decision of a case of a French vessel seized upon the coast of Africa: "No nation can exercise a right of visitation and search upon the common and unappropriated parts of the ocean except upon the belligerent claim". That is, of course, the contention that I have for so long been maintaining, that this right of search is a belligerent right and does not exist in time of peace. He then proceeds:

1115 No nation has the right to force its way to the liberation of Africa by trampling on the independence of other States, on the pretence of an eminent good, by means that are unlawful, or to press forward to a great principle by breaking through other great principles which stand in the way.

Then on page 6 is this emphatic statement:

The United States deny the right of the cruisers of any other power whatever for any purpose whatever to enter their vessels by force in time of peace. No such right is recognized by the law of nations. As Lord Stowell truly said: "I can find no authority that gives the right of interruption to the navigation of States upon the high seas, except that which the right of war gives to belligerents against neutrals. No nation can exercise a right of visitation and search upon the common and unappropriated parts of the Ocean except upon the belligerent claim".

At page 7 he says something which may have a very distinct application to this case:

It is one thing to do a deed avowedly illegal, and excuse it by the attendant circumstances; and it is another and quite a different thing to claim a right of action, and the right also of determining when, and how, and to what extent, it shall be exercised. And this is no barren distinction so far as the interest of this country is involved, but it is closely connected with an object dear to American people—the freedom of their citizens upon the great highway of the world.

So much for General Cass's view. Communications were then opened with other European Powers, with France and Germany among others, and proposals made for the concession of mutual rights by convention, which some of those Powers agreed to in 1862. On page 38 of this Parliamentary paper the suggestion is made, which I think emanated in the first instance from Lord Malmesbury, as a basis of such a Convention.

In virtue of the principle of the immunity of national flags, every merchant vessel navigating the high seas is exempt from all foreign jurisdiction. A ship of war can therefore only visit, detain, arrest and seize those merchant-vessels which she recognizes as being of the same nationality as herself.

Then he proceeds:

The flag being *primâ facie* the distinctive sign of the nationality of a vessel, and consequently the proof of the jurisdiction to which she is subject, it is natural that a merchant vessel on finding herself on the high seas in the presence of a man-of-war should hoist her flag to attest her nationality: so soon as the man-of-war has made herself known by hoisting her colours, the merchant vessel ought likewise to hoist hers. If she refuses to hoist her flag it is agreed that she may be summoned to do so, first, by a blank gun, and if that remains without effect, by a second gun shotted, but pointed so as not to strike her. As soon as the merchant vessel by hoisting her flag has established her nationality, the foreign man-of-war can claim no authority over her. The utmost which the latter may do is, in certain cases, to claim the right of speaking with her; that is to say, to ask her to reply to questions addressed to her through a speaking trumpet, but without interfering with her course. When, however, the presumption of nationality resulting from the colours hoisted by a merchant vessel is rendered seriously doubtful by information or by signs of a nature to encourage the belief that the vessel does not belong to the nation whose colours

she has assumed, then the foreign man-of-war may have recourse to a verification of the nationality assumed. With this object a boat shall be sent to the suspected vessel which shall have been previously hailed to announce the intended visit. The verification shall consist of the examination of the papers proving the nationality of the vessel.

These were the proposals which resulted in the Treaty of 1862 upon the subject.

Lord HANNEN.—From whom did these proposals emanate?

Sir CHARLES RUSSELL.—Originally from Lord Malmesbury, I think. It was a communication by Lord Malmesbury, the Foreign secretary, to Lord Napier the British Minister at Washington. This was Lord Malmesbury's proposal as to the identical instructions to be given to the cruisers of these nations.

He says:

The exhibition of these documents is all that can be desired. All enquiry into the nature of the cargo, commercial operations, or, in a word, on any other point but that of nationality, all search or visit of any kind, are absolutely forbidden. The officer entrusted with the verification ought to conduct his proceedings with great discretion and with all courtesy, and leave the vessel as soon as the verification has been effected, offering to enter in the ship's papers the fact and circumstances of the verification, and the motives which determined him to resort to it.

Except in the case of legitimate suspicion of fraud, it ought never otherwise to be necessary for the commander of a man-of-war to go or to send on board a merchant-vessel, so numerous are the signs which, putting colours out of the question, reveal to the eye of a seaman the nationality of a vessel.

Then follows this important provision:

In every case it is clearly understood that the man-of-war that decides on boarding a foreign merchant-vessel does it at her own risk and peril, and remains responsible for all the consequences which may be the result of her act.

The commander of the foreign ship of war who shall have had recourse to this measure ought, in all cases, to make it the subject of a report to his Government, and should explain the reasons of his having so acted. This report, and the reasons which led to the verification, shall be communicated officially to the Government to which the vessel whose colours have been verified shall belong.

Whenever the examination shall not be justified by evident reasons, or shall not have been conducted in a suitable manner, a claim may arise for indemnity.

There then is a communication of a similar kind to the Government of France; and on page 59 there is a communication to Lord Malmesbury by the Duke of Malakoff; and annexed was a draft of instructions proposed to be issued to the Commanders of French ships of war, which are, (though I have not compared them word for word), practically identical with what I have read. I will read sufficient to justify that statement. They begin:

INSTRUCTIONS PROPOSED TO BE ISSUED TO COMMANDERS OF FRENCH SHIPS OF WAR.

In consequence of the lapse of the Treaty with Great Britain for the suppression of the Slave Trade, the French and British Governments have felt the necessity of coming to some provisional arrangement with respect to the visit of merchant-vessels suspected of fraudulently assuming the British flag.

1117 The counterpart of that was "suspected of assuming fraudulently the French flag", and it begins:

Protected by the independence of her national flag, a merchant-vessel navigating the high seas is subject to no foreign jurisdiction, unless by virtue of any Treaty. A man-of-war can therefore only visit, detain, arrest, and seize those merchant-vessels which she recognises as being of the same nationality as herself.

And it proceeds to point in the same way to the flag being a *prima facie* indication, if there is no ground to suspect its honesty, of the nationality of the vessel.

Then it proceeds to say that, if it can be seriously called in question that it is fraudulently assumed, the proceedings mentioned may be taken; and finally, in clause 10:

In every supposition
that means in every supposed case,

it is thoroughly understood that the captain of a man-of-war who decides upon boarding or sending on board a merchant-vessel, always does it at his own risk and peril, and remains responsible for all the consequences of his act.

If the captain is mistaken, if he finds that the vessel is honestly bearing the flag to which she is entitled, then the nation to which the cruiser belongs must pay if the vessel has been damnified.

The PRESIDENT.—Is not that French draft applicable to time of war?

Sir CHARLES RUSSELL.—I do not understand it to be so. I understood this was intended to be applicable in time of peace also, that it should be mutually agreed by treaty to allow this invasion of what would have been, without such agreement, the invasion of the territoriality of the country. The object was one which all Governments would apparently have a *prima facie* interest in effecting, namely, the prevention of the fraudulent use of the national flag.

The PRESIDENT.—Were there any negotiations between France and England at that time about that matter.

Sir CHARLES RUSSELL.—Certainly, what I have just read to you was the communication from the Duke of Malakoff to Lord Malmesbury.

The PRESIDENT.—As it is dated in 1859, I thought it was a provision with reference to the Italian war against Austria.

Sir CHARLES RUSSELL.—I do not see any trace of it. The real object of the whole of this matter was the desire of those nations that were really in earnest to suppress the slave trade, that flags of nations that were themselves parties to the suppression should not be fraudulently used, or that flags of other nations should not be fraudulently used to cover that obnoxious traffic. I did read it, but probably I did not read distinctly. It is headed "Instructions proposed to be issued to commanders of French ships of war."

1118 The PRESIDENT.—Yes, but it does not apply in time of peace.

It does not imply that it is connected with the slave trade negotiations. That is what I did not know.

Sir CHARLES RUSSELL.—If I may suggest, the first clause rather shows it must have been contemplating a time of peace and not a time of war:

In consequence of the lapse of Treaty of Great Britain for the suppression of the slave trade the French and British Governments have felt the necessity of coming to some provisional arrangement with respect to the visit of merchant-vessels suspected of fraudulently assuming the British flag.

The PRESIDENT.—Yes, I beg your pardon, I had lost sight of it: you did read it and I remember it now.

Sir CHARLES RUSSELL.—Then, on page 64, are to be found similar instructions "about to be issued" (they had then got to the point of agreement) "to the Commanders of Cruisers". I need not trouble by reading that: I think it follows on the same lines.

There is only one other reference I have to make. The United States come into this arrangement; and I will read General Cass's communication on the subject. It is the 12th of May, 1859, to Lord Lyons, who was then Minister at Washington. A similar draft had been sent for the consideration of the United States Government:

As stated in the draft furnished by Lord Napier, no merchant-vessel navigating the high seas is subject to any foreign jurisdiction. A vessel of war cannot, there-

fore, visit, detain, arrest, or seize (except under Treaty) any merchant-vessel not recognised as belonging to her own nation. And as a necessary consequence from this rule, it is added in the same draft that in every case it is clearly to be understood that the vessel of war which determines to board a merchant-vessel must do so at her own risk and peril, and must remain responsible for all the consequences which may result from her own act.

Then General Cass proceeds:

These extracts, which fix the responsibility of every Government whose officers interrupt the voyage of a merchant-vessel upon the ocean, suggest very strongly the adoption by each Government of such instructions to its own officers, as will tend to make them appreciate this responsibility, and lead them to observe great caution in acting upon their suspicions against such a vessel. The same extracts supply a very just limitation, also in respect to the cases to which the instructions can, under any circumstances, apply.

And then follows this passage, to which I would ask attention.

Leaving out of view,
says General Cass

the crime of piracy, which happily is now seldom committed, the only instance (except under Treaty) in which a ship of war may be excused in visiting, detaining, arresting, or seizing any merchant-vessel bearing a foreign flag, is when such vessel is, for good and sufficient reasons, believed to belong, in fact, to the country of the visiting ship,—

their own nationals' ship.

A slaver cannot be detained by a foreign vessel because it is a slaver, unless
1119 the right of detention in such a case has been conferred by the Government to which the foreign vessel belongs. Except so far as it may have parted with it by Treaty, every nation has the exclusive care of its own flag upon the high seas.

The final letter is also a letter from General Cass of the 25th of January, 1859, in which he, referring to the African Slave Trade, says, and quite justly says:

The United States were among the earliest of the nations of the world to denounce the Traffic as unjust and inhuman.

And then he proceeds:

While, however, the President is thus earnestly opposed to the African Slave Trade, and thus determined to give full effect to the laws of the United States for its suppression, he cannot permit himself, in so doing, to concur in any principle, or assent to any practice, which he believes would be inconsistent with that entire immunity of merchant-vessels upon the ocean, in time of peace, for which this Government has always contended, and in whose preservation the commerce of the world has so deep an interest.

This is also the position, I am gratified to observe, of the Government of France. France, like the United States, recognises no right of search or visit upon the high seas, except in time of war. France, like the United States, holds, in the language of your Memorandum, that an "armed vessel cannot visit, detain, arrest, or seize any but such merchant-vessels as it ascertains to belong to the same nation to which the armed vessel itself belongs." France, like the United States, holds further, that while cases may exist of a fraudulent assumption of a flag, the verification of such a case must be made at the peril of the party making it, or in the words of your Memorandum, "under all circumstances it is well understood that the armed vessel that may determine to board a foreign merchant-vessel, does so in every instance at its own risk and peril, and stands responsible for all the consequences which may follow the act."

While thus recognizing the immunity of merchant-vessels on the ocean, and the grave responsibility which is assumed by a ship of war when she boards a foreign ship in order to verify its flag, your Memorandum suggests some interesting views in respect to the caution with which such a verification should be pursued, and such a responsibility exercised.

I do not understand that the French Government desires to limit this responsibility, or to change in any way that rule of international law by which in time of peace an honest merchantman is protected on the ocean, from any visit, detention, or search whatever.

Now I have come to the end of that correspondence, and I will not more pointedly refer to the inaccuracies, as I submit I have now shown them to be, of the United States Argument than to say this, that this correspondence clearly shows that whatever assertion was made in the first instance was not an assertion of a general right of visitation and search, but was a right put forward as a right undoubted, I admit, by Lord Palmerston, who used that language, of visitation for the purpose of establishing the nationality of the ship: that from the assertion of that right, in the emphatic language which I read earlier, he retired: and that that view is expressly disclaimed by the responsible minister of the Crown in his place in Parliament, acting upon the opinion of the Law Officers of the day, and reiterated and communicated in the correspondence which I have just read.

1120 Lord HANNEN.—What did those proposals result in?

Sir CHARLES RUSSELL.—In a Treaty of 1862. I thought I had it here to refer to it, but I have not, my Lord.

Lord HANNEN.—I only wanted a general statement to what extent they were adopted.

Sir CHARLES RUSSELL.—Shortly put it is this: a Treaty was entered into between the United States and Great Britain, by which was mutually conceded to the ships of war of each Power the right under the general conditions I have read to search vessels bearing the flag of the other, in order to ascertain if it were the true flag. The Treaty, was confined in its operation to the waters in which the West African slave-trade would have been carried on.

General FOSTER.—In 1862?

Sir CHARLES RUSSELL.—I think so.

The PRESIDENT.—And I think in the Treaty between France and England that not even so much as that was conceded.

Sir CHARLES RUSSELL.—No, not till a later period. France has always been very staunch in denying any right of interference with its ships upon the high seas, even under these extreme circumstances as they were considered. She always strenuously denied the right in any form, and even as a matter of agreement she was very slow and chary in altering the position she assumed.

I now pass on to another matter. You will see at the end of page 162 of the Argument an innocent little passage, as it looks there, taken from Azuni, which, if I did not explain the context, might lead to a very wrong conclusion indeed as to its meaning.

Azuni carries the principle still further, and holds that even national rights should yield to the rights of another nation, when the consequences to the latter are the more important.

A very broad proposition indeed.

When the perfect right of one nation clashes with the perfect right of another, reason, justice, and humanity require that in such case the one that will experience the least damage should yield to the other.

Well, if it has any application to this case that would mean that it is more important to the United States to keep to the industry of killing seals on the Pribilof Islands than it can be to Canadian fishermen to pursue pelagic sealing on the high seas, and therefore pelagic sealers should on that ground give way.

But I cannot think that my learned friend Mr. Phelps had leisure to read the context, or he would not have cited this passage, because when the context is read, his citation is, to say the least, amusing. My learned friend, Mr. Box, has been good enough to summarize the whole

passage for me, and, I think, correctly. I have Azuni here, and I will hand it to my learned friend. It is Azuni, vol. 1, page 226.
 1121 This is the *résumé* of the full passage and context, and my learned friends will see the point he makes—the illustration he gives of the clashing of those rights.

Marquis VENOSTA.—Azuni was an Italian.

Sir CHARLES RUSSELL.—Yes he was an Italian writer on the “*Droit maritime de l'Europe*”.

Mr. PHELPS.—I cited from the English translation, this is the French.

Sir RICHARD WEBSTER.—That may be so, but still his words are there.

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—My criticism is not one that turns upon verbal translation. The translation that my learned friend has used is quite accurate so far as the translation goes, but it is the context I want to call attention to to show what the particular passage means.

It is in nature a sacred and inviolable law which, in the conflict of two equal rights, authorises the suspension of the one of which the interruption produces a less damage, reparable in some manner either more easily or with less expense.

These are the instances, and the Tribunal will at once see that this is my only point about it.

The instances given are:

Jettison: that is to say, a ship is in peril, the whole adventure is in peril, and the right of the owner of particular goods, which happen to be on the top of the cargo and under the hatch way, must give way if the jettison of that cargo is necessary for the preservation of the greater portion of the whole adventure, or of the lives of those on board.

Demolition of a house to prevent a fire from spreading to one's own: Like the case which frequently happens in the great prairies of America where it is I believe thought perfectly justifiable if a fire is raging, to cut down the intervening vegetation, which belongs to somebody else, to prevent that fire spreading and causing more widely spread devastation.

So, sinking a burning ship to prevent the fire from spreading to its neighbours.

Taking one's neighbour's timber to raise the bank of a stream which is on the point of overflowing.

In extreme scarcity, taking ship-loads of food to supply the nation which is in want. That is of course a very extreme case.

In all these cases says Azuni it is enough to repair the damages in order to prevent complaint.

This violation of right is commanded by the imperious law of necessity which, in this conflict, chooses that one avoid the imminent, irreparable, and greater evil, of the death or ruin of a great number of individuals, equivalent compensation being granted.

I think that will show that the particular passage is not of any value upon the subject we are discussing.

I pass on now to one of a series of illustrations given by my learned friend, which, of course, he would not have given if he had not satisfied his own mind that they were in some sense analogies. But
 1122 analogies are like metaphors. They are very difficult to manage; and indeed an analogy brings you but a very short way, and that not very satisfactory either, upon your journey, because you have first to establish that the analogy is really a perfect analogy, and when you have got to that point it becomes a question *idem per idem*,

so that you are remitted back to the original case, which was your crux and difficulty in the matter.

But I must notice these cases. The first is on the top of page 176 of the argument:

Suppose that some method of explosive destruction should be discovered by which vessels on the seas adjacent to the Newfoundland coast outside of the jurisdictional line could, with profit to themselves, destroy all the fish that resort to those coasts, and so put an end to the whole fishing industry upon which their inhabitants so largely depend. Would this be a business that would be held justifiable as a part of the freedom of the sea? Although the fish are admitted to be purely *feræ naturæ*, and the general right of fishing in the open seas outside of certain limits is not denied.

Well, I would first ask: Is there any analogy between that case and the case we are discussing, if that can be called the exercise of the right of fishing at all? As I read the case, I fail to see where the profit comes in, because he says: "Could, with profit to themselves, destroy all the fish".

Mr. PHELPS.—Yes.

Sir CHARLES RUSSELL.—And gather them—perhaps that is understood?

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—"Destroy all the fish and gather them". I have, in the first instance, to say that it is a little extravagant to compare that which is not a known or recognized form of fishing with the pursuit of seals pelagically, which is the oldest form of the pursuit of seals known in the history of the pursuit itself.

Next, I say—(I think Senator Morgan was good enough to put a question to me the other day on the subject)—if in truth the case were that such wholesale destruction were resorted to for disproportionate results, it would be very strong evidence indeed to go to any Tribunal to determine whether that act was not itself done maliciously, and with the intent to injure those who had the common right of fishing.

Now the next case that is put is this:

An Atlantic cable has been laid between America and Great Britain, the operation of which is important to those countries and to the world. Suppose some method of deep-sea fishing or marine exploration should be invented, profitable to those engaged in it, but which should interrupt the operation of the cable and perhaps endanger its existence. Would those nations be powerless to defend themselves against such consequences, because the act is perpetrated upon the high sea?

Well, one would require to know the circumstances intended to be contemplated by that paragraph. For instance: Was the injury to the cable done accidentally in the lawful pursuit of a known mode
1123 of fishing, because, if so done, I should say there was no remedy, and no cause of complaint. If it were done gratuitously and maliciously, I should have thought there was. I am not now troubling myself with the question of jurisdiction or the particular Court in which the cause of action might be tried—I am speaking of it on broad and general principles, assuming no question of venue, or of technical difficulty, to arise. But in truth all this matter (because of the uncertainty of what the rights would be juridically considered in relation to such a matter) has been already dealt with, with the co-operative assent of, I may say, all the civilized Powers in the World. I proceed to shew how it has been dealt with.

By the Treaty of the 14th March 1884,—I will mention presently what nations are parties to it—wilful and negligent interruptions of telegraphic communication are made punishable without prejudice to civil action (Art. 2); offenders are to be tried in the Courts of the country of their own ship or nation (Art. 8); and when there is reason to

believe that a ship has infringed the Treaty, the cruisers of the contracting Parties may require production from the master of "pièces officielles" proving its nationality (Art. 10).

Now I have the Treaty before me. The Powers who are parties to it are.—The Queen of the United Kingdom of Great Britain and Ireland; the Emperor of Germany; the King of Prussia; the President of the Argentine Confederation; the Emperor of Austria; the King of Bohemia; the King of the Belgians; the Emperor of Brazil; the President of the Republic of Costa Rica; the King of Denmark; the President of the Dominican Republic; the King of Spain; the President of the United States of America; the President of the States of Columbia; the President of the French Republic; the President of the Republic of Guatemala; the King of the Hellènes; the King of Italy; the King of the Ottomans; the King of the Netherlands; The Grand-Duke of Luxembourg; the Shah of Persia; the King of Portugal; the King of Roumania; the Emperor of all the Russias; the President of the Republic of Salvador; the King of Servia; the King of Sweden and Norway; the President of the Oriental Republic of Uruguay. I cannot suggest any great Power that is not a party to this Convention, and therefore the case which my friend here suggests as a difficulty is a case which these Powers have recognized as one which might not be perhaps adequately or properly dealt with under existing international law, and therefore they have made it a matter of express compact for the benefit of all the Nations.

Now the next case on page 176, to which my friend refers, is one highly creditable to my friend's ingenuity, but does it help the Tribunal?

My friend says:

If a light-house were erected by a nation in waters outside of the three-mile line, for the benefit of its own commerce and that of the world,

that is the first "if"

1124 if some pursuit for gain on the adjacent high sea should be discovered which would obscure the light or endanger the light-house or the lives of its inmates, would that Government be defenseless?

Well, it is a very difficult case to realize what is really meant by that. For instance, I cannot quite realize how a pursuit of fishing on the high seas could, except by some stretch of imagination of which I am not capable, require the obscurity of the light of a light-house, or endanger the light-house or the lives of its inmates; but I wish to point out that I think my friend has, for the moment forgotten, that if a light-house is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that light-house is concerned, part of the territory of the nation which has erected it, and, as part of the territory of the nation which has erected it, it has, incident to it, all the rights that belong to the protection of territory—no more and no less.

Mr. PHELPS.—If it should be five miles out?

Sir CHARLES RUSSELL.—Certainly, undoubtedly. The most important light-houses in the world are outside the 3 mile limit.

Lord HANNEN.—The great Eddystone Light-house, 14 miles off the land, is built on the bed of a rock.

Sir CHARLES RUSSELL.—That point has never been doubted; and if it were there is ample authority to support it. The right to acquire by the construction of a light-house on a rock in mid-ocean a territorial right in respect of the space so occupied is undoubted; and therefore I answer my friend's case by saying that ordinary territorial law would apply to it—there is no reason why any different territorial law should apply.

Then my friend proceeds:

Lord Chief Justice Cockburn answers this inquiry in the case of *Queen v. Keyn* above cited (p. 198) when he declares that such encroachments upon the high sea would form a part of the defence of a country; and "come within the principle that a nation may do what is necessary for the protection of its own territory."

The passage which I conceive my friend was referring to, is a passage which, like that from Azuni, requires, in order to understand it, the whole passage to be read. I am reading now from page 58 of a printed report of the Judgment of Lord Chief Justice Cockburn.

It does not appear to me that the argument for the prosecution is advanced by reference to encroachments on the sea, in the way of harbours, piers, break-waters, light houses, and the like, even when projected into the open sea, or of forts erected in it, as is the case in the Solent. Where the sea, or the bed on which it rests, can be physically occupied permanently, it may be made subject to occupation in the same manner as unoccupied territory. In point of fact, such encroachments are generally made for the benefit of the navigation; and are therefore readily acquiesced in. Or they are for the purposes of defence, and come within the principle that a nation may do what is necessary for the protection of its own territory. Whether if an encroachment on the sea were such as to obstruct the navigation, to the ships of other nations, it would not amount to a just cause of complaint, as inconsistent with international rights, might, if the case arose, be deserving of serious consideration. That such encroachments are occasionally made seems to me to fall very far short of establishing such an exclusive property in the littoral sea as that, in the absence of legislation, it can be treated, to all intents and purposes, as part of the realm.

In other words, it defends and justifies the taking possession of a certain part of the sea, and permanently occupying it for the purpose of erecting light-houses.

Of course the President and other members of the Tribunal are aware that by the invention of a blind gentleman of the name of Mitchell, who invented the screw-pile arrangement, these piles are driven down in great depths of the sea, and upon these piles in many places, where there is no rock as a more secure resting place, many light-houses throughout the world are supported.

I think I have got to the end of the illustrations and of the cases cited by my learned friend with the exception of one set of cases, which may be called appeals in the nature of *argumentum ad hominem*, to which I have already incidentally referred namely: cases as to which there is a supposed analogy with the rights that the United States are here contending for; a supposed analogy conceived to be found in certain legislation of Great Britain, especially legislation in relation to her colonies and by her colonies. There is also a case of *Church v. Hubbard*, and some cases cognate to it, which I shall have a little later to refer to.

But I shall try to answer on this occasion the question addressed to me by the learned President before the adjournment as to the view of the British Government of the Greytown incident. You recollect, Sir, that you were good enough to address that inquiry to me.

The PRESIDENT.—Yes, Sir Charles.

Sir CHARLES RUSSELL.—I am now able to answer the inquiry. The matter became a subject of discussion in the House of Commons on the 19th of June, 1857, Lord Palmerston being then Prime Minister. In order to appreciate what follows, it is well to observe that the way in which the question arose was this: That in the bombardment of Greytown loss had been sustained by private persons, some of British nationality, some of French, and some of other nationalities; and the question was whether in the circumstances of that bombardment of Greytown, and according to principles of international law, the Gov-

ernments of those nationals would be justified in pressing upon the United States claims for compensation. The short answer will be found in the statement that they were regarded as acts of belligerent hostility, and that in the opinion of the Law Officers—I will read the opinion of the Law Officer of the day, a man of great eminence—it fell within the principle that innocent neutrals who suffer by the operation of belligerent acts in time of belligerency, had no claims which their Governments could press diplomatically. There were as usual in all cases of legislative bodies of any kind, I may say, and certainly of a popular character, diverse views, and persons were to be found
1126 to reproach the Government of the day for not having been more thorough and more strenuous in insisting that there should be compensation made. For instance, I see that Mr Roebuck, an eminent politician of that day, makes a more or less vehement attack upon Lord Palmerston because he has not done more; and Mr Disraeli, as he then was, Lord Beaconsfield, as he afterwards became, rather joins in that; but Lord Russell, who was at that time not in the Government of Lord Palmerston (and indeed, as some of you will recollect was on anything but good terms with Lord Palmerston, in 1857), supports the Government. What the Attorney General says is this:—the reference to Hansard is Third Series, vol. CXLVI, page 47.

(The Attorney-General, I ought to say, because it gives some weight to his opinion, was Sir Richard Bethel, afterwards Lord Westbury, Lord Chancellor of England.)

The Attorney General assured the hon. and learned member for Sheffield (Mr Roebuck) and the hon. Gentleman who had just sat down, that if the law advisers of the Crown had found that, compatibly with the international law of Europe, satisfaction could have been demanded from America for the losses sustained by British subjects at Greytown, they would unquestionably have pressed upon the Government advice to that effect. The opinion they arrived at was arrived at unwillingly and reluctantly by the law advisers of the Crown. But France also was concerned in this affair, and was she to be accused of truckling to America? In France they were obliged to come to the same conclusion, and France therefore as well as England had abstained from pressing any demand for satisfaction that could not legally be obtained. The experience of the proceedings between this country and America which he had had as law adviser of the Crown led him to a conclusion the reverse of that arrived at by the hon. Gentleman who had just sat down. If America were asked her opinion, she would say that she had reason to complain again and again of the strictness with which the law of this country and the principles of international law had been enforced against her. He defied the hon. Gentleman to point to a single instance in which England had given up a legal claim to satisfaction. Every jurist admitted that in a case like that of the Greytown bombardment no compensation could be enforced for the losses sustained. The principle which governed such cases was, that the citizens of foreign States who resided within the arena of war had no right to demand compensation from either belligerents, for the losses or injuries they sustained. As an instance of this doctrine he would beg the hon. Gentleman to call to mind the case of Copenhagen and the bombardment of other places.

I care not whether that was right or whether that was wrong. That was the view taken by the Law Officer, that it was a case of loss within the arena of war.

Now I come to the argument from the analogy of legislation in England which is relied upon by my learned friends. If I may be permitted to refer the Arbitrators to a convenient reference which will save the need of their constantly changing their books of reference, I would ask them to refer to the British Argument, at page 39.

Now may I make—without making it I hope in any acrimonious spirit—this one comment in reference to this legislation which I am about to call attention to. The facts are, with sufficient fullness and correctness in each of these cases, set out in the British Counter

1127 Case; and yet we have in the argument of the United States these cases reproduced as if they had not been explained, and the whole statement of explanation discarded as if it had not been made at all.

The PRESIDENT.—Perhaps that may be accounted for by chronology: that the Argument had been made before the Counter Case was delivered.

Sir CHARLES RUSSELL.—There was an extension of time; but if my friend says so I will accept that.

Mr. PHELPS.—Certainly not. We stand upon the Argument without any reference to chronology, and we expect to sustain it.

Sir CHARLES RUSSELL.—Then my friend will not accept the shield, Mr. President, which you are good enough graciously to offer.

Mr. Justice HARLAN.—What is your point? that the American Argument should have referred to the Counter Case and not reproduced the statutes in it?

Sir CHARLES RUSSELL.—My argument is—if it deserves to be designated by the name of argument—my observation is that whereas in our Counter Case we had stated the facts as they are—

Mr. PHELPS.—As you claim them.

Sir CHARLES RUSSELL.—*The facts as they are* as to this legislation: in the United States Argument that statement of the *facts as they are* is entirely disregarded as if it had not been made; the whole statement is ignored. It is not an important matter; but I think it is fitting to make some reference to it because one would have expected that when in the British Counter Case the explanations were given, some notice would be taken of those explanations, and if they were incorrect, that the points in which they were incorrect would have been pointed out.

On page of our Argument 39 we state that:

The claim of the United States to rest their case on the precedents of the laws of other nations forms a distinct branch of their case, and requires to be specially considered.

Such laws are referred to by the United States, for three objects:

1. To endeavour to prove a uniform practice of nations to protect seal life from destruction by means of extra-territorial legislation.

2. To endeavour to show a uniform practice of nations of extending the provisions of their fishery laws beyond the 3-mile limit; and of making these provisions applicable to foreigners.

3. To show that other examples of extra-territorial jurisdiction are to be found in the laws of other nations.

The deductions desired to be drawn by the United States from the examples cited are:

From 1. That the United States law under which British vessels have been seized is justified by the laws of other nations for the protection of seals.

From 2. That the law is justified by analogy to the fishery laws of other nations; and.

That the application of this law to foreigners beyond the 3 mile limit is also justified by example and analogy.

From 3. That the law, and more especially in its application to foreigners beyond the 3-mile limit, is further justified by analogy of other extra-territorial laws not dealing with fisheries.

1128 Then the scheme of consideration of these cases is explained:

It is proposed to demonstrate in the following Argument that these premises are not well founded, and that the position assumed by the United States is untenable.

With regard to the argument from the practice of other nations, or from analogy to the practice of other nations, it is submitted that the following propositions can alone be maintained.

To warrant any exceptional departure from the principles commonly accepted by all nations as part of the law of nations, it is essential that there should be an agreement between all:

1. As to the sufficiency of the causes calling for such exceptional legislation.

2. As to the means for remedying such causes, i. e., as to the purport of such legislation.

This follows from the fundamental principle on which the law of nations rests, viz., consent of nations.

This subject has already been dealt with, but it is necessary to examine categorically the examples of extra-territorial legislation adduced by the United States in order to show that they utterly fail to support the argument for which they are cited.

The first citations are in support of the proposition that seal life is protected by extra-territorial law of other countries. The instances given are the Falkland Islands, New Zealand, Cape of Good Hope, Canada and Newfoundland.

Those are British territories. These are followed by Sweden and Norway, Russia, Germany and Holland, with reference to the Greenland or Jan Mayen fisheries; the other countries cited are Russia, Uruguay, Chile, Argentine Republic and Japan.

I cannot do better than quote in substance what is said here.

You will observe, Mr. President, that in some of these passages some of the words are printed in Italics. I think it will be found in some of these cases that they are so printed in the United States Case or Counter Case or in the Appendix. Now as regards the Falkland Islands:

The Act providing a close time for seals is No. 4 of 1881. It recites that the seal fishery of the islands was once a source of profit to the colonists, but has been exhausted by indiscriminate and wasteful fishing, and that it is desirable to revive and protect this industry by the establishment of a close time *within the limits of this Colony and its dependencies*.

The Statute then enacts that a close time shall be observed *within the limits of this Colony and its dependencies* from the 1st October to the 1st April.

The words italicised have a special meaning.

And here I call attention to a principle which you will at once recognize, the difference between the powers of legislation of what may be called a supreme body, and the powers of legislation which may be exercised by a subordinate Legislature, which is the creation of a supreme Legislature. For instance, the Parliament of Westminster can legislate for the whole of the Queen's dominions, even for those portions of the dominions to which the Queen has given constitutional Government, and which has its own powers of legislation; and it can also legislate for the subjects of the Queen all the world over. But 1129 colonial Legislatures can legislate effectively only for and within the limit of their own actual territory. They cannot extend the effect of their legislation beyond that territory, or even to bind the subjects of the Queen beyond that territory.

This illustration from the Falkland Islands is referred to on page 168 of the United States Argument, the third paragraph from the top:

An ordinance of the Falkland Islands, passed in 1881, established a close season for the islands and the surrounding waters, from October to April in each year. Two of the islands lie 28 miles apart, and this regulation is enforced in the open sea lying between them.

You will observe that after that statement my learned friend gives, as it were, authorities for the statement, "Report of U. S. Fish Commission"—I do not know what that is, or where it is—"affidavit of Capt. Budington; Case of the United States, Appendix, Vol. 1, p. 435"; but for my purpose I will read from page 221 of the United States Case. Having set out this ordinance at the bottom of that page, they go on to say:

Capt. Budington

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This is the expert in law—

—an experienced navigator and seal hunter in southern waters, visited that region in January, 1892, and he states, under oath, that the ordinance of 1881 is enforced in the sea surrounding those islands outside the three-mile limit, and that it would be deemed a violation of the law to take seals during the close season between the Falkland Islands and Beauchene Island, twenty-eight miles distant.

When you read the affidavit, if you will bear in mind the words I have just read, I think you will find that it has been put a little too strongly in the Case; because Budington's affidavit, which is in another volume—Volume 2 of the Appendix, page 593—says, under the head of the Falkland Islands:

At one time these islands were very abundant in seal life, but excessive and indiscriminate killing has nearly annihilated them.

That is not the fact I am upon.

This fact was recognized by the Government of the islands, which passed an ordinance in 1881 establishing a close season from October to April for the islands and the seas adjacent thereto. My understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands.

So we have got this gentleman, who may be a good mariner, but hardly an expert in law, to say that his "understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands."

Mr. FOSTER.—The affidavit shows he was a seal hunter returned from the South Seas.

Sir CHARLES RUSSELL.—And he may go back to the South Seas, so far as I am concerned. I am dealing with him as an authority on this subject, as a lawyer. I am pointing out that what he says in 1130 this affidavit is not that he was ever stopped, not that he heard of anybody that ever was stopped, not that he heard anybody said that anybody ever was stopped, but that this hunter, who had returned from the South Seas—what recommendation that is to him, I do not know—says:

My understanding of this ordinance was that the Government would seize any vessel taking seals close to or within 15 or 20 miles of the islands. I understood this ordinance was passed on the ground that the seal resorting to these islands was the property of the Government and therefore it had a right to protect them every where. The Government, however, gave licences to certain parties. . . . to take seals during the close season.

Senator MORGAN.—Sir Charles, are all of those legislative acts of the colonies repealable by the Parliament of Great Britain?

Sir CHARLES RUSSELL.—The machinery is this. The assent of the Crown is absolutely necessary to give effect to any act in the nature of a legislative act by a Colony, whether it is a colony with a constitution or a Crown Colony. That is the way it stands. It would be quite within the powers of Parliament to pass legislation which should gain-say this, if it chose to do so.

Senator MORGAN.—Of any act of the Canadian Parliament, for instance?

Sir CHARLES RUSSELL.—Oh certainly, if it chose to do so. The Imperial Parliament, which, it should be borne in mind, has created the Legislature of Canada, for instance, has the power to modify that creation, and if necessary to undo it.

Senator MORGAN.—We have a system somewhat akin to it in the United States. The acts of the territorial Legislatures are considered as Acts of Congress, unless Congress intervenes to repeal or modify

them, so that they become the supreme authority of the Government of the United States. What is done by the colony is done by the Crown.

The PRESIDENT.—Unless it is cancelled?

Senator MORGAN.—Yes.

Sir CHARLES RUSSELL.—It is to me a most painful thing to have to refer you to so many books, but it seems to be absolutely necessary.

The PRESIDENT.—Could you not refer us directly to the statutes of these Colonies?

Sir CHARLES RUSSELL.—That is what I am going to do. You will find them in Volume 1, page 435, of the United States Appendix.

Mr. FOSTER.—We print all those statutes.

Sir CHARLES RUSSELL.—Yes.

Whereas the seal fishery of these islands, which was at one time a source of profit and advantage to the colonists, has been exhausted by indiscriminate and wasteful fishing, and it is desirable to revive and protect this industry by the establishment of a close time, during which it shall be unlawful to kill or capture seals within the limits of this colony and its dependencies:

Be it therefore enacted by the Governor of the Falkland Islands and their dependencies, with the advice and consent of the Legislative Council thereof, as follows:

1. No person shall kill or capture, or attempt to kill or capture, any seal 1131 within the limits of this colony and its dependencies, between the days hereinafter mentioned (which interval is hereinafter referred to as the close season); that is to say, between the first day of October and the first day of April following, both inclusive; and any person acting in contravention of this section shall forfeit any seals killed or captured by him and shall in addition thereto incur a penalty not exceeding one hundred pounds, and a further penalty of five pounds in respect of every seal so killed or captured.

2. Any owner or master or other person in charge of any ship or vessel who shall permit such ship or vessel to be employed in killing or capturing seals, or who shall permit any person belonging to such ship or vessel to be employed in killing or capturing as aforesaid, during the close season, shall forfeit any seals so killed or captured and in addition thereto shall be liable to a penalty not exceeding three hundred pounds for each offence.

3. Every offence under this ordinance may be prosecuted and every penalty under this ordinance may be recovered before the police magistrate or any two justices of the peace in a summary manner, or by action in the supreme court of this colony, together with full costs of suit: *Provided*, that the penalty imposed by the police magistrate or two justices shall not exceed one hundred pounds, exclusive of costs.

One-half of every penalty recovered under this ordinance shall be paid to the person who prosecuted the offence or sued for such penalty.

All fines, forfeitures, and penalties recovered under this ordinance, where not otherwise hereinbefore provided, shall be to Her Majesty, her heirs, and successors, and shall be paid to the treasurer for the use of the government of this colony.

For all purposes of and incidental to the trial and punishment of any person accused of any offence under this ordinance and the proceedings and matters preliminary and incidental to and consequential on his trial and punishment, and for all purposes of and incidental to the jurisdiction of any court or of any constable or officer with reference to such offence, the offence shall be deemed to have been committed either in the place in which it was actually committed or in any place in which the offender may for the time being be found.

4. Where the owner or master of a ship or vessel is adjudged to pay a penalty for an offence under this ordinance the court may, in addition to any other power they may have for the purpose of compelling payment of such penalty, direct the same to be levied by distress or arrestment and sale of the said ship or vessel and her tackle.

5. In this ordinance the expression "seal" means the "fur seal," the "sea otter," the "hair seal," the "sea elephant," the "sea leopard," and the "sea dog," and includes any animal of the seal kind which may be found within the limits of this colony and its dependencies.

Senator MORGAN.—Now, Sir Charles, before you close this subject, I wish to ask you a question, for information, merely. I wish to know whether the British Parliament has repealed any of these Acts of any of the Colonial Legislatures, or modified them, having reference to protection of seal life?

Sir CHARLES RUSSELL.—I am not aware of such a thing having happened. There is not one that applies.

Senator MORGAN.—I am not speaking about where they apply. I want to know whether the British Government is responsible, as a Government, in its legislation, for these Acts.

Sir CHARLES RUSSELL.—So far as the responsibility means that it has not interfered—

Senator MORGAN.—That is what I mean.

1132 Sir CHARLES RUSSELL.—With the legislative action within the constitutional rights of the particular dependency, whether a Crown Colony or self-governing Colony, I think that is correct.

Senator MORGAN.—No question has been made of the power of the Colonies to pass the respective laws that they have passed?

Sir CHARLES RUSSELL.—As far as I am aware, no. And also, I add to that, as far as I am aware, there is no reason why any question should be raised.

Senator MORGAN.—Perhaps not. I only wanted to know what the fact was.

Sir CHARLES RUSSELL.—As far as I know, that is the fact; but if you can give me any particulars in any precise case, I shall be glad to look it up.

Senator MORGAN.—I do not refer to any case at all. I merely wanted to know whether the Tribunal of Arbitration were to consider these statutes upon the colonial statute books as being statutes enacted by the consent of the British Crown?

Sir CHARLES RUSSELL.—I have stated what the facts are, Sir, and they will speak for themselves. I think I have already answered the question.

Senator MORGAN.—I supposed that you could tell me what the fact is in regard to it.

Sir CHARLES RUSSELL.—That legislation, so far as I am aware—I am proceeding to examine it in detail—is all strictly limited according to, and within, the proper constitutional lines. It is territorial legislation and territorial legislation only.

The PRESIDENT.—But I believe Senator Morgan is right in saying that as long as it has not been objected to by the Crown of England, the Crown of England is held responsible for it. You have just stated that, I think.

Sir CHARLES RUSSELL.—I think you probably, Sir, for a moment were otherwise engaged. I pointed out that as regards a British Colony, whether it has no constitution, and therefore no legislative assembly of its own, or whether it has a constitution, the assent of the Queen has to be given to such legislation before it can become operative. In either case, it is given through the Governor of the particular Colony, as in the case of Canada. The Crown moreover, even after assent has been given to a legislative act by the Governor in the name of the Queen, and it has become a law, has the power of disallowing any colonial Act, a power which must however be exercised usually within a fixed period of time. Great Britain has assented, and in that sense, is clearly responsible for the legislation.

Lord HANNEN.—They are all either with the consent, or without the dissent, of the English Government?

Sir CHARLES RUSSELL.—Quite so. I rather preferred to answer the question by stating what the actual facts were, which I have done. I think at the moment, sir, you were engaged, when I was explaining it to Senator Morgan.

The PRESIDENT.—I believe that answers Senator Morgan's question.

Sir CHARLES RUSSELL.—I think it does. I intended it to be an answer, and I think the Senator so understood.

1133 Senator MORGAN.—I understand this: that without the dissent of the Queen or the Government of Great Britain, in the case of Crown Colonies, their Statutes stand as if they had been enacted by Parliament, and that that is the same rule also in regard to what you call the constitutional Colonies: there being no dissent, the law is as if enacted by Parliament in legal effect, of course.

Sir CHARLES RUSSELL.—Now I wish if I may to conclude this case of the Falkland Islands, before the Court rises, and I will not repeat my observations which were more or less in the nature of a complaint: but this is what we say in our Counter Case, which I understand my learned friend had before him when his Argument was prepared. This is on page 87.

In order to suggest that the provisions of this Ordinance are extended to non-territorial waters, Captain Budington, a navigator and seal-hunter, is quoted as an authority for the statement "under oath" that this Ordinance is enforced outside the 3-mile limit.

It will be found, however, on reference to his affidavit, that Captain Budington only swears as to what was his "understanding" of the Ordinance; and as to any instance of the enforcement of this law against foreigners outside the ordinary limit of jurisdiction, he offers no evidence whatever.

The Ordinance, with reference to the close season thereby established, enacts:

And it repeats the section, which is confined in its operation to "the limits of this Colony and its dependencies".

This is the statement put in our Counter Case and before the Argument was prepared.

The terms of the Ordinance are expressly confined to the limits of the Colony and at no time since the Falkland Islands have belonged to Great Britain, whether before or after the making of the Ordinance in question, has any attempt been made to interfere with the capture of seals outside the ordinary territorial waters. This fact is noted in the British Commissioners' Report.

There is a distinct statement. First of all, our position is this, that the law itself is in fact strictly limited territorially; and secondly, that, in fact, it has never been asserted or put in force against a foreigner outside the 3-mile limit.

Senator MORGAN.—In regard to these colonial Acts in regard to seals, do any of them make leases of the right to take seals?

Sir CHARLES RUSSELL.—I am not aware that they do. They grant what might be called hunting licenses.

Senator MORGAN.—Yes.

Lord HANNEN.—What is the page of the British Commissioner's Report?

Sir RICHARD WEBSTER.—It is referred to on page 87, my Lord, of the Counter Case, and it is quoted at page 156.

Lord HANNEN.—But what is the passage at page 156 of the British Commissioners' Report that it is referred to?

The PRESIDENT.—Are you sure that it is the Behring Sea Commissioners'?

Sir CHARLES RUSSELL.—Yes, I will give you the passage.

1134 Mr. Justice HARLAN.—I suppose it is in reply to what Felton says in answer to question 3.

Sir RICHARD WEBSTER.—Yes, I think it is.

Sir CHARLES RUSSELL.—That is, of course, a statement of fact that can be challenged if not correct.

Mr. PHELPS.—What is the statement of fact?

Sir CHARLES RUSSELL.—I have just read it at page 87 of the Case.

Mr. PHELPS.—But I mean in the British Commissioners' Report.

The PRESIDENT.—Yes, the evidence of it.

Sir CHARLES RUSSELL.—I must be allowed to state it in my own way. There is the statement of fact which is capable of being challenged if not true. Now I will show the reference to the British Commissioners' Report.

There is set out on page 154 a circular letter of enquiry which they addressed to, among other Colonies, the Falkland Islands: it is as follows:

The Department of Fisheries of the Dominion of Canada, in connection with questions relating to the fur-seal fisheries of the North Pacific, is desirous of obtaining all possible information relating to the fur-seal fisheries of the Southern Hemisphere. The southern fur-seal, or "sea-bear" (of the family of eared seals, or *Otaridæ*), is known to have formed the object of an important industry in the early part of the present century, but the islands on which it once abounded are now reported, and believed to be, almost entirely depleted of seals. As the habits and life-history of the fur-seal of the North Pacific appear to be closely similar to those of the allied seals of the Southern Hemisphere, it is thought probable that the history of the decline of the southern fisheries may afford some facts having a direct bearing on the fur-seal fisheries of the North Pacific, and may serve to indicate a proper mode of protection to be accorded to these fisheries, if such should be found necessary.

In this connection, it would be of particular interest to know for each of the seal islands or sealing-grounds of the Southern Hemisphere:

1. Whether the decline or destruction of the fishery is attributable to the slaughter of the seals while on shore at their breeding-places, or to their pursuit at large on the circumjacent ocean.

2. In what manner the fur-seal fishery has been and is conducted in each particular locality.

3. Whether any, and, if any, what measures have been taken by various Governments towards the protection of the fur-seal fisheries in their territories or in places within their jurisdiction; and, further, if any such measures are known to have proved successful in preserving or rehabilitating the fisheries.

4. Generally, any particulars as to the life-history of the animal, its migration, season of bringing forth its young, and the habits of the seals while engaged in suckling and rearing the young.

Now the answer is on page 456.

The main cause is due to the reckless and indiscriminate slaughter of the seals during their breeding season.

And so on.

H. H. WALDRON.—The decline in the Southern Hemisphere, including the Falklands, is to be attributed to the indiscriminate slaughter of the females during the breeding season, whereby the young perish. Pursuit in the high seas is not carried on to any extent.

1135 Then.

Question 2. In what manner the fur-seal fishery has been, or is, conducted in each particular locality.

J. J. FELTON.—Formerly, by means of whale-boats; later on, by cutters and schooners. They would be fitted out for the "pupping" and the "shedding" seasons; as many men would be taken as possible, armed with clubs, spears, and guns, and, landing at the breeding places, they would line the beach and endeavour to turn the seals from taking to the water.

And so on, and that is repeated.

Whether any, and, if any, what measures have been taken by various Governments towards the protection of the fur-seal fisheries in their territories, or in places within their jurisdiction; and, further, if any such measures are known to have proved successful in preserving or rehabilitating the fisheries.

J. J. FELTON.—In the Falklands; since the close season was enacted, there has been an increase of seals; but foreign schooners occasionally break the law.

J. J. GOODHART.—See answer to Question I.

E. NILSSON.—Does not see any improvement since the Law enacting a close season was passed.

H. WALDRON.—To the same effect as J. J. Felton.

I think that is all, as far as I can make out.

Mr. Justice HARLAN.—The last answer on that page has a reference to the Falkland Islands.

Sir CHARLES RUSSELL.—Thank you Sir, I will read it:

H. WALDRON.—Owing to keen pursuit, the seals prefer caves and ledges of rocks under high cliffs to form breeding rookeries. The fur-seal hauls up to breed in January, the young leaving in May for other rookeries with both "wigs" and "clap-matches". There is no regular migration, but it is probable that, when hard pressed, they leave the South Shetlands and mainland for the Falklands. "They are peculiar in liking some places for several years, and then at once going away and not hauling up there again, apparently without cause, in some instances where but few were killed and in others quite unmolested."

Lord HANNEN.—That does not refer to the meaning it seemed to be quoted for.

Sir CHARLES RUSSELL.—I have just pointed out to my learned friend I do not think it justifies the statement that the British Commissioners affirmed that fact.

Sir RICHARD WEBSTER.—It was not intended to. It is independent. There is no evidence given in support of it. It is a statement of fact on behalf of the Government in the Counter Case, and that fact is noted in the British Commissioners' Report and is set out at page 193 of the British Commissioners' Report and referred to in section 129.

Lord HANNEN.—However, your idea is that this Ordinance does not deal with the high seas at all.

Sir RICHARD WEBSTER.—Yes, there has been in fact no assertion of it; there has been in fact, no exercise of the Act as if it did apply to the high seas: and those are facts which can be challenged and contradicted, if not accurate. Mr. Budington does not vouch that he 1136 ever heard of anybody, who ever heard of anybody else, who ever said that he had been prevented sealing: he only states that his understanding of the Ordinance is so and so.

General FOSTER.—A little more than that.

Sir CHARLES RUSSELL.—No, I really read every word he said.

General FOSTER.—I beg your pardon. I followed closely.

Sir CHARLES RUSSELL.—Well, I do not complain, but I really did.

Now, one at least of the Tribunal is aware of the very close scanning an Act requires, before it is intimated that Her Majesty will not disallow it. It is a duty which falls upon the permanent legal adviser of the Colonial Office, and in cases of importance or difficulty reference is also made to the Law Officers. It would be their duty to report against any Colonial Act which affected to assume a jurisdiction which it was beyond the competence of the Legislative Body, whatever it was, to exercise. If they so advised in respect of any act, the Privy Council, on that report, would advise the Queen to disallow it.

The PRESIDENT.—Well, I think we will adjourn now.

[The Tribunal thereupon adjourned until Tuesday next, the 30th of May, at 11.30 o'clock.]

TWENTY-NINTH DAY, MAY 30TH, 1893.

The PRESIDENT.—Sir Charles, we are ready for you to resume your argument.

Sir CHARLES RUSSELL.—Mr. President, I go straight to the resumption of the examination of the instances of legislation by various countries adduced by the United States which they contend are analogous, involve an assumption of jurisdiction which they say justifies or strengthens their position. I have considered the legislation of the Falkland Islands; and I would ask the Tribunal to open the British printed Argument at page 41. At the bottom of that page, the legislation of New Zealand is considered; and this is, as we submit, a conspicuous instance of the misunderstanding of the United States of the character of this legislation. What is said about it in the Argument of the United States is at pages 167 and 168; but I only need refer to page 168 which sums up what they conceive to be the result. It is the second sentence on the top of that page of their Argument. Summing up the result, as they conceive it, they say:

In other words, authority was conferred by these Acts to seize vessels for illegally taking seals over an area of the open sea extending at the furthest point 700 miles from the coast; and the Government of New Zealand has since kept a cruiser actively employed in enforcing these regulations.

That is to say, regulations extending 700 miles from the coast. That will be found to be an entire misunderstanding of the subject.

Now, I will content myself with reading what is the actual fact as to that legislation. On page 41 of the British Argument we say:

The Statute No. 43 of 1878 for the protection of seals establishes a close season; no reference is made to waters, but the Governor may by order exclude any part of the Colony from the provisions of the Statute.

A "public fishery" is defined to be "any salt or fresh waters in the Colony, or on the coasts or bays thereof;" it includes artificial waters, and extends to the ground under such water.

Further, it is provided that offences against the Act committed on the sea-coast or at sea within one marine league of the coast are to be deemed as having been committed in a "public fishery."

There is a therefore, clear limitation to the one marine league from the coast.

"The Fisheries Conservation Act of 1884" applies to certain waters of the Colony, the term "waters" being defined to mean "any salt, fresh, or brackish waters in the Colony, or on the coasts or bays thereof." The Governor is enabled to make regulations for the protection of fish, oysters, or seals.

By "The Amendment Act No. 27 of 1887" the penalty for violating the principal Act in its application to seals is increased.

1138 Vessels illegally taking seals are declared to be forfeited, and Her Majesty's vessels and officers are empowered to seize such vessels "if found within the jurisdiction of the Government of the Colony of New Zealand."

The Act also allows vessels within the same jurisdiction to be searched.

The United States Case contains an extraordinary mis-statement:

Now, here is what the United States say with regard to this legislation of New Zealand.

The area designated as "the colony" is taken to mean the area specified in the Act [26 & 27 Vict., cap. 23, sec. 2] creating the Colony, which defines its boundaries as coincident with parallels 33° and 53° south latitude, and 162° east and 173° west longitude.

The definition in the Act [The Fisheries Conservation Act, 1884] of the term "waters" indicates that it applies to the entire area of the Colony, of which the southeastern corner is over 700 miles from the coast of New Zealand, although a few smaller islands intervene.

Then the Argument proceeds—

In the Map [which I will not stop to refer to, the Tribunal can refer to it for themselves] in the United States Case an area coloured pink is shown, comprising the waters between the limits of latitude and longitude, to found the contention that these waters are included within the colonial limits.

The words of the Imperial Statute 26 & 27 Vict., cap. 23, sec. 2, above referred to, nevertheless, are clear and explicit, and are not capable of being misunderstood.

The designation of the Colony in that Statute is as follows:

The Colony of New Zealand shall, for the purposes of the said Act and for all other purposes whatever, be deemed to comprise *all territories, islands, and countries lying between 162° east longitude and 173° west longitude, and between the 33rd and 53rd parallels of south latitude.*

Only the territories, islands, and countries *lying between* these limits of latitude and longitude are thus seen to be included within the Colony.

In other words, in interpreting this Statute, the United States representatives have fallen into what we conceive to be precisely the same mistake which they fell into in construing their own Treaty of Cession of 1867 between themselves and Russia: that misconception being that because that Treaty of 1867 described a certain line drawn from Behring Straits south-westwards beyond the Aleutian Chain, that thereby there was a cession as of territory of all the waters that lay to the east of that line.

All that is said here is that within those limits whatever is territory is part of the Colony, no more than that, just as the words used in the Treaty of 1867 were quite apt words to describe the cession to America of all that was territory lying within those degrees of latitude and of longitude. These facts were stated in the British Counter Case and yet the argument is repeated in the print by the United States as if the explanation had not been made.

Now the Cape of Good Hope comes next in order, on page 43, and I notice that the printed Argument of my learned friend does not refer to this case of the Cape of Good Hope. If I am to assume that that is given up by my learned friends, I will pass it without any notice, but unless my learned friend gives me that intimation I must of course notice it. It is mentioned by them in their Case. It is not referred to in their Argument, but we have in our Counter Case, at page 89, 1139 dealt with it and explained what the facts were, and that has not been answered. I will read the explanation which is shortly put in page 89.

It proceeds thus:

It is stated in the United States Case that "in the Colony of the Cape of Good Hope sealing is prohibited at the rookeries and in the waters adjacent thereto, except under stringent regulations".

The evidence offered in support of these allegations consists of the following statements:

W. C. B. Stamp: who says: I am told, although I know nothing about it, that regulations of some kind have been made in the Colony of the Cape of Good Hope.

G. Comer: who says: The rookeries "are in the possession or control of a company, as I was then informed, which has the exclusive right to take seals there. We did not dare to go to those rookeries because sealing was prohibited, and we would not have been allowed to take them in the waters adjacent thereto."

That does not further their view at all. Then it proceeds:

The Regulations in force in this Colony are of the character which appears from the Government Notice which is printed in the Appendix to the British Commissioners' Report. By this Notice all persons are prohibited "from disturbing the seals on the said island" [in Mossel Bay] and are warned from trespassing there.

The Government Agent states that there is practically no pursuit of the animals in the water on these coasts. The system of killing the seals is the same throughout all the colonial islands, namely, with "clubs", by men landing in boats.

Then the explanation further proceeds:

As a matter of fact, the legislation at the Cape of Good Hope is entirely confined to the protection of seals on the islands.

There is no allegation of any assertion of any right inconsistent with that explanation which I have now read.

Now the case of Canada, again, is not referred to in the printed Argument of my learned friends, and I will pursue in relation to that the same course. Whether I am entitled to assume that the explanation given in our Counter Case was satisfactory or not, I do not know. I am entitled to say that the explanation was given of what the actual facts were in our Counter Case, and after that explanation is given, the matter is not again referred to or apparently relied upon in the United States Argument. It is referred to in the British Counter-Case, at page 89:

Turning from the fur-seal to the other varieties of seals, it is alleged in the United States Case that, as regards the hair-seal in the North Atlantic—

"They have thrown about them upon the high seas the guardianship of British statutes. . . Canadian statutes prohibit all persons, without prescribing any marine limit, from disturbing or injuring all sedentary seal fisheries during the time of fishing for seals, or from hindering or frightening the shoals of seals as they enter the fishery."

The only Canadian Statute referred to is the Fisheries Act of 1886, which undoubtedly affects Canadian subjects upon the high seas, and all persons within the territorial waters of Canada, but asserts no jurisdiction over foreign subjects outside those waters.

Senator MORGAN.—That is the statement from your Counter Case.

Sir CHARLES RUSSELL.—Yes, which is not challenged in the 1140 printed Argument subsequently delivered by the United States, and is the fact. I mean it states what the fact is. I am entitled to assume that in all these cases, unless the contrary is shown, that no case can be adduced of any assertion of a right outside the territorial waters. If my learned friends could have produced instances of such assertion outside territorial waters affecting other than British subjects, it would have been something to the point—it would have been at least the *argumentum ad hominem*; but it is not even that in the absence of any such evidence. They give an extract from the Canadian Statute which gives no justification whatever for the statement which is found in their Case; and the Tribunal will be good enough to bear in mind—I will refer to it later so as not to repeat myself—the paragraph which I have already explained as to colonial legislation, namely, that the power to legislate which is conceded to Colonies which have a representative system of Government—a constitutional Government, as it is shortly called—that that being a delegated power by the Imperial Parliament, it gives to the Colonial Legislature absolutely no power, even if it affected to exercise it, which it has not done, to legislate one inch beyond the actual territory. I shall point to some remarkable decisions of the Privy Council, which is the Appellate Court from the Colonies, which have given effect to that view of the powers of Colonial Legislatures.

Senator MORGAN.—What was the penalty imposed in the Canadian Act upon the taking of hair-seals.

Sir CHARLES RUSSELL.—I will tell you, Sir, in one moment. I have not got it in my mind at present.

Mr. Justice HARLAN.—It is at page 441.

Sir CHARLES RUSSELL.—I think that for hunting or killing whales, seals or porpoises, and so on, it is a penalty not exceeding \$300, or imprisonment not exceeding six months. Everyone who with a boat or vessel knowingly disturbs, etc. a seal fishery is to be liable to a penalty not exceeding \$60, or in default one month, and is liable to pay such damages as are assessed by the Fishery Officer or Justice of the Peace. The Statutes are set out page 441 of the Appendix, vol. 1, of the Case of the United States.

Mr. Justice HARLAN.—The first section relates to rockets and explosive instruments, and the next to sedentary seal fisheries. I believe none of the provisions relate directly to seal hunting.

Sir CHARLES RUSSELL.—No.

Senator MORGAN.—Not to fur-seal hunting.

Lord HANNEN.—It was included at anyrate in the general description.

Sir CHARLES RUSSELL.—I am informed by Mr. Tupper that these Statutes apply to the shore fishery.

Senator MORGAN.—They relate to hair-seals and not fur-seals.

Sir CHARLES RUSSELL.—I should not say it related to hair-seals only, if there are such things as fur-seals in that neighbourhood, because the phrase is "seals" generally.

1141 Lord HANNEN.—It would include both classes of seals.

Senator MORGAN.—There are no fur-seals in the Atlantic.

Lord HANNEN.—I dare say.

Sir CHARLES RUSSELL.—Very likely; that probably is so.

In reference to Mr. Justice Harlan's reference to the use of any explosive weapons for the purpose of fishing, I am reminded *à propos* of an entirely different matter by Mr. Tupper, which Mr. Phelps will be able to correct if erroneous,—it is rather in reference to the illustration given by Mr. Phelps as to whether it would be a defensible act to use dynamite at sea to kill fish,—Mr. Tupper informs me that, by concert between the United States and Canada, each of these communities has passed regulations against the use of dynamite.

Mr. TUPPER.—No.

Sir CHARLES RUSSELL.—No, that is not so. I am now told that they, foreseeing the possible danger that might ensue to interests which are interests not only of one country but of both, have concerted measures by their own legislation to deal with the use of anything of that kind.

Senator MORGAN.—Can Mr. Tupper cite the Tribunal to the arrangement or regulation between the United States and Canada on the subject of mackerel fishing?

Sir CHARLES RUSSELL.—Well, this is not in reference to what I am talking about; but by all means, if you wish to ask Mr. Tupper, do so, Sir. It is rather an interruption of my argument.

Mr. TUPPER.—The position of that matter is shortly this. The United States have legislated touching the taking of fish in their waters by purse-seining, and have prohibited the catching of mackerel in the United States waters during the spawning period of the mackerel season. Canada has prohibited the use of purse-seines in Canadian waters for the whole year; that is from January till December; and,

by an exchange of notes, the British Government, representing Canada, and the United States have now arranged to discuss a proposal for dealing with the mackerel fishery, if necessary, outside the 3-mile limit of the different countries.

Senator MORGAN.—I wish to enquire if the basis of that Agreement was not the fact that this method of purse-seining was an injury to young mackerel.

Mr. TUPPER.—Yes, destroying them in great quantities.

General FOSTER.—As I participated with Mr. Tupper in that negotiation I may refresh his memory in regard to it. I understand that a commission of experts has been appointed by the two Governments to settle the whole question of the fishing interests of the two countries in the adjacent waters, no mention being made of mackerel fishing or purse-seining whatever, according to my recollection. It covers the whole question of the fisheries.

Mr. TUPPER.—Well we differ upon that and we can produce the correspondence if necessary.

1142 Sir CHARLES RUSSELL.—At all events Mr. Tupper thinks not and whether it is, or is not, it is wholly immaterial. It is a very good illustration of what I referred to several days ago of where, for instance, trawling is found to interfere with sealing on the ground that it involves the loss of small fishes, nations have come by conventions (where the law cannot help one or the other) to mutual arrangements for the protection of their respective interests. It is a very good illustration, and all the better if Mr. Foster is correct in saying it is not limited to mackerel fishing, but has a wider and more general application. The illustration becomes for that reason the stronger and not the weaker.

Lord HANNEN.—I see from the passage cited from the Canadian Statute that they catch the seals there with nets.

Sir CHARLES RUSSELL.—Yes apparently my Lord, and I believe the British Commissioners' Report further suggests that nets should be disused, and I think some time ago the question was asked by Lord Hannen why it was that nets were given up. I have since asked for the explanation, and the reason is that the nets frequently include very young seals as well as seals which are the object of capture, and very often result in the life of the younger seals being lost, and that is the reason why the Commissioners recommended its disuse.

I have said all that I need say about Canada. Now about Newfoundland. The observations on the part of the United States will be found at page 444, and it is also referred to at page 168 of the American Argument.

(1) That no seals shall be killed in the seal-fishing ground lying off the island at any period of the year, except between March 14 and April 20, inclusive, and that no seal so caught shall be brought within the limits of the Colony, under a penalty of \$4,000 in either instance.

(2) That no steamer shall leave any port of the Colony for the seal fisheries before six o'clock a. m. on March 12, under a penalty of \$5,000.

(3) That no steamer shall proceed to the seal fisheries a second time in any one year unless obliged to return to port by accident.

This act extends and enlarges the scope of a previous act, dated February 22, 1879, which contained similar provisions, but with smaller penalties, and also the provision which is still in force, that no seal shall be caught of less weight than 28 pounds.

That is the statement in the United States Argument, and it will be observed, to begin with, that there is no allegation there that that applies to foreigners at all.

Now our statement in reference to it is at page 44 of the British Argument.

The Seal Fishery Act, 1889, 42 Vict., cap. 1, established a close time for seals, and prohibits the killing of "cats" [immature seals] in order more efficiently to preserve this close time. Steamers are not allowed to leave port before a certain day.

The Seal Fishery Act, 1892, provides more stringent regulations for the observance of the close time, and heavier penalties for leaving port before a certain day.

Seals killed in breach of the close time are not to be brought into any port of the Colony or its dependencies under a penalty of 4,000 dollars.

1143 Steamers are forbidden from going on a second trip in any one year, and if they shall engage at any time in killing seals at any place within the jurisdiction of the Supreme Court of Newfoundland after returning from the first trip they shall be deemed to have started on a second trip.

From these Statutes the following conclusions are drawn in the United States Case:

1. That Great Britain and its dependencies do not limit their Governmental protection to the fur-seal; it is extended to all varieties of seals wherever they resort to British territorial waters.

2. And they have thrown about them upon the high seas the guardianship of British Statutes.

It is admitted that the principle of providing a close time for seals has been adopted by British legislation as essential to the preservation of seal life.

It is denied that any country has the power to enforce such close-time regulations beyond the territorial waters against subjects of a foreign nation, though it may do so as regards its own subjects; and neither Great Britain nor her Colonies have ever departed or attempted to depart from this principle.

It is denied that the inferences drawn by the United States in respect of the legislation of some of the Colonies already considered are warranted. The principles of English law show conclusively that such inferences are unsound; it has already been shown that they are not in accordance with the facts; and no evidence has been adduced by the United States to support them.

Now I have one word further to say in relation to this statute. It has been objected by my friend, Mr. Phelps, in his Argument, and pointed to also by Mr. Coudert, that it was absurd to suppose that, where there was a valuable fishery carried on in the neighbourhood of the territory of a particular Power, that Power could put up with a state of things in which its own subjects there were to be prohibited during certain seasons from fishing, and yet that foreigners would not come under that regulation. That was the case that my friend Mr. Coudert put very forcibly. The answer to it is this: That where the fishing is carried on in the neighbourhood of a territory, that peculiar and special advantages accrue, from that fact to the subjects or citizens of the territory: they have a base of operation which foreigners have not; and foreigners resorting to those fisheries (speaking as a general rule), must come within the territorial jurisdiction of that particular Power for some purpose or the other connected with their pursuit of fishing; and, once they come within the limits of that territory, they thereupon become subject to the laws of that territory; and in this case you will see (and in some other cases to which I shall call attention), that the colonial Legislature or other legislative power, imposes, and within its constitutional rights imposes, certain conditions on those ships that come into its ports: for instance, that they shall not be allowed to go out before a certain day, or they shall not be allowed to go out unless they comply with this, that or the other condition; and thus it is that by means of the operation of local law, against all who come within the area of local law, plus the natural advantages which proximity to the fishing grounds presents, speaking generally, the fishery is more valuable to the subjects or citizens of the territory who are connected with it, than it is to those who being foreigners are
1144 not connected with it. The statute upon which they rely is set out at page 444 of the first volume of the Appendix to the Case

of the United States. I am not going to trouble you, Sir, by referring to it. I am contenting myself with the statement—(it is there to be examined by the Tribunal if they desire)—that it does not warrant the inference drawn from it by my friends.

Now the next illustration is the Greenland or Jan Mayen fisheries, and they are referred to on page 168 of the Argument of my friend. The paragraph is short and I will read it. It says:

The seal fisheries of Greenland were the subject of concurrent legislation in 1875, 1876, and 1877 by England, Norway, Sweden, Denmark, and Netherlands, which prohibits all fishing for seals by the inhabitants of those countries before April 3 in any year, within an area of the open sea bounded by the following parallels of latitude and longitude, viz., 67° N., 75° N., 5° E., 17° W.

The mere reading of that sentence ought to dispense with further comment. It shows that this legislation of a concurrent kind arrived at by these several Powers, each of them recognizing that it has no power outside territorial limits to bind other than its own subjects,—the subjects of each of these Powers resorting to these fisheries are however bound by the legislation of their own country; and inasmuch as by convention these Powers have agreed to legislate so as to bind their respective subjects, then these laws have an extra-territorial application to the subjects of England, Norway, Sweden, Denmark and the Netherlands.

The matter is explained, and clearly explained, on page 45 of the printed Argument of Great Britain:

The second group of enactments of other countries referred to in the United States Case are based upon Conventions; they therefore lend no support to the United States contention, that they can by their independent action claim to enforce such regulations against the subjects of other nations in respect of fishing in the high sea.

The enactments in question are those of Great Britain, Sweden, Norway, Russia, Germany, and Holland. They all deal with the Jan Mayen seal fisheries in the Atlantic east of Greenland; and proceed on the principle here enunciated.

The principle is at once explained by the section of the Act which I am going to read.

The first section of "The Great Britain Greenland Seal Fishery Act of 1875" is shortly as follows:

When it appears to Her Majesty in Council that the foreign States whose ships or subjects are engaged in the Jan Mayen fishery. . . . have made or will make with respect to their own ships and subjects the like provisions to those contained in this Act, it shall be lawful for Her Majesty, by Order in Council, to direct that this Act shall apply to the said seal fishery.

In other words, when the other nations have determined on their legislation, then the Queen, by Order in Council, can apply the provisions of the Act in question.

It then proceeds:

The legislation of the other countries is conceived in a similar spirit, and was passed after negotiations between their respective Governments.

The necessary legislation having been provided, the Queen, by Order in 1145 Council, dated the 28th November, 1876, put the Act in force against her own subjects.

The great difficulty of effectively maintaining a close time in distant fisheries in the high seas, and of protecting and regulating such fisheries, except as against subjects, has in many instances been dealt with by Conventions, as is stated in the United States Case.

These Conventions proceed on principles well established.

The principles are:

1. The determination of the limits of the exclusive fisheries of the respective parties to the Convention.
2. Except as expressly varied by agreement the respective national jurisdictions are preserved intact.
3. It is only by agreement that jurisdiction on the high sea over its nationals is given by one nation to another.

Because, you will observe that these conventions sometimes, not invariably, but frequently give the right to the cruisers of one nation to seize, upon the high sea, the ships of a subject of another Power, a party to the convention, which has offended against the provisions of the convention:

Then it goes on:

These principles do not advance the United States contention. The consent of other nations is wanting to the exercise by the United States of the exclusive control which it claims. The existence of the Conventions demonstrates their necessity; by such Conventions alone can one nation presume to control the subjects of another State upon the high seas.

They recognize the right of the subjects of all the contracting Parties alike to fish in the high sea beyond the territorial waters, but for their mutual benefit they subject the fishing to regulations to be observed by the subjects of all alike. The Conventions and the legislation giving effect to them do not profess to impose these regulations on the subjects of other countries, not parties to the Conventions, nor to prohibit them in any way from fishing in the high seas, nor could they do so.

The next case is Russia, which is referred to on page 169 of the Argument of the United States; and a statement that is made here, necessitates that I should go a little out of my way in this matter.

The statement in the Argument of the United States is this:

By the law of Russia, the whole business of the pursuit of seals in the White Sea and Caspian Sea, both as to time and manuer, is regulated, and all killing of the seals except in pursuance of such regulations is prohibited.

Certain references are then made: and it proceeds:

The firm and resolute recent action of the Russian Government in prohibiting in the open sea, near the Commander Islands, the same depredations upon the seal herd that are complained of by the United States in the present case, and in capturing the Canadian vessels engaged in it, is well known and will be universally approved. That Great Britain, strong and fearless to defend her rights in every quarter of the globe, will send a fleet into those waters to mount guard over the extermination of the Russian seals by the slaughter of pregnant and nursing females, is not to be reasonably expected. The world will see no war between Great Britain and Russia on that score.

Well, it seems to me (although we know from the correspondence that we have, that the representatives of the United States have been in communication with Russia)—that this is a mis-statement, as I hope to make clear, of Russian action and Russian pretensions on this 1146 matter. First of all I wish to deal with the matter of Russian legislation and of Russian action; and we have got a very reliable means of judging of that by a correspondence entirely on the part of those interested from the point of view of the United States, and I am afraid, Sir, I must ask you to refer to one more book in this connection. It is Volume II of the Appendix to the British Case. The correspondence begins at the bottom of page 16 of Part II. You will see there, Sir, a letter from Mr. Hoffman. Mr. Hoffman was, as I understand, the Representative at St. Petersburg, of the United States.

General FOSTER.—He was the Chargé d'Affaires.

Sir CHARLES RUSSELL.—The Chargé d'Affaires.

Now, this letter is sent to him from the Department of State, on the 7th of March, 1882.

SIR: I enclose copies of letters from the Treasury, and a copy of a letter from Messrs. Lynde and Hough, of San Francisco, to the Secretary of the Treasury, touching the Pacific coast fisheries. This latter communication states that, according to late news, "foreign vessels must receive an order from the Governor of Siberia, besides paying duties or 10 dollars per ton on all fish caught in Russian waters", which they say would be ruinous to their business. In view of the above, I have to ask that you will make immediate enquiry on this subject, and report the facts. If a brief telegram will furnish information of value to our fishermen in this regard, you can send one.

Then the enclosures are to be found on page 17. I will read the second and third of those enclosures; the first I need not trouble you with, I think. The second is:

The subjoined Notice by the Russian Consul at Yokohama, that American vessels are not allowed, without a special permit or licence from the Governor-General of Eastern Siberia, "to carry on hunting, trading, fishing, etc., on the Russian coasts, or islands in the Okhotsk or Behring Seas, or on the north-eastern coast of Asia, or within the sea-boundary line", is published by the Department for the information of American ship-masters interested.

Now, here is the third enclosure.

At the request of the local authorities of Behring and other Islands, the Under-signed hereby notifies that the Russian Imperial Government publishes, for general knowledge, the following.

(1) Without a special permit or licence from the Governor-General of Eastern Siberia, foreign vessels are not allowed to carry on trading, hunting, fishing, etc., on the Russian coast or islands in the Okhotsk and Behring Seas, or on the north-eastern coast of Asia, or within their sea-boundary line.

Mr. Justice HARLAN.—What line is that? What does he mean there by the sea-boundary line?

Sir CHARLES RUSSELL.—The marine league from the shore. You will see that presently, Sir, when I have developed the correspondence.

Then it proceeds:

(2) For such permits or licences, foreign vessels should apply to Vladivostock, exclusively.

(3) In the port of Petropaulovsk, though being the only port of entry in Kamtschatka, such permits or licenses shall not be issued.

1147 (4) No permits or licences whatever shall be issued for hunting, fishing, or trading at or on the Commodore and Robben Islands.

Those are, you will recollect, specially seal islands. Then it goes on:

(5) Foreign vessels found trading, fishing, hunting, etc., in Russian waters, without a licence or permit from the Governor-General, and also those possessing a licence or permit who may infringe the existing bye-laws on hunting, shall be confiscated, both vessels and cargoes, for the benefit of the Government. This enactment shall be enforced henceforth, commencing with A. D. 1882.

(6) The enforcement of the above will be intrusted to Russian men-of-war, and also to Russian merchant-vessels, which, for that purpose, will carry military detachments and be provided with proper instructions.

Then at page 18 follows a letter—the fifth enclosure—from which I must read an extract before I read Mr. Hoffman's reply, in which Messrs. Lynde and Hough state their position and their complaint:

Sir: You will please pardon us for this seeming intrusion, but the matter in which we now seek your aid and assistance is of great import to us.

We now are and have been extensively engaged in the Pacific Coast Cod fisheries, and, in fact, are among the very few who fifteen years ago started in a small way, believing with energy and fair dealing we could work up an enterprise that would be a benefit to the coast. Our ideas were correct. We have been yearly sending vessels to the coast of Kamschatka (Sea of Okhotsk) for fish. We never have been molested in Russian waters from catching cod-fish or procuring bait, which are small salmon in the rivers, or filling fresh water for the use of ship, but it appears now there is a law which has never been enforced against foreigners, the same we have recently noted, and which we have been apprised of, and the substance is that foreign vessels must receive an order from the Governor of Siberia, besides must pay a duty of 10 dollars per ton on all fish caught in Russian waters. This decree, if sustained—

And so on.

Now this communication being made to Mr. Hoffman at St. Petersburg, here is his answer. He says:

I have the honor to acknowledge the receipt of a Circular of the Treasury Department of the 30th January last upon the subject of fishing, etc, in the Behring Sea and in the Sea of Okhotsk.

I am able to give the Département some little information upon this subject, derived nearly four years ago from Mr. Charles H. Smith, for many years a resident of Vladivostok and at one time our Consul or Vice-Consul at that port.

A glance at the Map will show that the Kurile Islands are dotted across the entrance to the sea of Okhotsk the entire distance from Japan on the south to the southernmost cape of Kantelhatka on the north.

In the time when Russia owned the whole of these islands her Representatives in Siberia claimed that the Sea of Okhotsk was a *mare clausum*, for that Russian jurisdiction extended from island to island, and over 2 marine leagues of intermediate sea from Japan to Kamschatka.

But about five years ago Russia ceded the southern group of these islands to Japan in return for the half of the Island of Saghalien, which belonged to that power.

As soon as this was done it became impossible for the Siberian authorities to maintain their claim. My informant was not aware that this claim had ever been seriously made at St. Petersburg.

The best whaling grounds are found in the bays and inlets of the Sea of Okhotsk.

Into these the Russian Government does not permit foreign whalers to enter, 1148 upon the ground that the entrance to them, from headland to headland, is less than 2 marine leagues wide. But while they permit no foreign whalers to penetrate into these bays, they avail themselves of their wealth very little. The whole privilege of whaling in those waters is a monopoly owned by an unimportant Company, which employs two or three sailing schooners only, the trying and other laborious work being done at their stations on shore.

Then apparently he inquires farther into the matter, and he says, in a letter dated March 27th 1882, page 19.

I have the honor to acknowledge the receipt of your No. 120, with its inclosures, in reference to our Pacific Ocean fisheries. Your despatch reached me yesterday, and to-day I have written to M. de Giers upon the subject, and I propose to call upon him upon his first reception day.

In the meantime, and until further information, I do not see that any new orders necessarily affecting our fishermen have been issued by the Russian Government. Messrs. Lynde and Hough have apparently given insufficient attention to the words "Russian waters". These waters are defined in the Notice published by the Imperial vice-consulate at Yokohama, as follows:

"Fishing etc., on the Russian coast or islands in the Okhotsk and Behring Seas, or on the north-eastern coast of Asia, or within their sea-boundary line."

If I recollect correctly the information given me by Mr. Smith upon this subject, referred to in my No. 44 of June 1878, and in my number 207 of this month, the cod banks lie in the open Sea of Okhotsk, many marine leagues off the south-western coast of Kamschatka. I observe that Messrs. Lynde and Hough state that their vessels fish from 10 to 25 miles from the shore. At that distance in an open sea they cannot be said "to fish upon the coast."

I do not think that Russia claims that the sea of Okhotsk is a *mare clausum*, over which she has exclusive jurisdiction. If she does her claim is not a tenable one since the cession of part of the group of the Kurile Islands to Japan, if it ever were tenable at any time.

I may add that, according to the information given me four years ago, Russia opposes no objection to foreign fishermen landing in desert places on the coast of Kamchatka, far from the few villages which are found on that coast, for the purposes of catching bait and procuring fresh water; but she does object to all communication between trading and fishing vessels and the inhabitants, alleging that these vessels sell them whiskey upon which they get drunk, and neglect their fishing, their only means of livelihood, and then, with their wives and children, die of starvation the ensuing winter.

Then there comes a further note from the same gentleman in these terms. In the first paragraph he says:

I have the honor to forward to you herewith a translation of a note recently received from M. de Giers upon the subject of hunting, fishing, and trading in the Pacific waters.

I do not see that there is anything in the Regulations referred to that affects our whalers, nor our cod fisheries either, except that when they go ashore to catch small fish for bait in the streams, they expose themselves to interruption from the Russian authorities, who, finding them in territorial waters, may accuse them of having taken their fish therein.

Then M. de Giers' letter follows. It is in these words:

Referring to the exchange of communications which has taken place between us on the subject of a Notice published by our Consul at Yokohama relative to

1149 fishing, hunting, and to trade, in the Russian waters of the Pacific, and in reply to the note which you addressed to me, dated the 15th (27th) March, I am now in a position to give you the following information.

A Notice of the tenour of that annexed to your note of the 15th March was, in fact, published by our Consul at Yokohama, and our Consul-General at San Francisco is also authorized to publish it.

This measure refers only to prohibited industries and to the trade in contraband; the restrictions which it establishes extend strictly to the territorial waters of Russia only. It was required by the numerous abuses proved in late years, and which fell with all their weight on the population of our sea shore and of our islands, whose only means of support is by fishing and hunting. These abuses inflicted also a marked injury on the interests of the Company to which the Imperial Government had conceded the monopoly of fishing and hunting ("exportation") in islands called the "Commodore" and the "Seals".

Beyond the new Regulation, of which the essential point is the obligation imposed upon captains of vessels who desire to fish and to hunt in the Russian waters of the Pacific to provide themselves at Vladivostock with the permission or licence of the Governor-General of Oriental Siberia, the right of fishing, hunting, and of trade by foreigners in our territorial waters is regulated by Article 560 and those following of Vol. XII, Part II, of the Code of Laws.

Now, Sir, if you look to the bottom of that page headed "Inclosure 2", you will see the Articles.

ARTICLE 560. The maritime waters, even when they wash the shores where there is a permanent population, cannot be the subject of private possession; they are open to the use of one and all.

ART. 561. No exception will be made to this general rule, except under the form of special privileges granted for the right of fishing in certain fixed localities and during limited periods.

ART. 562. The above Regulation regarding the right of fishing and analogous occupations on the seas extends equally to all lakes which do not belong to private properties.

ART. 565. No restrictions shall be established as regards the apparatus (engines) employed for fishing and for analogous operations in the high seas, and it shall be permitted to every one to use for this purpose such apparatus as he shall judge to be best according to the circumstances of the locality.

ART. 571. Ships in quarantine are not permitted to fish. The same prohibition extends in general to all persons in those localities where ships are lying undergoing quarantine.

Now you see, Sir, that this correspondence is between two Government Departments of the United States. My friends had access to this even more readily than we had access to it. There it is; and you will now see how far they are founded in the observations they make in their case on this subject.

Now I conclude the matter by asking your attention to page 22 of the same volume. The correspondence I have been reading, up to the present time, you will observe, Sir, relates to the year 1882.

Now on page 22 is a later letter in 1887, from Mr. Lothrop who was I think—General Foster will correct me if I am wrong—then the *Chargé d'Affaires*?

General FOSTER.—He was the Minister.

1150 Sir CHARLES RUSSELL.—He was then Minister of the United States at St.-Petersburg. He says, writing to Mr. Bayard who was, as you will recollect, Sir, Secretary of State at that time:

I have the honour to transmit to you a translation of a communication received from the Imperial Foreign Office on the 1st February instant, relative to the seizure of the schooner "Eliza".

The Russian Government claims that she was seized and condemned under the provisions of an Order, or Regulation, which took effect at the beginning of 1882, and which absolutely prohibited every kind of trading, hunting, and fishing on the Russian Pacific coast without a special licence from the Governor-General.

It is not claimed that the "Eliza" was engaged in seal-fishing, but that she was found actually engaged in trading with the natives with the contraband articles of arms and strong liquors.

She was condemned by a Commission sitting on the Imperial corvette "Rashōnik", composed of the officers thereof. In this respect, the case, is precisely like that of the "Henrietta", mentioned in my last preceding dispatch N° 95, and of this date.

It will be noticed that Mr. Spooner, the owner of the "Eliza", in his statement of his claim, declares that the "Eliza" was on a trading voyage, engaged in bartering with the natives, and catching walrus, and as such did not come under the Notice of the Russian Government, which was directed against the capture of seals on Copper, Robbins, and Behring Islands.

It will be seen that Mr. Spooner either refers to an Order of the Russian Government different from the one mentioned by the Imperial Foreign Office, or he understood the letter in a very different sense.

I may add that the Russian Code of Prize Law of 1869, Article 21, and now in force, limits the jurisdictional waters of Russia to 3 miles from the shore.

I think that is all.

The communication from General Vlangaly to Mr. Lothrop appears to corroborate the statement of Mr. Lothrop, that it was not a question of fishing, but a question of the "Eliza" being engaged in an illicit trade.

The second part of that letter is to this effect:

This information is in substance to the effect that the "Eliza" was confiscated not for the fact of seal hunting, but by virtue of an Administrative Regulation prohibiting, from the beginning of the year 1882, every kind of commercial act, of hunting, and of fishing on our coasts of the Pacific, without a special authorization from the Governor-General, and carrying with it, against those disregarding it, the penalty of the seizure of the ship as well as of the cargo.

Then a little lower down he says:

The crew of the "Eliza" was engaged not only hunting walrus on our coast of Kamschatka, and in commercial transactions with the natives, but traded there with illicit articles such as arms and strong liquors.

I think it will also be found that at a later stage, although emulating to some extent, but a little way behind the United States, some seizures have been made by Russia; it will be found that they allege that those seizures were made within territorial waters and that they required the captains seized to sign statements that in point of fact they were illegally engaged within the limits of the territorial waters; but this is a matter with respect to which I do not wish at present to be diverted. I think you will see, Sir, that I have answered satisfactorily the point which is made here.

1151 Marquis VENOSTA.—Do you not think that the Russian Government has perhaps considered the Gulf of Mesensk as a gulf, the waters of which are territorial waters? I do not know, I ask you.

Sir CHARLES RUSSELL.—That I am just coming to Sir.

Marquis VENOSTA.—Because a nation may recognize the general rule of the cannon-shot on the open sea, and may have some peculiar claim, more or less plausible, in regard to a gulf.

Sir CHARLES RUSSELL.—I am just coming to that: it is the next item of that argument. At the bottom of page 46 it says:

The Russian law dealing with the Ustinsk sealing industry in the White Sea is set out in the United States case.

The industry is carried on in the Gulf of Mesensk in the White Sea; the gulf is 53 miles wide.

The principal provisions of the law are the appointing certain days of departure to the fisheries, and prohibiting the lighting of fires to windward of the groups or hauling-grounds of the seals.

The law is not directly or indirectly applied to foreigners.

In this law again, you see an example of the control that possession of territory gives over foreigners if they come within the sphere of its

operation, as they may be obliged to do; they are controlled by the local law regulating days of departure, or other conditions of departure; and it may further be, as Count Venosta has been good enough to suggest, that Russia may think that it has a claim to the Gulf of Mesensk upon another and different ground as being a gulf largely enclosed by territory. But it does not seem to me necessary to consider that: and both Governments recognize, that what Marquis Venosta has been good enough to suggest is possible.

I have already dealt with Behring Sea, and the Sea of Okhotsk, on page 47.

Then as regards the Caspian Sea, at the bottom of page 47 of the British Argument, it is said:

The fishing and sealing industries in the Caspian Sea are also dealt with by law, which expressly declares that the catching of fish and killing of seals in the waters of the Caspian included in the Russian Empire are free to all who desire to engage in the same, except in certain specified localities, under observance of the established rules. A close time is appointed.

Of course the Caspian Sea stands in an entirely different category from any we have been discussing. The Caspian is a land-locked sea included within the territorial dominions of Russia and Persia, and I need not say that that being the fact, those Powers have absolutely the right to exclude all whom they please from access to those territories, because the access can only be obtained, in the one case through Russian, and in the other case through Persian territory: because it is an admitted right of sovereignty to deny access through their territory to any person they please.

Senator MORGAN.—Do you know, Sir Charles, whether Persia has coincided with Russia in its enactments?

1152 Sir CHARLES RUSSELL.—I am unable to say, Sir; and it is enough to say that one need only look at the map to see that the Caspian Sea is entirely surrounded by land—Persian on the one side and Russian on the other—but the case affords no aid to this Tribunal at all on the question we are discussing, and presents no analogy.

Now the next case is that of Uruguay; and as to this, I have to say that although this is referred to in the Case of the United States, it is answered in the British Counter Case at page 90, and after that answer has been given, it is not thereafter adverted to in the printed Argument of the United States; and therefore I content myself with saying that the answer has been given in the British Counter-Case, and to this there has been no rejoinder.

The statement is this. It is, in effect, the statement at page 48 of the British Argument:

The laws of Uruguay which regulate the taking of seals upon the Lobos Islands do not extend beyond the ordinary territorial jurisdiction, and have no application to pelagic sealing beyond that limit. Seals are taken on the islands, and the State—

this is part of the enactment

does not permit vessels of any kind to anchor off any of the said islands, and does not allow any works to be constructed that might frighten the seals away.

That is the whole story.

So as to Chile; that is referred to in the Case of the United States, but is not reproduced in the Argument of my learned friend.

Mr. PHELPS.—At the bottom of page 168, in the Argument, you will find a reference to Uruguay.

Sir CHARLES RUSSELL.—I beg your pardon; that is so. I had omitted to notice it.

Under the law of Uruguay the killing of seals on the Lobos and other islands "in that part of the ocean adjacent to the departments of Maldonado and Rocha" is secured to contractors, who pay to the Government a license fee and duty.

If that is all that my learned friend has to say about it, I am content to take it, it is not a thing that demands an answer.

Then Chile is mentioned in the Case; I will read what we say about it at page 90 of our Counter Case. We set out what is said in the United States Case thus:

The United States Case says:

The Governments of Chile and the Argentine Republic have also recently given protection to the fur-seals resorting to their coasts in the hope of restoring their almost exterminated rookeries.

The mischief, however, appears to have been entirely done by sealers landing on the rookeries. Mr. Comer states that.

If there had been strict regulations enforced, allowing us to kill only young "wigs", and not to disturb the breeding seals, I am convinced, and have no doubt, that all these rookeries would be full of seals to-day.

The Chilean law referred to appears to be the Ordinance of the 17th August, 1892, from which the following extracts are made in order to show that the 1153 Chilean Government asserts no jurisdiction beyond the ordinary 3-mile limit, but is careful to define strictly the limits of the operation of the Ordinance.

Then the Ordinance is set out.

"Ordinance regulating the Pursuit at Sea or on Land of Seals or Sea-wolves, Otters and 'Chungungos' in the Coasts, Islands, and Territorial Waters of Chile.

"ARTICLE 1. Only Chileans and foreigners domiciled in Chile are allowed to engage in the pursuit on land or at sea of seals or sea-wolves, otters, and 'chungungos' in the coasts, islands, and territorial waters of the Republic, as laid down in Article 611 of the Civil Code.

"No ships can engage in the pursuit to which this Ordinance refers except those Chilean vessels which are in possession of the qualifications required by the Navigation Laws to be considered as such, foreign vessels being absolutely prohibited from engaging in this industry.

"ART. 2. For the purposes of this Ordinance, the coasts, islands, and territorial waters of Chile shall be considered as divided into as many zones as there are Maritime Governments in the Republic.

"The extent of each zone shall be that of the respective Maritime Government."

Then it proceeds:

Acting under powers conferred by the above Ordinance, the President of the Republic on the 20th August, 1892, decreed that the fishery of seals

"be suspended for the period of one year in the regions included in the Maritime Governments of Chiloe and Magellanes, and on the coasts of the Islands of Juan Fernandez."

The general law of Chile as to fisheries is contained in the Civil Code, where it is enacted:

ARTICLE 585.

And I would beg to compliment Chile upon its very accurate statement of what I conceive to be the law recognized by nations in this matter.

Things which in their nature are common property, as the product of the high seas, are not subject to any dominion, and no nation, corporation, or individual has any right to monopolize them. The use or enjoyment of them is determined among the citizens of any one nation by the laws of that nation, but between different nations by international law.

"ARTICLE 593. The adjacent sea, to a distance of 1 marine league, measured from low-water mark, is the territorial sea, and under the national dominion; but police administration for the purposes of the security of the State or the carrying out of fiscal Regulations, extends to a distance of 4 marine leagues, measured in the same manner."

The 4 marine leagues for the two purposes mentioned I do not admit; nor for the latter purpose, without the qualification which I have more than once given.

"ARTICLE 611. Sea fishing is free, but in the territorial seas the right of fishing is enjoyed only by Chilean citizens or domiciled foreigners."

Now the next case given is the Argentine Republic and that was mentioned in the Case, but is not again mentioned I think I only need read what is said in the British Argument, p. 48.

"The laws of the Republic are not set out in the United States Appendix. The statement in the United States Case is merely that protection is given to the fur-seals resorting to the coasts; it is not stated that the regulations are extra-territorial, or that they apply to foreigners."

1154 The next case is Japan. This also appeared in the United States Case, but it does not appear in the Argument. It is dealt with at page 92 of the British Counter Case.

It is also stated that "the Japanese Government has taken steps toward the restoration and preservation of the fur-seals at the Kurile Islands". The extract from Regulations of 1885 referred to by way of verification, and set forth in the Appendix, relates to islands within the territory of Japan, and no other law is set forth or mentioned; nor is it alleged in the Case that any of the Japanese laws relating to seal fisheries have an extraterritorial operation. Further, the Regulations of 1885 do not appear to be now in force, for the full official Memorandum supplied on the 14th December, 1891, by the courtesy of the Japanese Government, in answer to a circular asking for "copies of any printed documents or Reports referring to the fur-seal fisheries" sets forth "the several Regulations in force at the present time", among which those of 1885 are not given; and it states that there are no means of checking "foreign poachers" "outside the line of territorial limit fixed by international law."

Now, so far, I think I have dealt with every case cited on this point: and on page 49 of our Argument is stated the conclusion to which I think the Tribunal is justified in coming upon an examination in detail of these instances.

None of the countries above specified profess to control the killing of seals by extra-territorial provisions, or by interfering with foreigners on the high seas, or in any other way than in accordance with the principles already established; nor do they profess to claim a property in or a right of protection of seals in the high sea.

The first contention of the United States, that seal life is protected by extra-territorial laws of other countries applicable to foreigners, is therefore shown to be without foundation.

I now come to the next branch of this argument.

A further contention of the United States is that, not seal-fisheries only, but other fisheries, are protected by extra-territorial laws of other nations, and that they are extended to foreigners.

Then there are the Irish oyster fisheries, the Scotch herring fisheries, the Ceylon pearl fisheries, the Queensland and West Australian fisheries, which may be called British examples: and the foreign examples are France, Algeria, Italy, Norwegian, Columbia, and Mexico. These I will examine in order.

The subject of the Irish oyster fisheries which comes first in order is referred to on page 166 of the United States Argument. It says:

Oyster beds in the open sea have been made the subject of similar legislation in Great Britain.

A section of the British "Sea Fisheries Act, 1868", conferred upon the Crown the right by orders in council to restrict and regulate dredging for oysters on any oyster bed within *twenty* miles of a straight line drawn between two specified points on the coast of Ireland, "outside of the exclusive fishery limits of the British Isles." The act extends to all boats specified in the order, whether British or foreign.

Now so far (and I should like the Tribunal to follow this a little closely) it states, and states correctly, that this British "Sea Fisheries Act

1868", which *prima facie* applies only to subjects of the Crown, and not to foreigners, gives to the Crown the right, by Order in Council, to specify boats, whether British or foreign, and so bring them within the operation of the Act. Now I call attention to what the actual state of the case is, and to the further fact that no such Order has been ever made to include any foreign boats, and that there has never been any assertion of power under this Act as against any foreigner whatever.

I might, but for the way in which it has been referred to, dismiss it very lightly, because at page 93 in our Counter Case, relating to this matter, we make this statement:

As to Ireland, the British Government have never assumed to put in force against foreigners any bye-laws made under "The Seal Fisheries Act, 1868," affecting waters outside territorial limits. And although this Act is relied on in the United States Case as authorizing the assertion of jurisdiction over foreigners outside those limits, no bye-law having that effect exists, and it would be contrary to the practice of the British Government that any such bye-laws should be made, unless in pursuance of some Treaty with the Power whose subjects may be affected.

Now that is a statement of fact my learned friend, when he came to prepare his Argument did not meet, and could not meet, and it ought to be quite enough for the purpose of this discussion.

But the matter is gone into fully in the British Argument at page 50.

The Statute permits the Irish Fishery Commissioners to regulate, by bye-laws, oyster dredging on banks 20 miles to seaward of a certain line drawn between two headlands on the east coast of Ireland.

Within this line the extreme depth of indentation is not more than 5 miles.

The Act provides that the bye-laws are to apply equally to all boats and persons on whom they may be binding; but they are not to come into operation until an Order in Council so directs.

The Order in Council is to be binding on all British sea-fishing boats, and on any other sea-fishing boats specified in the Orders.

Therefore, till there is an Order specifying any except British sea fishing boats, it has, and can have, no application to any other.

The facts which have occurred since the passing of the Statute are as follows:

The Commissioners have made a bye-law appointing a close time.

The bye-law was put in force by Order in Council of the 29th April, 1869.

The Order recited the power given to the Queen by the Act to specify other besides British boats to which the bye-law was to apply.

No other boats were so specified.

The law is therefore expressly limited to British boats within the 20 miles. It cannot by the terms of the Act itself apply to any foreign boats.

It would be contrary to the principles on which British legislation invariably proceeds that bye-laws should apply to foreign boats outside the 3-mile limit, unless power to enforce such a bye-law against the boats of any nation had been acquired by Treaty.

The provision was inserted in the Act to provide for the case of any such Treaty being entered into.

Thereafter, without such enabling provision in the Act, the Queen would possess no power to make an order in Council bringing foreigners within the Act.

The statement made in the United States Case is therefore inaccurate.

You see therefore the object of the assertion of that power: because, if a Treaty should be made with any other State that might be interested in this fishery, the Queen would have had no jurisdiction to apply it to persons outside the three-mile limit other than her own subjects, unless the Statute gave her express power so to do.

Now the next case referred to is the Scotch Herring Fishery; and precisely the same thing may be said of this:

By the Act of 1887, 52 and 53 Vict, cap. 23, a close time is provided, and trawling is prohibited within the north eastern indentation of the coast of Scotland; the line of limit is drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, a distance of 80 miles.

Penalties are imposed on any person infringing the provisions of the Act.

Stress is laid in the United States Case on the words "any person;" and the statement is made that "the Act is not confined in its operations to British subjects."

This statement is at variance with the principles of English legislation and the practice of the English Courts in interpreting Statutes.

"Any person" is a term commonly used in English Statutes dealing with offences, and it is invariably applied to such persons only as owe a duty of obedience to the British Parliament.

That is to say, so far as their extra-territorial application is concerned. But I cannot help thinking that with regard to all this class of cases, it helps the Tribunal very, very little, if at all; because, supposing it were to be made clear that there was a case in which a Legislature had affected to bind foreigners outside territorial limits, that is either a good law or a bad law. It does not make it international law because a particular Power has affected to usurp a power which international law does not warrant it in assuming. I shall later have to call attention to cases illustrating this principle of the construction of British Statutes which I have been referring to, namely, that if the words of a Statute are general in its application to all persons, the uniform rule of construction is that, extra-territorially, it applies only to those who are subject to the laws of Great Britain.

Now, the next case cited is the Ceylon Pearl Fishery, and I may say in passing that this is a subject which may be referred to under a different head of claim. The erudition of the members of the Tribunal may be possibly able to supplement my scant information on the subject, but, as far as I know, these fisheries of Ceylon and Bahrem stand in a position perfectly unique. How old they are, I do not know. Some of my learned friends have said that they are old enough to be mentioned in Herodotus. I do not know how the fact is, I have not been able to verify it; but these facts are undoubted that for many generations the owners of the territory of Ceylon have, with the acquiescence of all other Powers of the World, been allowed to claim to exercise dominion in respect of these Fisheries which are contiguous to the coast but which extend beyond the three miles of the territorial zone or belt. Those facts are undoubted, and I care not whether the title is without a flaw; it is a title which has been recognised for a great many years; has been acquiesced in; and as to which, as far as I know, no dispute has ever occurred. There is also the consideration whether this case may not be referable to a different consideration; it may, possibly be founded upon exclusive possession, from their contiguity

1157 to the shore and from the manner in which the fisheries are themselves carried on. My learned friend Mr. Carter was very powerful in relation to the suggestion that the claim to the Ceylon Fisheries was defended upon the ground that you could occupy portions of the sea away from the land; and he then proceeded to say that, if that was so, then all that a Nation had to do was to discover where there was a valuable feeding bank for some valuable race of fish, and buoy it out where you could get a bottom sufficient at all events, to plant your leads upon the ground,—to buoy out 100 square miles, or 200 square miles, leave the buoys, and say "That is our territory."

I must ask the Tribunal, is that an argument which is to be treated seriously? Is there any analogy between that case and the occupation of a very small portion of the bottom of the sea contiguous to admitted territory, and the pursuit there of this particular fishing? I submit that the analogy does not exist, and the illustration is one that is very strained. There is undoubtedly some warrant for the distinction between the case of these fisheries, whether they are pearl, or whether they are

coral, or whether they are oyster, and there is an obvious distinction in fact, between a fishery of that description and one which depends on the pursuit of any free-swimming fish in the Ocean. Chief Justice Cockburn, in that case of the *Queen v. Keyn*, which has been so often referred to, says that a portion of the bed of the sea, where it can be physically, permanently occupied, may be subject to occupation in the same manner as unoccupied territory; Vattel also is cited upon page 52 of our Argument, he says:

Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property?

Mr. Justice HARLAN.—Where is Chief Justice Cockburn's judgment reported?

Sir CHARLES RUSSELL.—It is in the Law Reports, 2 Exchequer Division, at page 63. I can lend any of the Tribunal the book if they desire it.

Mr. Justice HARLAN.—Yes, I should like to see it.

Sir CHARLES RUSSELL.—I may have to refer to it a little later.

I must refer now to the Australian Pearl Fisheries as another instance of a clear misunderstanding on the part of my learned friends. On page 52 of our Argument we state that—

In the United States Case reference is thus made to the Australian fishery laws:

"These Statutes extended the local regulations of the two countries mentioned (Queensland and Western Australia) to defined areas of the open sea, of which the most remote points are about 250 miles from the coast of Queensland and about 600 miles from the coast of Western Australia".

It suffices to point out that these statutes are in express terms confined to British ships and boats attached to British ships.

The reference is to page 233 of the United States Case. This is the passage:

The pearl fisheries of Queensland and Western Australia were, in the years 1888 and 1889, made the subject of regulation by two statutes enacted by the Federal Council of Australasia. These statutes extended the local regulations of the two countries mentioned to defined areas of the open sea, of which the most remote points are about two hundred and fifty miles from the coast of Queensland, and about six hundred miles from the coast of western Australia.

General FOSTER.—We go on to say that they are confined to British subjects.

Sir CHARLES RUSSELL.—Yes that is just what I am going to read:

These acts are, by their terms limited in their operations to British subjects,

(And therefore of course have nothing to do with the case,)

but as Sir George Baden-Powell has pointed out, in a recent address delivered before the Association for the Codification of the Law of Nations, the remoteness of these waters renders it practically impossible for foreign vessels to participate in the pearl fisheries without entering an Australian port, and thereby rendering themselves amenable to Australian law.

Quite so, that is what I have been saying, and why that should have been cited I do not know.

Then the next case is the law of France as to which the Tribunal have the best means within their reach of informing themselves if we do not explain it correctly. France is referred to at page 165 of the United States Argument thus:

Legislation of the same character has also taken place in France and Italy in reference to coral reefs in the open sea and outside the jurisdictional limits.

The French law of 1864 relating to the coral fisheries of Algeria and Tunis required all fishermen to take out licenses to fish anywhere on the coral banks, which extend into the Mediterranean 7 miles from shore. In addition to this license all foreign

fishermen were required to take out patents from the Government, for which a considerable sum had to be paid; and by the recent act of 1888, foreign fishermen are precluded entirely from fishing within 3 miles from shore, apparently leaving the former regulations in force with respect to such portions of the coral banks as lie outside of those limits.

Now we have dealt with the whole of the French legislation which they mentioned in their original case, but when my learned friend comes to his Argument the only point which is made relates to the case of Algeria and Tunis, and I think I must trouble the Tribunal with a short reference to what we say about this subject at page 94 of the British Counter Case.

The United States Case says that the Decree of the 10th May 1862.—

“went so far as to provide in terms that under certain circumstances fishing might be prohibited over areas of the sea beyond 3 miles from shore”.

This Decree, of which Article 2 only is set forth in the Appendix to the United States Case, is given at length in the Appendix to this Counter-Case. Article 1 has the following paragraph:

Les pêcheurs sont tenus d'observer, dans les mers situées entre les côtes de France et celle du Royaume-Uni de la Grande-Bretagne et d'Irlande, les prescriptions de la Convention du 2 août 1839, et du Règlement International du 23 juin 1843.

This shows that French subjects only are affected; for the Government did, and could bind its subjects only by the Convention of 1839.

Article 2 is as follows:

Sur la demande des prud'hommes—

The PRESIDENT.—A prud'homme is a sort of Alderman.

1159 Sir CHARLES RUSSELL.—

Sur la demande des prud'hommes des pêcheurs, de leurs délégués et, à défaut, des syndics des gens de mer, certaines pêches peuvent être temporairement interdites sur une étendue de mer au delà de 3 milles du littoral, si cette mesure est commandée par l'intérêt de la conservation des fonds ou de la pêche de poissons de passage.

That is “free swimming fish.”

The PRESIDENT.—Yes.

Sir CHARLES RUSSELL.—

L'Arrêté d'interdiction est pris par le Préfet Maritime.

Then our Counter Case continues:

It is not alleged in the United States Case that the power thus given has been acted on as against foreigners, and it is submitted that Article 2 was not intended to authorize bye-laws affecting foreigners beyond territorial limits.

The construction which supposes the Decree to apply to foreigners assumes it to assert an authority to prohibit fishing to all nations, unlimited in the selection of the kinds of fish to which the prohibition may apply, either as to their being “located” near French coasts, or as to their being those in which France has “an interest, an industry and a commerce” and assumes that the prohibition may extend to mere “fishes of passage” in which the interest of France is only that which it has in common with other nations, and may apply to every part of the high seas.

I omit the intervening passage: it then proceeds:

The extent to which France claims to legislate for foreign fishermen is now regulated by the Law of the 1st March 1888.

Article 1 says:

“La pêche est interdite aux bateaux étrangers dans les eaux territoriales de la France et de l'Algérie, en deçà d'une limite qui est fixée à 3 milles marins au large de la basse mer.”

The United States Case proceeds:

“Numerous laws have also been enacted by France to protect and regulate the coral fisheries of Algeria, both as to natives and foreigners, and the coral beds so regulated extend at some points as far as 7 miles into the sea.”

This is not verified by particulars or evidence.

If that answer is in any way incomplete, I would ask you to be good enough, Sir, to inform your colleagues what it may be necessary to know further about it.

The next case is that of the Algerian Coral Fisheries, which I have already dealt with as part of France.

The next is the Italian Coral Fisheries, referred to on page 53 of our Argument; and I will content myself with reading the observation which the Marquis Venosta was good enough to make in the course of my learned friend Mr. Coudert's argument. It will be found at page 570 of the print.

I will say in regard to the observation of Mr. Coudert that the Italian Decrees do not apply to foreigners. The three Decrees cited in the Case of the United States are an addition to the Regulation of November 13th, 1882, which is made to apply the law of March 4th, 1877, on fishing, and this law in its 1st article as well as the Regulations limits their zone of application to the territorial waters. The coral

Banks of Sciacca where fishery was forbidden for some time, are outside the territorial waters; so those Decrees were not applicable to foreigners if they went there; but the industry, in fact, is exclusively carried on by Italian citizens. I must add however that this prohibition has now been repealed.

Mr. COUDERT.—Yes, I was coming to that question,—the distinction between citizens and foreigners, and the privilege that the rule would give to foreigners over citizens. Of course, if as the Arbitrator says, and I desire to be instructed by him.

Marquis VISCONTI-VENOSTA.—It is a question of fact.

Marquis VISCONTI-VENOSTA.—The question of fact is that this does not apply to foreigners.

Sir CHARLES RUSSELL.—Then we have next the Norwegian Whale Fisheries, which are mentioned in the Case of the United States, but not referred to in the Argument of my learned friend, Mr. Phelps. We have, at page 96 of our Counter Case, dealt with that matter.

As to Norway, the United States Case says that the principle of contention (3) of the United States as set out at page 74, which I will refer to in a moment

is recognized in a Statute for the protection of whales, "in Varanger Fiord, an arm of the open sea about 32 marine miles in width." There is nothing in the Norwegian laws set forth in the Appendix to the United States Case to show that they apply to foreigners at all. If they do, then, as regards Varanger Fiord, the question may be whether or not it belongs to the "inner waters" of Norway.

Mr. GRAM.—I should only wish to say it is quite true there is nothing in the Norwegian Law which expressly shows that it is intended to apply to foreigners; but, as a matter of fact, it is directed against foreigners as well as against Norwegian citizens,—the Fiords are considered to be interior waters as a rule.

Sir CHARLES RUSSELL.—Yes. As a matter of fact, I believe, I am right in saying that no question has ever arisen as to the necessity of applying as against foreigners any principle of exclusion.

Mr. GRAM.—I beg your pardon. Norway has applied the principle against foreign subjects in that part of the country.

Sir CHARLES RUSSELL.—I was not aware of that. Perhaps you will be good enough, sir, to tell the Arbitrators the result of the contention.

Mr. GRAM.—It has always been maintained that the Fiords are interior waters against foreigners as well as against Norwegians.

Sir CHARLES RUSSELL.—The statement in the Argument is that if the law applies to foreigners, and is put in force against foreigners, then as regards the Varanger Fiord, the question is whether it does or does not belong to the inner waters of Norway or fall within the principle of land-locked waters.

Lord HANNEN.—And it turns entirely on that, Sir Charles. The question is solely whether these are interior waters.

Senator MORGAN.—What is the width of these interior waters, or fiords?

Sir CHARLES RUSSELL.—I have just read it, Sir. It is 32 miles.
 1161 Senator MORGAN.—That must be a good way from the three mile limit, somewhere.

Sir CHARLES RUSSELL.—Yes.

Senator MORGAN.—It is the Norwegian construction of the three mile limit.

Mr. GRAM.—The distance is calculated from the mouth of the fiords.

Sir CHARLES RUSSELL.—I think I may remind Senator Morgan that there are bays on the American coast—Delaware Bay for instance—which have been claimed by the United States as coming within that principle of inner waters, land-locked waters, although they are wider at the mouth than Varanger Fiord.

Senator MORGAN.—I know of no case in which that question has been brought up between the United States and any foreign Government.

Sir CHARLES RUSSELL.—That is another matter. I was merely suggesting that; and I think Senator Morgan will admit the impeachment.

The PRESIDENT.—This all shows that we must be extremely prudent.

We will not attempt to define what is meant by territorial waters; and I believe indeed that question is not before us.

Lord HANNEN.—I think, Sir Charles, you will find it was brought up with reference to the Bay of Fundy, before an Arbitration of which I have some knowledge; and it was decided that the Bay of Fundy could not be claimed by England. The United States disputed it.

Senator MORGAN.—Because there is an American island in the Bay of Fundy.

Sir CHARLES RUSSELL.—However, as the learned President has said, it does not touch this question, because it is not put as an extension of jurisdiction beyond the three mile limit; but it is based upon the assertion, right or wrong, that it is inner or land-locked waters of the territory. Whether that contention is right or wrong, it is not necessary to consider. The illustration, whatever the case is, does not help the argument put forward.

The next reference, Sir, is to Panama, which is referred to on page 165 of the Argument of the United States, where my friend says:

Similar restrictions upon the pearl fisheries in the open sea have been likewise imposed by the Government of Colombia.

A decree by the governor of Panama in the United States of Colombia, in 1890, prohibited the use of diving machines for the collection of pearls within a section of the Gulf of Panama, which is between 60 and 70 marine miles in width, and of which the most remote point is 30 marine miles from the main land.

From the map which is referred to and set out at page 484 of the First Volume of the Appendix to the Case of the United States, it would appear that there are two gulfs in the Bay of Panama, and not one as might be gathered from the above statement, and that both, or at least one of them, may fall within the principle of embayed waters.

Our comment upon this matter at page 96 of the Counter Case is this:

1162 The law of Panama next referred to applies, and is alleged to apply, only to pearl fisheries as to the title or want of title to which, or their proximity to islands or coast, or whether in inland waters, nothing is said. Nor is there anything to show that the law in question applies to foreigners.

The assertion in the United States Case as to the area affected by the law is unsupported by evidence; and it will be observed that the Map of the Panama pearl fisheries in the Appendix, does not purport to come from the Panama Government, but to be "prepared at the office of the Coast and Geodetic Survey". From what materials it was so prepared is not explained; and as it refers to a Decree of 1890, and is not dated, it may be supposed to have been made for exhibition to the Tribunal of Arbitration.

No doubt the map is honestly enough made for the purposes for which it is intended; but it is not an official map, and it does not supply data which would enable one to judge of the exact weight to be attached to it.

The Tribunal here adjourned for a short time.

SIR CHARLES RUSSELL.—Mr. President, I am glad to say that, in reference to that matter of the legislation in relation to the purse seine and mackerel fishery, my friends Mr. Tupper and Mr. Foster are both right. Mr. Foster is right in saying that the convention entered into is general. My friend Mr. Tupper is right in saying that the occasion of its being entered into was in relation to the purse seine. It stands thus: That on the 22nd of May, 1890 the Canadian Government asked that the United States Government might be communicated with, with a view of obtaining some international legislation, either for the purpose of prohibition or of restriction of the use of the purse seine in the mackerel fishery, in order that, for the general good, the impending danger to this valuable industry might be averted.

That was the subject for discussion; and ultimately the Convention entered into resulted in an arrangement for the appointment of a commission to consider and report concerning the regulations, practice and restrictions proper to be adopted in concert, with regard to, among other things:

The limitation or prevention of exhaustive or destructive methods of taking fish and shell-fish in the territorial and contiguous waters of the United States and Her Majesty's possessions in North America respectively, and also in the waters of the open seas *outside the territorial limits* of either country to which the inhabitants of the respective countries may habitually resort for the purpose of such fishing.

It was therefore made by Convention a matter which was, when it came to any further head, to be given effect to by legislation by either country so as to bind its own nationals.

Senator MORGAN.—That process of purse seine fishing, Sir Charles, allow me to say, was the invention of the people of the United States and was practised by them; and both the Government of the United States and the Government of Canada thought it ought to be given up.

SIR CHARLES RUSSELL.—I presume, Sir, like many other inventions of the United States it was used by others than the people of the United States—that it was used by both Canadian and United States fishermen.

1163 Senator MORGAN.—It was commonly used by both; yes.

SIR CHARLES RUSSELL.—Now, sir, I left off at page 54 of the British Argument; and the only one of these cases of fishery remaining is the Mexican Pearl Fisheries. That was referred to in the United States Case, but is not referred to in their Argument. I will content myself therefore with reading from page 96 of the British Counter Case, which states what the facts are, which are not contradicted.

The facts stated with reference to these pearl fisheries are not verified by evidence. The Mexican Regulations appear only to refer to "the waters of the Republic;" and even then foreigners are admitted to the fisheries on complying with certain Regulations as to registration and payment of tonnage and lighthouse dues.

It is worth observing that, although Mexican legislation is adduced in the United States Case as an example of the exercise of jurisdiction outside the 3-mile limit, yet in setting out the Regulations of 1874 in the Appendix, those relating to the boundaries of the fishing districts are omitted.

As showing that Great Britain has not consented to the exercise of fishery jurisdiction by Mexico beyond the ordinary limit, reference may be made to the Treaty of the 27th November, 1888, between Great Britain and that country, of which the last paragraph of Article IV is as follows:

The two Contracting Parties agree to consider, as a limit of their territorial waters on their respective coasts, the distance of 4 marine leagues reckoned from the line of low-water mark. Nevertheless, this stipulation shall have no effect, excepting in what may relate to the observance and application of the Custom-house Regulations and the measures for preventing smuggling, and cannot be extended to other questions of civil and criminal jurisdiction or of international maritime law.

Now, Sir, I have come to the end of the examples as regards fishery laws; and I have next to draw attention to the general principles of the applicable to legislation of this class, as set out on page 55 of the Argument, where we say:

Throughout the foregoing discussion of the legislation of various nations, certain principles of law have been referred to, the full explanation of which had necessarily to be postponed until the examinations were completed.

For convenience these principles will now be collected, and will then be separately examined:

(I) That by the universal usage of nations, the laws of any state have no extra-territorial application to foreigners, even if they have such application to subjects.

(II) That Great Britain has incorporated this principle into her own law by a long-established usage, and a series of decisions of her Courts; and that the law of the United States is identical.

(III) That the British Colonies have no power to legislate for foreigners beyond the colonial limits.

(IV) That international law has recognized the right to acquire certain portions of the waters of the sea and the soil under the sea, in bays, and in waters between islands and the mainland.

(V) That the analogy attempted to be traced by the United States between the claims to protect seals in Behring Sea, and the principles applicable to coral reefs and pearl beds, is unwarranted.

(VI) And, finally, that there is no complete or even partial consent of nations to any such pretension as to property in, and protection of, seals as set up by the United States.

Now, as regards the first of these points, that there is no extra-territorial application of the laws of any State to foreigners, I do

not feel it incumbent upon me to labour that point, because it is conceded practically, I think, by my learned friend, Mr. Phelps, in his Argument. He admits that, as laws they have no extra-territorial effect. His contention, with which I have already dealt, and to which I must recur again, is that although they have no extra-territorial effect as laws, yet they may have some effect under another denomination which my learned friend calls self-defensive or self-preservative regulations. I have, as I say, already dealt with that; but I will recur to it, momentarily at least, again.

The next proposition is that the laws of Great Britain have no extra-territorial application to foreigners. Chief Justice Cockburn, in that case to which I have before referred of *the Queen v. Keyn*, states the proposition thus, on page 73 of the report:

Where the language of a statute is general and may include foreigners or not, the true canon of construction is to assume that the legislature has not so enacted as to violate the rights of other nations.

And in that connection also there is a quotation from a judgment of Lord Stowell in the "*Le Louis*", which I will refer to later. I will not read it now.

At the top of page 57 of our Argument, a case is referred to which is not unimportant, in which Lord Justice Turner, a Judge of the Appeal Court, says:

This is a British Act of Parliament, and it is not, I think, to be presumed that the British Parliament could intend to legislate as to the rights and liabilities of foreigners; in order to warrant such a conclusion, I think that either the words of the Act ought to be express or the context of it very clear.

And again Baron Parke, in *Jeffreys v. Boosey*, said:

The Legislature has no power over any person except its own subjects, that is, persons natural-born subjects, or resident, or whilst they are within the limits of the kingdom; the Legislature can impose no duties except on them, and when legislating for the benefit of persons must *prima facie* be considered to mean the benefits of those who owe obedience to our laws, and whose interest the Legislature is under a correlative obligation to protect.

There is a remarkable illustration of this in the case referred to of *ex parte Blain*, re *Sawers*:

The question arose as to the application of the English Bankruptcy Law to foreigners in England; the definitions of acts of bankruptcy in the Statute include the commission of certain acts "in England or elsewhere;" yet it was held by the Court of Appeal that a foreigner in England, although on general principles he was subject to English law, could not be made bankrupt unless he had committed an act of bankruptcy in England. The words "or elsewhere" were held not to apply to such a foreigner on the principles above stated.

I have already referred to the case of *Queen v. Keyn*, and I will not repeat the reference to that case.

The next principle adverted to is that the Colonies have no power of extra-territorial legislation for foreigners. That principle follows from the one which I enunciated early this morning, namely that these colonial Legislatures are acting under a delegated authority, an authority delegated to them by the Imperial Parliament and that they have no power to bind any one outside their own territory. A very remarkable illustration of that is mentioned at page 58 in the case of *Macleod v. Attorney General for New South Wales*, which arose in this way. The charge was that Macleod had committed bigamy. The local statute enacted that:

Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

Here were general words similar to the words "any person", so much relied on by the United States.

The Judicial Committee nevertheless rejected their general application. They said:

The colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and indeed inconsistent with the most familiar principles of international law. . . .

The words "whosoever being married" mean whosoever being married and who is amenable at the time of the offence committed to the jurisdiction of the colony. . . . "Wheresoever" may be read, "Wheresoever in this colony the offence is committed."

So that although the words of the statute were "whosoever being married"—without any limitation of place—"marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years"—where the first marriage had taken place inside the colony, and the second marriage outside it, it was held that the man could not be convicted under the terms of that section for bigamy.

The case is reported in the "Appeal Cases" of the Law Reports for 1891, at page 445. I have the case before me and it is at the disposition of any of the tribunal who desire to read it. The considered judgment of the Court was delivered by the late Lord Chancellor. On page 458, he says:

The result as it appears to their Lordships must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside.

Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories and the maxim which has been more than once quoted "*extra territorium jus dicenti impune non paretur*" would be applicable to such a case.

Then, Mr. President, follows a statement on page 59 of our Argument of those cases where the law does recognize the right of a State to acquire certain portions of the water of the sea and of the 1166 soil under the sea, and to include them within its territory;

I do not stop to dwell upon them because I do not conceive it necessary, but they will all be found to be cases which are either defensible as being bays or within a headland offing, or being simply portions of contiguous sea as to which possession, or what was treated as possession, has been acquired.

Then at the bottom of page 59, and on page 60, there is a brief consideration of the point of whether there can be said to be any analogy between the claim to property in and to protect free-swimming animals, such as fish and seals, and a like claim in respect of oysters which have a fixed *locus*, or coral beds which have a fixed *situs*: but I do not propose to trouble you with dwelling upon that subject. I have so frequently enunciated the principle that I do not desire to do more than refer to it in the words of Chief Justice Cockburn in the case of *Queen v. Keyn*, which is a case deserving of notice on many grounds, first because of the examination of the general law to which many judicial minds on that occasion applied themselves, but also because the case itself was a remarkable illustration of the regard paid by the law of England to that principle of strictly confining a law of a country to the territorial limits of that country. What was that case? It was the case of an offence supposed to have been committed within three miles of the coast, and therefore within the narrowest limit fixed as the territorial zone; and yet the majority of that Court declined to affirm the proposition that the Courts of Great Britain had jurisdiction, without legislation, to deal with an offence committed within the three mile limit: it was a very remarkable illustration of the tenacity with which that principle is observed.

On the next page of our Argument, page 60, we recur to the argument on the "Hovering Acts", as to which, incidentally, I shall have to say a word presently in connection with a case to which I shall call attention. The Quarantine Acts have already been dealt with, and I do not trouble the Tribunal with that matter.

I therefore invite the Tribunal on this part of the case to arrive at the conclusion that the assertion by the United States that the practice of nations supports the claim now put forward is without foundation. If it is regarded as an assumption of jurisdiction on the high sea, it was entirely beyond the power of the United States Congress to pass the act applying to foreigners; for, without the acquiescence of other nations, and without example in the practice of other nations, it infringes upon the rights of those nations upon the high seas.

If, on the other hand, it is to be regarded as part of the general jurisdiction exercised by the United States over Behring Sea, it was also beyond the power of the United States to make the act apply to foreigners; for, without the consent of other nations, and without example in the practice of other nations, it extended the territorial waters of the United States to a limit hitherto unknown and unrecognized, and in so doing, it infringed upon the rights of other nations upon the high seas.

I have already dealt with the other view in which this question is put, and, as I have said, I must recur to it, namely, the so-called self-preservative or self-defensive regulations. Therefore I claim that the answer to the fifth question ought to be, as given on page 63 of our Argument, namely:

That the United States have no right (a) of protection, or (b) of property, in the seals frequenting the islands of the United States in Behring Sea when they are found outside the ordinary 3-mile limit.

There is one other case, to which I must make an allusion. That is the exceptional case of the St. Helena Act of 1815, the history of which, no doubt, Sir, is in your mind. I think I may content myself with reading what is said in the Argument upon it. Mr. Blaine, you will recollect in one of his earliest dispatches, which is set out in the first volume of the United States Appendix, at page 283, refers to this Act, and says:—Here is an island in mid-ocean, and the Government of Great Britain assumed an authority and power to exclude the commerce of nations from the approach to that island for its own political ends, an assumption of jurisdiction and of authority much greater than they allege we are claiming in this case.

The facts are shortly and correctly set out at page 61 of our argument; and I have got before me, in order to supplement that statement, a copy of the Articles of the Treaty upon the subject, signed in Paris, on the 2nd of August, 1815, authorizing this exceptional Act. The statement in the Argument is this:

At the peace of 1815 it was determined by Great Britain in conjunction with the allied Powers, that St. Helena should be the place allotted for the residence of the Emperor Napoleon Buonaparte, under such regulations as might be necessary for the perfect security of his person; and it was resolved that, for this purpose, all ships whatever.—

Mr. Justice HARLAN.—It was resolved by whom; by the parties to that Treaty?

Sir CHARLES RUSSELL.—The parties to this Treaty; yes. You will see in a moment, sir. I have got before me a copy of the Articles of 1815.

And it was resolved that for this purpose, all ships whatever, British and foreign, excepting only the East Indian Company's ships, should be excluded from all approach to the island. Notice was accordingly given by the British Chargé d'Affaires at Washington to the United States Government on the 24th November, 1815, that a Treaty of Commerce between Great Britain and the United States, dated the 3rd July, 1815, under Article III of which liberty of touching for refreshment at the island was given to United States vessels, could not be carried out in this respect; and that the ratifications of the Treaty would be exchanged under the explicit declaration that United States vessels could not be allowed to touch at, or hold any communication whatever with, the island, so long as it should continue to be the residence of the Emperor. The Treaty was ratified on this understanding.

So that, so far as the United States was concerned, although not a party to the Treaty itself, it assented to that, and ratified a Treaty of Commerce with Great Britain on the express stipulation that that Treaty should be subject to the effect of the arrangement which I am now about to explain. So far, therefore, as the United States is concerned, that is the position of things. Now, how do the matters stand as regards the other Powers? The Articles of the Treaty which bear upon this matter are in these terms:

ART. 1. Napoleon Buonaparte is considered by the Powers who have signed the Treaty of the 25th of March as their prisoner.

ART. 2. His custody is especially entrusted to the British Government. The choice of the place and of the measures which may best secure the object of the present stipulation are reserved to his Britannic Majesty.

That is the Treaty of the other Powers. Now, is it not enough to say—

Mr. PHELPS.—What are you reading from, Sir Charles?

Sir CHARLES RUSSELL.—The Articles of the Treaty.

Mr. PHELPS.—What Treaty?

Sir CHARLES RUSSELL.—The Treaty between the Powers, by whom the charge of the Great Emperor was committed to the British Government.

Mr. PHELPS.—Is that in the Case anywhere?

Sir CHARLES RUSSELL.—No; it is not in the Case; but it is not material that it should be in the Case. I am reading a historic document. But surely, it is enough to say about this matter, without more, that it is no reference, no guide to this Tribunal, and throws no light whatever upon the question that we are discussing. It was not an assertion of any general right upon the part of Great Britain. It was a case in which a number of the Powers—the allied Powers, as they were called—at the close of a long and disastrous war, took these measures, and, so far as the United States is concerned, took these measures with the implied assent of the United States.

The PRESIDENT.—Was that assented to by the United States?

Sir CHARLES RUSSELL.—Yes. I have read, Sir, the grounds upon which I base that argument. The matter stood thus: The United States and Great Britain had entered into a Treaty of commerce. Before the ratification of that Treaty, when it would become binding upon both the Powers, this arrangement as to the custody of the Great Emperor was entered into by the Allied Powers. Upon that, communication is made by the British Government to the United States Government, and they are told, "We can only ratify the Treaty subject to your recognizing that you have no longer the right to touch at St. Helena, or to go within a stipulated distance of it."

The PRESIDENT.—And that communication was accepted?

Sir CHARLES RUSSELL.—That communication was accepted, and the Treaty ratified after that communication was made. Therefore it does not lie in their mouth to say that that was something they were obliged to do, or which was put upon them by compulsion.

Senator MORGAN.—I think the United States might be justly credited with having accepted and admitted, in that arrangement, the proposition that the great nations of the earth, in providing for their security and the security of their political rights, could impose upon other Powers a recognition of this exception that they had made in the open sea for the security of the Emperor Napoleon; and so they could make an exception of like character for the security of any great industry or any great enterprise, or any other thing that would concern the affairs of the whole commercial world.

Sir CHARLES RUSSELL.—If I may respectfully say so, Sir, there is a great chasm between the premise and the conclusion.

Senator MORGAN.—I do not happen to see it.

Sir CHARLES RUSSELL.—To answer it in detail, Mr. Senator, would indeed cause a very wide deviation from my path.

Lord HANNEN.—I was going to ask what was the effect of the restraint. I think it was only this. All vessels were forbidden to touch at the islands.

Senator MORGAN.—A little more.

Lord HANNEN.—I was going to add, and the rest is analogous to the Hovering Acts. There was nothing to prevent vessels sailing through the waters adjoining St. Helena; but they were not allowed to hover in those waters.

Senator MORGAN.—I beg your pardon. They were not allowed to approach within fifteen miles.

Sir CHARLES RUSSELL.—I rather thought the distance was more than fifteen miles.

Senator MORGAN.—It may be more, but it is at least that.

Lord HANNEN.—I was only inviting you to give us the terms, which are not in my recollection.

Sir CHARLES RUSSELL.—I thought we had it in the United States Case, but we have not.

Senator MORGAN.—It was 26 miles, was it not?

Sir CHARLES RUSSELL.—I have got a note from the Archivist of the Dominion of Canada, Mr. Brynner, and there is no reason why I should not read the whole of it. My friend will have no objection, probably.

Mr. PHELPS.—You will find the Act, Sir Charles, on page 495 of the first Volume of the United States Appendix.

Sir CHARLES RUSSELL.—There is only a part of the Act, I think, set out there Mr. Phelps.

Mr. PHELPS.—All that touches this point. Section 4, is there.

Sir CHARLES RUSSELL.—Then I had better read it:

IV. And be it further enacted. That it shall and may be lawful to and for the Governor, or in his Absence the Deputy Governor of the said Island for the time being, or for the Commander for the time being of His Majesty's Naval or Military Forces stationed off or at the said Island, respectively, and the Persons acting under his or their Orders and Commands, respectively, by all necessary Ways and Means to hinder and prevent any Ship, Vessel, or Boat, Ships or Vessels, or Boats (except Ships and Vessels of and belonging to or chartered by the said United Company of Merchants, also duly licensed by the said Company for that Purpose, as hereinbefore mentioned), from repairing to, trading, or touching at the said Island, or having any Communication with the same; and to hinder and prevent any Person or Persons from landing upon the said Island from such Ships, Vessels or Boats, and to seize and detain all and every Person or Persons that shall land upon the said Island from the same; and all such Ships, Vessels or Boats (except as above excepted) as shall repair to, or trade, or touch at the said Island, or shall be found hovering within Eight Leagues of the Coast thereof.

Lord Hannen is quite right.

And which shall or may belong, in the Whole or in Part, to any Subject or Subjects of His Majesty, or to any Person or Persons owing Allegiance to His Majesty, shall and are hereby declared to be forfeited to His Majesty, and shall and may be seized and detained, and brought to *England*, and shall and may be prosecuted to Condemnation by His Majesty's Attorney General, in any of His Majesty's Courts of Record at *Westminster*, in such manner and form as any Ship, Vessel or Boat may be seized, detained, or prosecuted for any Breach or Violation of the Navigation or Revenue Laws of this Country; and the Offence for which such Ship, Vessel or Boat shall be proceeded against shall and may be laid and charged to have been done and committed in the County of *Middlesex*; and if any Ship, Vessel or Boat not belonging, in the Whole or in Part, to any Person or Persons the Subject or Subjects of or owing Allegiance to His Majesty, his Heirs and Successors, shall repair to or trade or touch at the said Island of *Saint Helena*, or shall be found hovering within Eight Leagues of the Coast thereof, and shall not depart from the said Island or the Coast thereof when and so soon as the Master or other Person having the Charge and Command thereof shall be ordered so to do by the Governor or Lieutenant Governor of the said Island for the time being, or by the Commander of His Majesty's Naval or Military Force stationed at or off the said Island for the time being (unless in case of unavoidable Necessity, or Distress of Weather), such Ship or Vessel shall be deemed Forfeited.

Lord HANNEN.—There is no restriction against sailing through the waters. It is only against hovering.

Sir CHARLES RUSSELL.—None at all.

And shall and may be seized and detained and prosecuted in the same manner as hereinbefore enacted as to Ships, Vessels or Boats of or belonging to any Subject or Subjects of His Majesty.

You will see how very strained and exaggerated is the reference by Mr. Blaine in the letter to which I have referred, which is that enormously long letter of the 17th of December, 1890. It covers some 27 pages, but the passage in question is on page 283. The first part of it admits the point I have just mentioned.

Before the ratifications of the treaty were exchanged, in the following November, it was determined that Napoleon should be sent to St. Helena. England thereupon declined to ratify the treaty unless the United States should surrender the provision respecting that island. After that came the stringent enactment of Parliament forbidding vessels to hover within 24 miles of the island. The United States was already a great commercial power. She had 1,400,000 tons of shipping; more than 500 ships bearing her flag were engaged in trade around the capes. Lord Salisbury has had much to say about the liberty of the seas, but these 500 American ships were denied the liberty of the seas in a space 50 miles wide in the South Atlantic Ocean by the express authority of Great Britain.

I say that is not correct at all; that all they were prohibited 1171 from doing was to hover there. There was nothing to prevent them sailing within three miles of the coast, if they were proceeding upon their voyage.

Mr. Justice HARLAN.—When he uses the word “liberty” there, he means the right to use the island in the ordinary way upon terms of equality; and the Act does prevent other vessels from trading.

Sir CHARLES RUSSELL.—But this would convey to the ordinary reader, Mr. Justice Harlan with great deference, that there was an exclusion by their being denied the liberty of the seas for that space of 50 miles. He is reckoning there 25 miles on each side of the island. He conveys the idea that there is an exclusion from that distance. There is nothing of the kind. What the mandate, or whatever it is to be called, amounts to is a prohibition against landing and a prohibition against hovering within that distance; but if a vessel is upon its journey east or west, there is nothing to prevent its sailing as close to the island as it wishes—nothing whatever.

But I need not say that an exceptional case, under exceptional circumstances, forms no precedent whatever.

Now may I in this connection, as it has come up, again reiterate what I have before said: that these isolated instances of assertion, well or ill founded, prove nothing as to what is the rule or principle of international law. The principle of what is international law is well stated by the late Chief Justice Cockburn at page 63 of the report of his judgment.

He is applying it to the question of the three mile zone, and treating that still as, to some extent, an undetermined matter.

And when in support of this position, or of the theory of the three-mile zone in general, the statements of the writers on international law are relied on, the question may well be asked—upon what authority are these statements founded? When and in what manner have the nations who are to be affected by such a rule as these writers, following one another, have laid down, signified their assent to it?—to say nothing of the difficulty which might be found in saying to which of these conflicting opinions such assent had been given.

For, even if entire unanimity had existed in respect of the important particulars to which I have referred, in place of so much discrepancy of opinion, the question would still remain, how far the law as stated by the publicists had received the assent of the civilized nations of the world? For writers on international law, however valuable their labours may be to elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express—as by treaty, or the acknowledged concurrence of governments—or may be implied from established usage—an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to

the local law as well as to that of their own country. In the absence of proof of assent as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views or statements.

Nor, in my opinion would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply without an Act of parliament, what would practically amount to a new law. In so doing we should be unjustifiably usurping the province of the legislature. The assent
1172 of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer, without such legislation, a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.

Now I am glad, Mr. President, to have made considerable progress, and to have gone a long way towards getting to the end of this argument; but there are still some matters with which I must trouble you. There are three cases referred to by my friend, Mr. Phelps, in his Argument, which deserve consideration by themselves. They are the cases of *Church v. Hubbard*; *Rose v. Himely*; and *Hudson v. Guestier*.

Now the case of *Church v. Hubbard*, of which both Mr. Phelps and Mr. Carter made some use in their arguments, when you come to consider it, is really about the simplest case in the world; and, if I may be allowed to say so of so great a Judge as Chief Justice Marshall, it was so simple a case that I am surprised that he found himself able to make an important judicial utterance depend upon it.

Now I will tell the Court what the case was. It was not a case involving the question of international rights as between nations, at all: it was a case between a man who had insured his ship "the *Aurora*" and an underwriter, who was the insurer; and in the policies of insurance there was an exception from the general risk which the underwriter undertook. I am now speaking with the report in the 2nd of Cranch's Reports, page 187, before me. There were two policies of insurance; in each case there was excepted from the general risk which the underwriter undertook, these words: in one policy "The insurers are not liable for seizure by the *Portuguese* for illicit trade." In the other "The insurers do not take the risk of illicit trade with the *Portuguese*." And it was held (and I think quite rightly held), that those two exceptions meant the same thing. The sole question, therefore, in determining whether the underwriter was liable or not, was whether the seizure of a ship, which was in fact seized by the Portuguese authorities, was to be regarded as a seizure by the Portuguese authorities for engaging in illicit trade, or whether it was to be regarded as an unjustifiable and gratuitous act of maritime trespass. That was absolutely the sole question in the case.

Now the Portuguese Government had forbidden trade with particular ports in its dominions, and the facts found by the Judge who enquired into them, in order to ascertain whether the vessel was seized for illicit trade, are set out at page 192, where it is stated that in consequence of the acts of examination made on board the brig *Aurora*, and of questions put to her Captain, and so on, the Judge comes to the conclusion that

The motives hereby alleged for having put into a port of this establishment are unprecedented, and inadmissible, and the causes assigned cannot be proved.

It was alleged that she had gone in there for water or some
1173 other need, and not for illicit trade. The Judge came to the conclusion that that was not true. He says:

I therefore believe it to be all affected for the purpose of introducing here commercial and contraband articles of which the cargo is composed; if there are not other motives besides these, of which there is the greatest presumption.

And then the Judge of First Instance proceeds to justify that by a further examination of the case; and he finally comes to the conclusion that if it had only been their intention to look for the same coast, then it is presumed he was making for it for the purpose not of business, but of smuggling.

Now that being the state of the case, it is argued on the one side that the seizure was not one which, by the strict letter of the Portuguese law, was authorized, or by international law was authorized, because the vessel had not gone into ports trade with which was forbidden, and was anchored some four leagues off the coast; although the master had gone in, as alleged, for the purpose of making arrangements for this illicit trade, it was argued that as the ship was seized beyond the three mile limit it was practically an act of maritime trespass.

The learned Judge deals with that in a way that I will call your attention to. The argument is enormously long, and the judgment, which resembles it, is at page 231. On page 232 Chief Justice Marshall says:

The words of the exception in the first policy are: The insurers are not liable for seizure by the Portuguese for illicit trade.

Then he repeats the words in the second policy; and then he says:

For the plaintiff it is contended, that the terms used require an actual traffic between the vessel and inhabitants, and a seizure in consequence of that traffic, or at least that the vessel should have been brought into port in order to constitute a case which comes within the exception of the policy.

It was a question upon the policy. Then he goes on:

But such does not seem to be the necessary import of the words. The more enlarged and liberal construction given to the defendants, is certainly warranted by common usage.

Then he goes on:

In this case the unlawfulness of the voyage was perfectly understood by both parties.

That is to say, you the underwriter knew the unlawfulness of the trade which you were not going to take upon yourself the consequence of; you the assured knew the unlawfulness of the particular trade of which you agreed you would take upon yourself the risk and would not put it upon the underwriter.

Then he goes on to say:

That the crown of Portugal excluded, with the most jealous watchfulness, 1174 the commercial intercourse of foreigners with their colonies, was probably, a fact of as much notoriety as that foreigners had devised means to elude this watchfulness, and to carry on a gainful but very hazardous trade with those colonies. If the attempt should succeed, it would be very profitable, but the risk attending it was necessarily great. It was this risk which the underwriters, on a fair construction of their words, did not mean to take upon themselves. "They are not liable", they say, "for seizures by the Portuguese for illicit trade". They do not take the risk of illicit trade with the Portuguese; now this illicit trade was the sole and avowed object of the voyage, and the vessel was engaged in it from the time of her leaving the port of New-York.

Therefore, really, as it seems to me, this matter might have ended there, and it did not require to examine whether or not the thing could be said to be strictly defensible or justifiable by international law, to make the risk one within the contemplation of both parties to the contract, and one which the underwriter never intended to take upon himself, and which the assured never thought the underwriter was taking upon himself. No doubt, the learned Judge does go more widely into the question, and he does on page 234 examine the power of nations within and without their territory, but in a way which, it seems to me,

so far from helping, disproves the contention which my learned friends are submitting, as I think you will see.

The learned Judge says:

That the law of nations prohibits the exercise of any act of authority over a vessel in the situation of the *Aurora*, and that this seizure is, on that account, a mere marine trespass, not within the exception, cannot be admitted. To reason from the extent of protection a nation will afford to foreigners to the extent of the means it may use for its own security does not seem to be perfectly correct. It is opposed by principles which are universally acknowledged. The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.

Upon this principle the right of a belligerent to search a neutral vessel—

Here we get at once to belligerent rights—

On the high seas for contraband of war is universally admitted, because the belligerent has a right to prevent the injury done to himself by the assistance intended for his enemy: so too a nation has a right to prohibit any commerce within its colonies. Any attempt to violate the laws made to protect this right, is an injury to which it may prevent, and it has the right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same in all times and in all situations, if they are such—

this is the part which is conclusive against the suggestion of right which my learned friend is making—

if they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exertions. If they are such as are reasonable and necessary to secure their laws from violation they will be submitted to.

1175 And again:

Thus in the channel, where a very great part of the commerce, to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels on suspicion of attempting an illicit trade, must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the Government may be extended somewhat further; and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce, which is claimed by all nations holding distant possessions.

If this right be extended too far, the exercise of it will be resisted.

Again, the principle is stated, which I have already enunciated, and which will be found again and again echoed in the textwriters, this being a question of the protection of revenue laws, the whole jurisdiction or assertion of authority is not based on the absolute right of one nation to put that authority in force, but on the fact that if the regulations are reasonable, and are recognized as such by the authority of the country against whose nationals they are to be enforced, they will be assented to; but if they are extended too far, they will be resisted. It is not the assertion of an absolute right—it is the assertion of a qualified measure of protection depending, for its sufficient exercise, upon assent.

Now the rest of the judgment I need not trouble the Tribunal with, because it has no bearing upon the point with which I am concerned. There is also another reason for dismissing it as an authority upon this question, that it was not necessary to the decision whether the risk was within the policy or not, for that alone was the point to be determined, and it was to be determined by municipal law.

Now I come to the two cases of *Rose v. Himely*, and *Hudson v. Guestier*, I have spent some hours with the assistance of my friends, Mr. Box and Mr. Piggott, in trying to get at the meaning of these cases which occupy a very considerable space in the Reports, but when you come to

the bottom of them they will be found really to be of very little help indeed to this Tribunal. Now I will try shortly to explain what these cases were. The case of *Rose v. Himely* was a claim to a cargo of coffee and the then owner and possessor of the coffee claimed his title to it under a foreign judgment of condemnation of a Court—of San Domingo, which was French territory; and the main question discussed was whether or not the American Court could go behind the foreign judgment to examine the question of jurisdiction: whether the facts as they existed gave the Court jurisdiction to entertain the matter. Chief Justice Marshall and three of his colleagues held that they were warranted in examining the question of the jurisdiction of the Court in relation to the constitutional powers of the Court, and in relation to the situation of the thing condemned; but the dissenting judge, Mr. Justice Johnson, in a very elaborate and able judgment, dissented from those views and came to the conclusion that the principal judgment was not examinable at all; and in the course of that judgment—indeed in the course 1176 of both judgments—a great deal of matter is gone into by both of them a good way outside the particular point in hand. Chief Justice Marshall's judgment is rather more closely, as it seems to me, to the point; but Mr. Justice Johnson's, (whose judgment is found in page 221 of the report of the case 4th volume of Cranch's Reports) may be correctly summed up in this sentence: that there was no right to inquire into the cause of capture or to review the judgment of the Prize Court, but that if there were power to go behind, then he regarded the seizure in the case in question as legitimately made and not as an enforcement of a municipal act, but as an assertion of a belligerent right. That is the sum and substance of *Rose v. Himely*.

In the case of *Hudson v. Guestier*, the question came up again, and upon substantially the same facts, because although it appears in one part of the case of *Hudson v. Guestier* that the seizure was not made, as in *Rose v. Himely*, outside the three miles, but according to one statement in *Hudson v. Guestier* was made within the three miles, yet the Judges in their judgment treat the facts as if they were similar, and nothing turns on the question whether it was inside or outside three miles.

MR. CARTER.—There were two trials. On the first trial it appears to have been within the three miles, and on the second trial further out.

SIR CHARLES RUSSELL.—That very likely explains how it is variously stated as a seizure *within*, and a seizure *without*, the 3 mile limit. However, the result of the case is what I desire to call attention to. The result was that the Judges in that second case took the view which Mr. Justice Johnson had taken in the first, namely that the foreign judgment was not examinable. And therefore says Chief Justice Marshall at the end of the case, "My judgment in *Rose v. Himely* is therefore to be taken as overruled." That is exactly the result. I hope my friends will not differ from me about it, because we have examined it with as much care as it is possible to bestow upon it, and I think that is really what it does come to. The passage I refer to in *Hudson v. Guestier* is this—

Senator MORGAN.—Was it a prize Court in San Domingo?

SIR CHARLES RUSSELL.—Yes, it was a prize Court in San Domingo. The other Judges, except the Chief Justice, concurred in the judgment of Mr. Justice Livingston, whose judgment was appealed from and which deals with the point whether the original judgment was examinable, and the Chief Justice observed that he had supposed that the former opinion delivered in this case upon the point had been concurred in by four Judges, but in this he was mistaken, and so on.

However, he says in conclusion, that the principle of that case of *Rose v. Himely* is now overruled.

Now I have read these cases with all possible desire to get to the bottom of them, and try and see what information they would give, by way of assistance to the Tribunal—but beyond certain expressions which are to be found in them here and there, not always quite *ad rem* to the particular points they were discussing, some in the judgment of

Chief Justice Marshall and some in the judgment of Mr. Justice Johnson, there is really nothing that is of any material aid to the Court. I want however to explain to the Court how those

cases were regarded by a textwriter whom we certainly, in England, consider as a textwriter of some authority—I mean Mr. Dana, in his edition of Wheaton, which is an American book of authority. I observe my friend Mr. Phelps in the Argument does not treat Mr. Dana as being a person of very high authority. I will only observe in relation to that that his edition of Wheaton is received with respect in the English Courts; and as regards his ability and position, I can point to the fact that he was the Counsel chosen by a very able Secretary of State, himself a distinguished lawyer, to represent the interests of the United States on the Halifax Fisheries Arbitration: the Secretary of State who selected him was Mr. Secretary Evarts, who is known to some of the Tribunal and known to me personally as a lawyer of distinction: Mr. Evarts not only selected Mr. Dana, but speaking of his selection, he congratulates the United States on having been able to secure a Counsel of such distinguished eminence.

The passage I am now about to read is printed in the print handed in to the Members of the Tribunal a few days ago. It is an intelligent criticism upon the whole of this part of the law, shortly described as the “hovering principle”, if it can be designated by the name of “principle”. I refer to the note to section 180: the note being 108, and the page 208 in the 8th edition. In section 179 he refers to the exclusive territorial jurisdiction over the inclosed parts of the sea along the coast called the King’s Chambers: he proceeds:

It appears from Sir Leoline Jenkins that both in the reigns of James I and Charles II the security of British commerce was provided for by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbours of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruizers even of their enemy’s vessels would be restored by the Court of Admiralty, if made within the King’s Chambers. So also the British “Hovering Act”, passed in 1736 (9 Geo. II, cap. 35), assumes, for certain revenue purposes, a jurisdiction of 4 leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties. A similar provision is contained in the Revenue Laws of the United States; and both these provisions have been declared by judicial authority in each country to be consistent with the law and usage of nations.

His note upon that includes a criticism of *Church v. Hubbard*, and perhaps you will be good enough to allow my learned friend Mr. Box to read it.

The PRESIDENT.—Certainly.

Mr. M. H. BOX.—

108. *Municipal Seizures beyond the Marine League or Cannon-shot.*—The statement in the text requires further consideration. It has been seen that the consent of nations extends the territory of a State to a marine league or cannon-shot from the coast. Acts done within this distance are within the sovereign territory. The war right of visit and search extends over the whole sea. But it will not be found that any consent of nations can be shown in favour of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon-shot. Doubtless States have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found that, in later

times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented. The Revenue Laws of the United States, for instance, provide that if a vessel bound to a port in the United States shall, except for necessity, unload cargo within 4 leagues of the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo forfeit, and the master incurs a penalty (Act of the 2d March, 1797, § 27); but the Statute does not authorize a seizure of a foreign vessel, when beyond the territorial jurisdiction. The Statute may well be construed to mean only that of a foreign vessel, coming to an American port, and there seized for a violation of Revenue Regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to, and shall come within, the territory of the United States, after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the Revenue Laws within the jurisdiction. Under the previous sections of that Act, it is made the duty of revenue officers to board all vessels, for the purpose of examining their papers, within 4 leagues of the coast. If foreign vessels have been boarded and seized on the high sea, and have been adjudged guilty, and their Governments have not objected, it is probably either because they were not appealed to, or have acquiesced in the particular instance, from motives of comity.

The cases cited in the authors's note do not necessarily and strictly sustain the position taken in the text. In the "*Lonis*" (Dodson, ii, 245) the arrest was held unjustified, because made in time of peace for a violation of municipal law beyond territorial waters. The words of Sir William Scott, on pp. 245 and 246, with reference to the Hovering Acts, are only illustrative of the admitted rule, that neighbouring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes near the coast, but beyond the marine league, as under the Hovering Laws of Great Britain and the United States, "has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean"; and adds, "a recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all rights of visitation, was resisted by the British Government, and was finally withdrawn". *Church v. Hubbard* (Cranch, ii, 187), was an action on a policy of insurance, in which there was an exception of risks of illicit trade with the Portuguese. The voyage was for such an illicit trade, and the vessel, in pursuance of that purpose, came to anchor within about 4 leagues of the Portuguese coast; and the master went on shore on business, where he was arrested, and the vessel was afterwards seized at her anchorage and condemned. The owner sought to recover for the condemnation. The Court held that it was not necessary for the defendants to prove an illicit trade begun, but only that the risks excluded were incurred by the prosecution of such a voyage. It is true that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws by seizures made within reasonable limits, as to which, he said nations must exercise comity and concession, and the exact extent of which was not settled; and in the case before the Court, the 4 leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is, that the Court did not undertake to pronounce judicially in a suit on a private contract; that a seizure of an American vessel, made at 4 leagues, by a foreign Power, was void and a mere trespass. In the subsequent case of *Rosc v. Himeley* (Cranch, iv, 241), where a vessel was seized 10 leagues from the French coast, and taken to a Spanish port, and condemned in a French Tribunal under municipal and not belligerent law, the Court held that any seizures for 1179 municipal purposes beyond the territory of the Sovereign are invalid; assuming, perhaps, that 10 leagues must be beyond the territorial limits for all purposes.

In *Hudson v. Guestier* (Cranch, iv, 293) where it was agreed that the seizure was municipal, and was made within a league of the French coast, the majority of the Court held that the jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port.

The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, vi, 359. At the new trial the place of seizure was disputed, and the Judge instructed the jury that a municipal seizure made within 6 leagues of the French coast was valid, and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict, not, however, upon the ground that a municipal seizure made at 6 leagues from the coast was valid, but on the ground

that the French decree of condemnation must be considered as settling the facts involved; and if a seizure within a less distance from shore was necessary to jurisdiction, the decree may have determined the fact accordingly; and the verdict in the Circuit Court did not disclose the opinion of the jury on that point. The Judges differed in stating the principle of this case and of *Rose v. Himely*; and the report leaves the difference somewhat obscure.

This subject was discussed incidentally in the case of the "Cagliari," which was a seizure on the high seas, not for violation of Revenue Laws, but on a claim somewhat mixed of piracy and war. In the opinion given by Dr. Twiss to the Sardinian Government in that case, the learned writer refers to what has sometimes been treated as an exceptional right of search and seizure, for revenue purposes, beyond the marine league; and says that no such exception can be sustained as a right. He adds: "In ordinary cases, indeed, where a merchant-ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* towards the other State, with which he is in amity, and to have consequently forfeited any just claim to his protection." He considers the Revenue Regulations of many States, authorizing visit and seizure beyond their waters, to be enforceable at the peril of such States, and to rest on the express or tacit permission of the States whose vessels may be seized.

It may be said that the principle is settled that municipal seizures cannot be made for any purpose beyond territorial waters. It is also settled that the limit of these waters is, in the absence of Treaty, the marine league or the cannon-shot.

It cannot now be successfully maintained either that municipal visits and search may be made beyond the territorial waters for special purposes, or that there are different bounds of that territory for different objects. But as the line of territorial waters, if not fixed, is dependent on the unsettled range of artillery fire, and if fixed, must be by an arbitrary measure, the Courts, in the earlier cases, were not strict as to standards of distance where no foreign Powers intervened in the causes.

In later times, it is safe to infer that judicial, as well as political Tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike.

Sir CHARLES RUSSELL.—This, Mr. President, seems to us, as we submit, a very intelligible and very accurate criticism of the cases that are there referred to.

For the purpose of this argument I have not felt called upon to enter upon any very precise or critical examination of many points which may be said to be in a certain degree indeterminate even at the present moment. I mean, whether it can be said that the territorial waters are absolutely fixed at three miles: whether the law as to embayed waters and headlands, and various things of that kind, is perfectly clear.

1180 These are matters as to which, unquestionably, even up to the present day, writers widely differ; but upon the question of the extent to which, territorially considered, a municipal law can operate, I cannot think that there can be any ground for difference of opinion: namely, that the statement which is attributed to that learned Judge—directed to the validity of a municipal seizure, that is a seizure under a municipal law outside three leagues from the coast—is, at least, a matter that is far from being clear.

It is very difficult to see how, if once you recognize the fact that a Statute can only operate co-terminously with the territory of the State, you can say that the municipal Statute, as of right, can operate outside by any process of law. And without expressing (for it is not my function to do it) any opinion or view upon the matter, at all events I may go so far as to say, that it is at least doubtful whether the true justification for acts done even under the so-called Hovering Acts outside the territorial limits does not rest upon the implied assent of other countries who will not interfere to protect their own nationals if they believe that those nationals have, in bad faith, been endeavouring to violate the laws of a friendly Power,—the State in question regarding those laws as just, reasonable and necessary.

Lord HANNEN.—And you may add "and having similar laws of their own".

Sir CHARLES RUSSELL.—Yes; and having similar laws of their own.

Mr. Justice HARLAN.—Do you think the Courts of those countries, which passed those laws, can in administering them proceed as a matter of law upon that ground?

Sir CHARLES RUSSELL.—I should hardly like to answer that question, without consideration, unless you can refer me to some case where the question has been raised in litigation. I know no case where the Power, the ship of whose national has been seized, has interposed to raise the question of jurisdiction.

I do not wish to say anything with which my judgment does not go, though, of course, I submit it not as matter of opinion but of argument; but I think, as a matter of law, as a matter of strict right, it would be exceedingly difficult to justify a seizure under a municipal Statute outside the limits of territory. This I can say; while I am not giving up any right which properly belongs to the Power I represent, as far as I know (and I have had means of enquiring into this matter), there is no case, within a reasonable period of time from the present, in which any seizure has been effected under the Hovering Acts by Great Britain which has been in any way challenged or brought into question: and no seizure at all in recent years that I am able to trace, outside the territorial limits. Whether the actual authority is greater does not matter; I only state the fact that in recent time there has been no exercise of it.

But see how far away we are from the subject that is before us. This is to be said in defence of the principle of the Hovering Acts, that they are directed against an offence against the Revenue Laws of a 1181 country to be completed on the territory of that country; in other words, it is an offence which can be only consummated by coming within the territorial jurisdiction of the particular country.

Senator MORGAN.—That is not the case in regard to the Island of Saint Helena. There the "Hovering Act" was for the protection of a political right, not the Revenue.

Sir CHARLES RUSSELL.—I quite agree. If you ask me Senator (if I may respectfully put it so) if I will undertake to defend, upon strict legal principles, every act the Executive of the United States has done, or the Executive of Great Britain has done, or the Executive of any other great country has done, I decline the task. It is true that my learned friend, Mr. Carter, was not appalled by it. He went the length of defending various things done by various Powers, and satisfied himself he could bring them all within a proper justification of ascertained legal principles.

Mr. CARTER.—Well, it was not quite so broad as that.

Sir CHARLES RUSSELL.—I thought so, and I hoped that my learned friend was right in that. I confess I would not like to have that obligation imposed upon me.

The great point which we are here contending for, and which is the real point between us, is this; whether, in time of peace there is any justification upon the ground that the ship of one nation has got hold of a piece of property of another nation,—the right in time of peace, and outside the territorial limits upon the high seas,—for the claim to search that vessel, seize that vessel, bring it into a Prize Court, which is in fact a war tribunal, and there condemn it?

That is the question we are considering; and all these questions of the Hovering Act assist us very little indeed in that direction.

Senator MORGAN.—That is a belligerent act that relates to a past transaction.

Sir CHARLES RUSSELL.—It is a belligerent act, whether it relates to a past or present transaction.

Senator MORGAN.—The right claimed by the United States, is in the nature of self-defence, and relates to the prevention of a trespass immediately threatened or being consummated.

Sir CHARLES RUSSELL.—Yes; but the Senator must be good enough to bear in mind those are not the facts.

The facts are the seizure of some of the vessels when the sealing was past and gone, and when they had the seal-skins on board.

Senator MORGAN.—I was speaking of principles of international law, and not trying to make an application of them.

Sir CHARLES RUSSELL.—Very well; but I think you will find, Sir, that even that narrow application will not do.

I now refer to those printed authorities, and if you will be good enough to take the print that has been given to you I will refer first to the case of the "Louis". This was decided by Lord Stowell in 1817, and the facts that gave rise to it were these. A French ship 1182 engaged in the slave trade was condemned, and it came before Lord Stowell upon the question whether or not it could be justified. He says:

Upon the first question, *whether the right of search exists in time of peace*, I have to observe that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct States. Relative magnitude creates no distinction of right; relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbour; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their politic and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of States in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right, incommotions as its exercise may occasionally be to those who are subjected to it, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence, in preventing the enemy from being supplied with the instruments of war, and from having his means of annoyance augmented by the advantages of maritime commerce; against the property of his enemy each belligerent has the extreme rights of war. Against that of neutrals—the friends of both—each has the right of visitation and search, and of pursuing an inquiry whether they are employed in the service of his enemy, the right being subject, in almost all cases of an inquiry wrongfully pursued, to a compensation in costs and damages.

With professed pirates there is no state of peace. They are the enemies of every country, and at all times, and therefore are universally subject to the extreme rights of war.

Then I pass over a passage.

Another exploded practice was that of Princes granting private letters of marque against the subjects of Powers in amity, by whom they had been injured, without being able to obtain redress from the Sovereign or Tribunals of that country. But at present, under the law, as now generally understood and practised, no nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea, save only on the belligerent claim.

Senator MORGAN.—I agree to that.

Sir CHARLES RUSSELL.—If you please. I will come to that later.

If it be asked why the right of search does not exist in time of peace as well as in war, the answer is prompt: that it has not the same foundation on which alone it is tolerated in war—the necessities of self-defence. They introduced it in war,

and practice has established it. No such necessities have introduced it in time of peace, and no such practice has established it. . .

Piracy being excluded, the Court has to look for some new and peculiar ground; but, in the first place, a new and very extensive ground is offered to it by the suggestion, which has been strongly pressed, that this trade—

That is the slave trade:

if not the crime of piracy, is nevertheless *crime*, and that every nation, and, indeed, every individual, has not only a right, but a duty, to prevent in every place the commission of crime. It is a sphere of duty sufficiently large that is thus opened out to communities and to their members. But to establish the consequence
1183 required, it is first necessary to establish that the right to interpose by force to prevent the commission of crime commences not upon the commencement of the overt act, nor upon the evident approach towards it, but on the bare surmise grounded on the mere possibility; for unless it goes that length it will not support the right of forcible inquiry and search.

He then proceeds to consider that matter, and at the bottom of the page he continues.

It (the Court) must look to the legal standard of morality; and upon a question of this nature, that standard must be found in the law of nations as fixed and evidenced by general and ancient and admitted practice, by Treaties, and by the general tenour of the Laws and Ordinances, and the formal transactions of civilized States.

The next case was decided in 1824 by Chief Justice Marshall, and was also a slave case. He refers to the "Le Louis" and he goes on in the third paragraph:

In the very full and elaborate opinion given on this case, Sir William Scott, in explicit terms, lays down the broad principle that the right of search is confined to a state of war. It is a right strictly belligerent in its character, which can never be exercised by a nation at peace, except against professed pirates, who are the enemies of the human race. The act of trading in slaves, however detestable, was not, he said, "the act of freebooters, enemies of the human race, renouncing every country, and ravaging every country, in its coasts and vessels indiscriminately". It was not piracy.

The right of visitation and search being strictly a belligerent right, and the Slave Trade being neither piratical nor contrary to the law of nations, the principle is asserted, and maintained with great strength of reasoning, that it cannot be exercised on the vessels of a foreign Power, unless permitted by Treaty.

The next case of the "Apollon" I pass over. It has been already referred to in the discussion we had in relation to one of the illustrations given by Mr. Phelps.

The next is the judgment of Mr. Justice Story in "The Marianna Flora". He says:

It is necessary to ascertain what are the rights and duties of armed and other ships navigating the ocean in time of peace. It is admitted that the right of visitation and search does not, under such circumstances, belong to the public ships of any nation. This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. It is true that it has been held in the Courts of this country that American ships offending against our laws, and foreign ships in like manner offending within our jurisdiction, may afterwards be pursued and seized upon the ocean, and rightfully brought into our ports for adjudication. This, however, has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified. If he fails, he must make full compensation in damages.

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all; appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption; but whatever may be that business, she is bound to pursue it in such a manner as not to violate the rights of others. The general maxim in such cases is, "*sic utere tuo, ut non alienum lædas.*"

1184 The case of "La Jeune Eugénie" is in the same category, and I do not think I ought to trouble the Tribunal with reading it. I pass on to the case of *Buron v. Denman* which was decided in 1848.

The law on the subject of slaves has been settled—

(says Baron Parke in summing up.)

by the case of "Le Louis," which has been referred to. That case was decided in the year 1817, by Sir William Scott, who went fully into the question of the legality of the Slave Trade, and laid down certain positions which have since been acquiesced in both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a Treaty with the country to which they belong prohibiting the Slave Trade; secondly, that trading in slaves is not a crime by the law of nations; thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong; and, fourthly, that if there be a law in a particular country prohibiting the Slave Trade, it is not open to every one to punish the offender against that law, but proceedings must be taken in the Tribunals of his own country.

I have already read the Parliamentary discussion on the right of search, and I do not trouble you with it again. I have also read the passage from Dana's *Wheaton*.

In conclusion I read a passage from Phillimore dealing with this question of self-preservation. He says:

The right of self-preservation by that defence which prevents, as well as that which repels, attack is the next international right which presents itself for discussion, and which, it will be seen, may under certain circumstances, and to a certain extent modify the right of territorial inviolability.

The right of self-preservation is the first law of nations, as it is of individuals. A society which is not in a condition to repel aggression from without is wanting in its principal duty to the members of which it is composed, and to the chief end of its institution.

All means which do not affect the independence of other nations are lawful for this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.

The means by which a nation usually provides for her safety are:

1. By alliances with other States;
2. By maintaining a military and naval force; and
3. By erecting fortifications and taking measures of the like kind within her own dominions.

I do not think there is any more that I need read, except on the top of the next page, paragraph CCIV.

We have hitherto considered what measures a nation is entitled to take for the preservation of her safety *within* her own dominions. It may happen that the same right may warrant her in extending precautionary measures *without* these limits and even in transgressing the borders of her neighbour's territory. For international law considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.

He then proceeds to consider the cases which have already
1185 been incidentally referred to: the case of ship "Carolne", which was sent adrift in the river between lake Erie and lake Ontario. It is not necessary for me to refer to that again.

Now there is one other set of authorities to which I should like to refer, and they are important because they show the position assumed by the United States upon this question, and continuously assumed by the United States as shown in the authoritative utterances of the executive head of the Government. I have a series of these utterances arranged in chronological order from the year 1843 down as late as 1880 or later.

Senator MORGAN.—Do you mean the Secretary of State?

Sir CHARLES RUSSELL.—In some cases the President, and in other cases the Secretary of State.

I will give the references in each case. The first is a Message from President Tyler in 1843, communicating to the House of Representatives correspondence as to the construction of the Ashburton Treaty of 1842, for, among other things, the final suppression of the African slave trade. Great Britain asserted that it authorized a mutual right of search. The United States opposed this view successfully.

This is the way the President, who formulates his message after the best legal and constitutional advice he could obtain, deals with this:

The attempt to justify such a pretension [that is, to subject the trade of the world to a system of maritime police adopted at will by a naval Power, in any places or in any articles which such Power might see fit to prohibit to its own subjects or citizens] from the right to visit and detain ships upon reasonable suspicion of piracy would deservedly be exposed to universal condemnation, since it would be an attempt to convert an established rule of maritime law, incorporated as a principle into the international code by the consent of all nations, into a rule and principle adopted by a single nation, and enforced only by its assumed authority. To seize and detain a ship upon suspicion of piracy, with probable cause and good faith, affords no just ground either for complaint on the part of the nation whose flag she bears, or claim of indemnity on the part of the owner. The universal law sanctions, and the common good requires the existence of such a rule. The right, under such circumstances, not only to visit and detain, but to search a ship, is a perfect right, and involves neither responsibility nor indemnity.

But with this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, beyond the limits of her territorial jurisdiction.

Then in 1855 Mr. Marcy, the then Secretary of State, protesting against certain orders of the British and French Governments to naval commanders to prevent by force, if necessary, the landing of adventurers, from any nation, on the Island of Cuba, with hostile intent, says:

The right of visitation and search is a belligerent right, and no nation which is not engaged in hostilities can have any pretence to exercise it upon the open sea.

The established doctrine upon this subject is that the right of visitation and search of vessels, armed or unarmed, navigating the high seas in time of peace does not belong to the public ships of any nation.

Senator MORGAN.—As against the ships of any other nation.

1186 Sir CHARLES RUSSELL.—Certainly.

Senator MORGAN.—Not its own.

Sir CHARLES RUSSELL.—No, certainly not his own. We are talking of public ships asserting the right of visitation against ships of another nation in time of peace.

This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions.

The undersigned avails himself of the authority and language of a distinguished writer on international law:—We again repeat that it is impossible to show a single passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right on the high seas in time of peace independent of special compact.

The right of seizure for a breach of the revenue laws, or laws of trade and navigation of a particular country, is quite different.

The utmost length to which the exercise of this right on the high seas has ever been carried in respect to the vessels of another nation has been to justify seizing them within the territorial jurisdiction of the state against whose laws they offend, and pursuing them in case of flight beyond that limit, arresting them on the ocean, and bringing them in for adjudication. This, however, suggests the Supreme Court of the United States, in the case before quoted, of the *Marianna Flora*, has never been supposed to draw after it any right of visitation or search. The party in such case, seizes at his peril. If he establishes the forfeiture he is justified.

Mr. Justice HARLAN.—Sir Charles, suppose the case of a vessel fitted out on the European side of the Atlantic Ocean, and loaded with

goods for the express purpose of smuggling them into the United States in violation of its Revenue Laws; would the language of Mr. Marcy go to the extent that the United States could only seize that vessel after it got within its territorial waters?

SIR CHARLES RUSSELL.—Certainly, the language would; but the case that you put is undoubtedly one of the most difficult cases that one has to consider,—the most difficult. You have a vessel as to which you have information such as you suggest, that she is coming to your coasts for the express purpose of violating your laws, but is outside your three-mile limit. Are you to allow her to take the chance of darkness on a coast imperfectly guarded and to run ashore her cargo in boats in violation of your Revenue Laws? That is a question I have had to consider, and it is one of enormous difficulty. If I may express an opinion to which no value is to be attached, it would be probable in such a case, if the Executive Authority had clear and decisive information of the character that you mention, she would probably do something before the vessel got within the three-mile limit, if it was proved to be necessary, relying upon the non-interference of the State to which that fraudulent vessel belonged not to make any complaint or raise any question whether the strict territorial limits had been exceeded.

MR. JUSTICE HARLAN.—Could a Court of the United States, sitting in judgment on that act, proceed on that ground?

SIR CHARLES RUSSELL.—I am a little puzzled as to that point, 1187 because of some of the assertions made by the Supreme Court Judges in the case of *re Sayward*. Undoubtedly there are some expressions in those judgments, as there were in the judgment of the Court below, which would seem to suggest a doubt whether, if the Executive assert that they do an act under and with the authority of a particular Statute, the Court will go beyond that assertion of executive authority. As, for instance, suppose the executive authority were to assert there was extra-territorial jurisdiction, or to say it was territory for the purpose of this executive act,—it seems to me doubtful, from some of the expressions I read, whether the Judges of the United States Court would consider themselves justified in going beyond the executive act to see if it was justified. Subject to that, if it came up in an English Court, I think it would be—

MR. JUSTICE HARLAN.—Troublesome?

SIR CHARLES RUSSELL.—Yes, troublesome; quite so.

THE PRESIDENT.—In the case alluded to, if I understand it right, no Statute was invoked. They merely spoke of the action of the Executive without saying it was founded on a Statute. They said it was an action of the Executive, and it was out of their power to control it. That is what we call a separation of powers, and that is a little different from invoking a Statute.

SIR CHARLES RUSSELL.—Quite so; and they also did another thing; they said, this Act of Congress treats this as territory, and the Executive have invoked this Statute and put it in force as embracing and including and applying to territory, and we cannot go beyond that.

MR. JUSTICE HARLAN.—The President having interpreted the Statute by his act?

SIR CHARLES RUSSELL.—Yes.

Now, I have very little more to read; and as I shall not occupy the Tribunal very long to-morrow, perhaps I may be allowed to finish these citations before the Court rises. I want to show the continuity and consistency of these opinions. Mr. Cass, the Secretary of State, writes to Mr. Dallas on February the 23rd, 1859, apropos of a discussion as to

the right of visit not existing in time of peace, even in the case of a slaver.

The forcible visitation of vessels upon the ocean is prohibited by the law of nations, in time of peace, and this exemption from foreign jurisdiction is now recognised by Great Britain, and, it is believed, by all other commercial Powers, even if the exercise of a right of visit were essential to the suppression of the slave trade. Whether such a right should be conceded by one nation to its co-states of the world is a question for its own consideration, involving very serious consequences, but which is little likely to encounter any prejudiced feelings in favour of the slave trade in its solution, nor to be influenced by them.

Then President Grant, in the case of the "Virginus",—a ship flying the United States flag, seized on the high seas near Cuba, and the crew in a very high-handed way, shot—says in his Fifth Annual Message in 1873.

It is a well-established principle, asserted by the United States from the 1188 beginning of their national independence, recognised by Great Britain and other maritime Powers, and stated by the Senate in a resolution passed unanimously on 16th June, 1858, that American vessels on the high seas in time of peace, bearing the American flag, remain under the jurisdiction of the country to which they belong; and therefore any visitation, molestation, or detention of such vessels by force, or by the exhibition of force, on the part of a foreign Power, is in derogation of the sovereignty of the United States.

Finally, Mr. Evarts, to whom I have already alluded, a lawyer of great eminence, in reference to the seizure of United States ships by Spanish gunboats in non-territorial waters near Cuba,—I think there was a protest also on the part of Great Britain in reference to this matter; it was in relation to an assertion on the part of the Spanish Authorities extending 6 miles from the territory,—writes this:

It needs no argument to show that the exercise of any such asserted right [visitation and search] upon commercial vessels, on the high seas, in time of peace, is inconsistent with the maintenance of even the most ordinary semblance of friendly relations between the nation which thus conducts itself and that whose merchant vessels are exposed to systematic detention and search by armed force.

This Government never has recognized, and never will recognize, any pretence or exercise of sovereignty on the part of Spain beyond the belt of a league from the Cuban coast over the commerce of this country in time of peace. This rule of the law of nations we consider too firmly established to be drawn into debate, and any dominion over the sea outside of this limit will be resisted with the same firmness as if such dominion were asserted in mid-ocean.

But the distinction between dominion over the sea, carrying a right of visit and search of all vessels found within such dominion, and fiscal or revenue regulations of commerce, vessels, and cargoes engaged in trade as allowed with our ports to a reasonable range of approach to such ports, needs only to be pointed out to be fully appreciated.

Every nation has full jurisdiction of commerce with itself, until by treaty stipulations it has parted with some portions of this full control.

In this jurisdiction is easily included a requirement that vessels seeking our ports, in trade, shall be subject to such visitation and inspection as the exigencies of our trade may demand, in the judgment of this Government, for the protection of the revenues and the adequate administration of the customs service.

This is not dominion over the sea where these vessels are visited, but dominion over this commerce with us, its vehicles and cargoes, even while at sea. It carries no assertion of dominion, territorial and *in invitum*, but over voluntary trade in progress and by its own election, submissive to our regulations of it, even in its approaches to our coasts and while still outside our territorial dominion.

That is rather an ingenious suggestion in defence of the revenue jurisdiction upon another ground, namely that although the ship has not come into your actual territory, yet she is submitting to your regulations, even in her approach to the coast and while still out of territorial jurisdiction. I do not stop to defend it. I cite the passage for a different purpose.

Now I am quite content to stop here, though there is another matter I have to call attention to, namely, what is the true character of this doctrine of self-defence or self-preservation. I shall dwell for a few minutes upon it, in order to refer to one writer of authority, and 1189 of acknowledged eminence. I mean Mr. Hall in his book upon International Law.

The PRESIDENT.—Will you please yourself about that, Sir Charles.
Sir CHARLES RUSSELL.—Then with your permission, Sir, I will take it to-morrow, and I will take it very shortly.

[The Tribunal then adjourned till to-morrow at 11.30.]

THIRTIETH DAY, MAY 31ST, 1893.

Sir CHARLES RUSSELL.—Mr. President, I wish to begin by correcting an error into which I seem to have fallen a few days ago. At page 762 of the Print I find that I uttered an economic heresy. I was dealing with the question of the economic effect of the tax imposed by the United States, upon each sealskin brought into its territory, and I think I did misconceive the economic effect of that imposition. My error, which I now wish to acknowledge, was kindly pointed out to me at the time by certain questions addressed to me by you, Mr. President, by Mr. Justice Harlan, and by Senator Morgan.

Another matter I also wish to set right is this. You will recollect, Mr. President, that I was referring to the fact of the length of time and the extent of territory over which the Hudson's Bay Company had for many years carried on the business of collecting the skins of fur-bearing animals of all kinds including fur-seals, principally through the agency of the native population. In that correction, I stated, more widely than the facts justified me, the extent of Alaskan territory which the Hudson's Bay Company in point of fact leased from the Russian Company.

I have now ascertained what the precise facts are; and it amounts to this, that the lease which the Hudson's Bay Company had was of that part of the Alaskan territory which we have been calling, for brevity's sake, the *lisière*, or margin of coast south of the Aleutian Chain. The facts are that, in 1839, the first lease was granted for a payment in kind, consisting of, among other things, 2,000 otter skins, and certain supplies of food, and other commodities. That was a lease for 10 years. It was renewed from time to time; in 1849, in 1853, and finally continued, under one or other agreement with the Commercial Company, down to the time of the cession of Alaska by Russia to the United States in 1867. Now, with these two corrections, I pass on to the conclusion of my Argument.

Mr. PHELPS.—I beg your pardon, I did not understand the first one that you desired to correct.

Sir CHARLES RUSSELL.—It is unimportant in the consideration of the general question. I only wanted to set myself right with the Tribunal. It was the suggestion that the imposition by the United States of the tax now amounting to some 42 shillings per skin, affected economically the price in the market. That was the point.

Now I pass on to the conclusion of this very long discussion. I said yesterday that upon this subject of the rights of self-defence or
1191 self-preservation, as they are indifferently called, I desired to refer to one modern authority who is in complete agreement with every textwriter whom I have had the opportunity of consulting. There are none so far as I have been able to discover that differ from him.

I have examined among others Kent, Martens, Manning, Heffter, Wheaton and Twiss, and I find no discrepancy of opinion upon the subject to which I am now addressing myself, namely, what are the

rights of defence, and of preservation, properly so called. The chapter which I desire to refer to particularly is in a book treated, and deservedly treated, as a book of authority in our English Courts, a book as to which I have to make my own acknowledgments of its practical utility in the actual business of my profession; I mean the Treatise of Mr. Hall. Upon consideration, Mr. President, and regarding the very serious demands that I have made upon the patience of this Tribunal, I have not thought it right to trouble you at this stage with any lengthened citation from it. I will, however, attempt briefly to summarize what is the principle, and the limitation of the principle, which he lays down in this connection. He deals with these right of self-defence and self-preservation on the same principle precisely, as Mr. Webster did in that despatch in relation to the "Caroline," which I have more than once referred to, that is to say, as rights which spring into existence in cases of grave and serious emergency, the occasion only covering what is essentially necessary for immediate protection. It applies to cases only where there is no opportunity of remonstrance to the other nation against whom those acts are directed; that these acts may generally be treated by the nation against whose nationals those acts are directed as a *casus belli*; that they are not rights in the legal sense of the term, but are in the nature of belligerent or quasi-belligerent rights; and lastly that they are to be resorted to only if other means, diplomatic representations and the like, have failed.

I will only read one sentence in justification of that last which is an important point. He says:

As in other cases the danger must be serious and imminent, and prevention, through the agency of the State whose rights are disregarded, must be impossible.

One observation I should like to make which I had intended yesterday to make in connection with the case of *Church v. Hubbard* with which I dealt at length, and as to which I also cited the comment and criticism of Mr. Dana in his edition of "Wheaton's International Law". My learned friend, Mr. Carter, referred to an *obiter dictum* of Chief Justice Cockburn in the celebrated case of the *Queen v. Keyn*, as though it added force or authority to the expression of opinion of Chief Justice Marshall. The Chief Justice Cockburn was not concerned in considering the question of the limitation of rights internationally considered at all. He was concerned with the question 1192 which I endeavoured to explain yesterday whether, according to the law of England, although the three-mile zone was internationally regarded as part of the territory of the country, it could be so regarded as to bring it within the area of the criminal jurisdiction of the country without express legislation; and it was therefore merely incidental to the consideration of that question that he refers to the authority of, among others, Chief Justice Marshall, an authority which I do not dispute. The learned Judge's dictum was addressed to the case of an invasion of the revenue law; and although the seizure in that case was at a greater distance than, I think, has ever been recognized as within proper limits by any other Judge, yet it is to be observed that Chief Justice Marshall was not considering the question as between a nation asserting the right and a nation resisting the right, but was merely called upon to determine in that particular case whether the risk of the seizure which, in fact, took place, was or was not a risk contemplated by the parties within the meaning of a particular contract of insurance.

Now I think I have come to the end of the citation of authorities, and I wish to put the points finally as they come up for adjudication by this Tribunal.

First, as to the seizures, I have argued the question whether or not those seizures could be justified upon any principle recognized by international law and I have endeavoured to establish—I hope I have successfully established—that they cannot be so defended. It is a fact to which I have not previously called the attention of the Tribunal that when in their Counter Case the United States are called upon to justify those seizures, they justify them upon one ground, and upon one ground only.

If you, Mr. President, will be good enough to turn to page 130 of the Counter Case you will see what I mean. On the previous page 129, they have admitted the seizures as to some vessels, and the orders of expulsion from Behring Sea in prohibition of sealing as regards other vessels, and in the next page they proceed to justify those seizures, the marginal note being "Reasons why seizures made".

The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur-seals in the waters of Behring Sea in violation of the statutes of the United States, and that such seizures were made in accordance with the laws of the United States enacted for the protection of their property interest in the fur-seals which frequent Behring Sea and breed only upon the Pribilof Islands, which Islands are part of the territory of the United States, and that the acts of the crews if permitted would exterminate the Alaskan seal herd and thereby destroy an article of commerce valuable to all civilized nations.

You will see therefore that in their Counter Case there is no suggestion of that contention, which I may have to say a final word or two about, that these provisions, although there is no justification for them, as Mr. Carter admitted, as a statute, may yet be treated as defensive regulations.

1193 That is an idea which is attributable to the ingenuity of my learned friends and which appears developed for the first time in the printed Argument, but does not appear in the Case, or, as I have said, even in the Counter Case.

Now, Senator Morgan yesterday made a suggestion to the effect that these were mere acts in defence of property; but I would point out that the acts complained of were of three kinds; first, as regards vessels engaged in sealing, next as regards vessels that had been engaged in sealing, and, lastly, as regards vessels equipped for the purpose of being engaged in sealing.

And I have to point out that while, if the fur-seal is to be treated as an article of property, there is, the right to defend it in the high sea, if it is attacked,—while I concede that, what lies upon my learned friends to show is that even if there is such property right, the consent of nations has been given, and that international law has sanctioned, any other than the ordinary right of defence of possession which belongs to an individual owner of property; and if it be objected that, in the case of the fur-seal, the property is of so volatile a kind that that mere right of defence of possession would be inadequate, I answer, first, that the very circumstance of it being of so volatile a character goes some way to show how impossible it is to conceive the idea of property in it. But, in the next place, I have to say that the volatile character of the property cannot alter the rights, internationally recognized, in regard to it; any more than in the case of a great frontier or an extended coast which needed to be defended by an adequate Police-force in order to prevent a violation of its Revenue Laws,—any more than in such a case it would be admissible for the Power possessing that frontier, and

desiring to save the expense of adequately guarding it, to resort to extreme, or cruel, or violent measures in order to strike terror into possible offenders, and prevent the invasion of that frontier line for illicit purposes. It is a proposition which needs a justification that authority does not give it;—that even if an item—because the principle must go that length,—of the property of a nation, however unimportant in value, is seized, it will justify that nation in seizing upon the high seas, the ship in which this property is, and in condemning that ship. Some warrant in international law must be shown in support of so serious a proposition.

I will put the case in this way, and I invite my friend Mr. Phelps' attention to it when he comes to address you: it is conceded for the purpose of justifying what are the international rights, and what are the international sanctions attached to those rights, that the municipal statute may be treated as if it did not exist—that it may be rubbed out of the record. And now my friend will have the opportunity of telling us to what form of libel he, as a lawyer (if that municipal statute did not exist) could put his name, and which he would maintain in argument before Judges, which could justify the action which has taken place in regard to these ships belonging to Great Britain.

1194 I have dwelt—I do not intend to recur to it—upon the fact that from the first to the last the proceeding has been based upon the municipal statute, for breach of the municipal statute, and for breach of the municipal statute alone. I wish to say a word or two about the point of whether it is possible, now, to turn this municipal statute (even if there were international warrant for the sanction it contains), into a self-preservative regulation.

Now, Mr. President, I submit that the contention that a Government, proceeding upon a municipal statute, invoking the aid of its municipal Judge to enforce that statute, charging the British subject libelled with an offence against that statute and against that statute alone, should now be heard to say that it can justify its proceedings as an offence against international law, is a very startling proposition. But it is still more startling that a Defendant who has been libelled—whose ship has been confiscated and confiscated upon the ground that he had committed an offence against the municipal statute, is now to be told that he is charged with, and his property confiscated upon the ground of, an international offence of which he was never informed, and which he was never called upon to answer. And, lastly, the proposition is still more startling when you consider the attitude of a Government towards the Judge of its own Court. It appeals to that Judge to put in force the municipal statute; it asks his aid upon the ground that an offence has been committed within the area to which that statute relates. The judge proceeds upon that basis; he considers the question in that relation alone, and yet we are to be told that he was acting as an international Judge—as Judge of a war Tribunal—although he did not know it: that he was dealing with and proceeding upon the basis of great principles of international law which closely touch the sovereignty of nations and the peace of the world, although his judgment shows that he had not in his remotest apprehension the consideration of the most elementary principles of international law itself. No, Mr. President, this matter rests, must rest, for its justification upon the grounds which they have put forward and put forward with so much deliberation—the grounds taken in the diplomatic correspondence, the grounds taken in their libel in Court, because the Tribunal will not forget the emphatic

statement of counsel to which I have previously adverted, that after stating their case founded upon the assumption of territory, basing the assumption of that territory upon the derivative title from Russia, their argument and libel conclude with the emphatic words:

Such is our understanding of the law, such is the record; upon them the United States are prepared to abide the judgment of the Court and the opinion of the civilized world.

I have only in this connection one other concluding remark to make—it touches a subject to which I have previously frequently adverted.

It is to point out that no instance can be cited, which I am aware 1195 of, in which the provisions of a municipal statute intended to operate—avowedly intended to operate—as a statutory authority and a statutory authority only, has ever been treated as a self-defensive, or as a selfpreservative, regulation. Indeed, when you come to consider the principle to which I have just adverted—the principle of sudden danger and emergency, leaving no opportunity for consideration or device of means—you cannot fail to determine that the notion of an elaborate and carefully prepared Code of punishments is inconsistent with the notion of what a Nation may do in its sudden emergency: and it is, as Mr. Webster well put it, that very consideration which lies at the basis of this whole doctrine of what a nation may resort to in the case of sudden emergency.

Now, I have done with this, and I leave the subject; but I wish to paint out that, except as regards what has taken place, namely the seizures, this question is of no future practical importance for the reason which I will make apparent in a moment. It is necessary to consider it in relation to the question of the unwarrantable character of the seizures; but, if this Court were to affirm a right in the United States in relation to the fur-seals, I need not tell this Tribunal that the question of what international rights of protection the United States possess, would become practically immaterial, because Great Britain would be bound, in good faith, to respect the affirmation of any right which this Tribunal declared to exist, and to enjoin upon its nationals the avoidance of any disturbance of that right. Therefore, except as regards the past seizures the question is one of relatively small importance.

I have thought it right to argue this question of what are the rights of protection even on the assumption that there was a *right* to protect; but, of course, I have but ill-succeeded in my task if I have not conveyed to this Tribunal that the main stress and burden of my argument has been addressed to the denial of any such right in whatever form that right is suggested. In connection, therefore, with the seizures, I have, with the assistance of my learned friends, framed the questions of fact which we submit this Tribunal may properly be called upon to answer in the manner which I am now about to take the liberty of suggesting. They have been shown to my learned friend Mr. Phelps, and although his opportunity of considering them was limited, and I do not consider him debarred in any way from criticising them when he has more time for deliberation, I think I am justified in saying that so far as he has read them they do not deal with anything except facts which are not in dispute.

Mr. PHELPS.—I ought to say, perhaps, in justice to Sir Charles, that I made an observation that quite justifies what he has just said in respect of these statements. On another perusal, I think that perhaps one of these statements may be open to criticism, and therefore it is

only fair to state, now, the only point we shall make in respect of them. We conceive—

Sir CHARLES RUSSELL.—I think my friend had better reserve that. I will read them and presently you can have an opportunity of stating your view.

1196 Mr. PHELPS.—Certainly, unless it is your convenience.

Sir CHARLES RUSSELL.—Thank you, I do not think so. I have said my friend is not in any way estopped from criticising them, but I think it will be found that they will not be open to any objection as to raising any fact not in dispute. It is quite right that this Tribunal should be relieved, as far as possible, from determining questions of fact. For instance, it is suggested in the United States Case that some of the ships were really owned by United States citizens, and that therefore, as these men were offending against the laws of their own country that they ought not to be compensated for the loss of their ships.

That is, of course, a perfectly legitimate point to raise. We do not think, in point of fact, it is well founded, and it happened that one of these reputed owners was in Paris a few days ago—I believe is still—and we suggested to our friends whether it might not be a convenient opportunity for getting his examination and cross-examination taken upon this question before a commissioner; but my friends—I make no complaint of it—thought that was hardly a mode of procedure contemplated by the Treaty, so that any question of fact of that kind must be left open to either party to prove or to dispute at the convenient time when the subsequent question of liability and the measure of liability are in question.

Lord HANNEN.—Unless I am mistaken it is a question of fact that neither of you call upon this Tribunal to decide?

Sir CHARLES RUSSELL.—That is so.

The only facts we call upon the Tribunal to determine, are those which I will not take the liberty to read.

The British Government having submitted to the Arbitrators certain questions of fact as involved in the claims for damages set forth in the Schedule to the British Case, pages 1 to 60 inclusive, ask for the following findings thereon, namely:

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the said Schedule, were made by the authority of the United States Government.

2. That they were made in non-territorial waters.

3. That the several searches, seizures, condemnations and confiscations whether of ships or goods, and the several arrests fines and imprisonments, were for alleged breaches of municipal laws of the United States, which alleged breaches were wholly committed on the high seas outside the territorial waters of the United States.

The PRESIDENT.—You do not consider that is undisputed—just that point.

Sir CHARLES RUSSELL.—I confess I think it is undisputed. I think it cannot be denied that the several searches were made, the seizures were made, the condemnations were made, the confiscations were made, as for breaches of municipal law.

Mr. CARTER.—There is an implied statement there which we deny.

Sir CHARLES RUSSELL.—I think, as a matter of fact, it cannot be denied—I think it is correct.

The PRESIDENT.—I do not believe it is undisputed.

1197 Sir CHARLES RUSSELL.—It is difficult to say what is not disputed. My friend Mr. Carter says there is something implied here, which is not admitted.

Mr. CARTER.—We will present our view of it.

Sir CHARLES RUSSELL.—Quite so.

Then 4th:

That the several orders, mentioned in the said Schedule, whereby ships were prevented from pursuing their voyages, were given on the high seas outside territorial waters under the authority of the United States Government and in execution of the municipal laws of the United States; and

5. That the said several searches, seizures, condemnations, confiscations, fines, imprisonments and orders were not made imposed or given under any claim or assertion of right or jurisdiction except such as is submitted to the decision of the Arbitrators by the questions in Article VI of the Treaty of Arbitration.

That I think covers the whole ground. At all events we will take the opportunity of handing a copy of those questions to the members of the Tribunal.

The PRESIDENT.—You imply, by that last question, that we are perfectly competent to decide all the questions of law which are involved by the seizures?

Sir CHARLES RUSSELL.—This is a question of fact which we are asking you to find. We are asking you to find that, in fact, the seizures, condemnations, and confiscations, were not made except upon a claim or assertion of right covered by the Treaty. The 5th finding proposed is practically intended to assert, as a fact, that the grounds upon which it is even now sought, (whether by municipal statute, or self-defensive, or self-preservative regulations) are covered by the Treaty. About that, I think there is no room for doubt.

The PRESIDENT.—May I, once more, put the same question on that: Do you believe that that fifth question of yours is undisputed?

Sir CHARLES RUSSELL.—Absolutely, I think: although, as I said just now it is very difficult to say what is not disputed. I cannot conceive that it can be disputed: because its dispute would mean this—that there is some ground behind, which has never appeared in the whole course of these years and is not adverted to either in the correspondence, the Case, Counter Case, or Argument upon which the United States can justify what it has done,—and which has not been submitted to this Tribunal.

The PRESIDENT.—Perhaps Mr. Phelps will be kind enough, in his turn, to tell us whether he accepts this, or whether he intends to dispute it.

Mr. PHELPS.—Certainly.

Sir CHARLES RUSSELL.—Now I wish to get on, with the permission of the Tribunal. I wish to relieve, and am glad to relieve, the Tribunal of one question at all events, and that is the question of damages under Article V of the *modus vivendi* of 1892, which is also remitted to this Tribunal. This, Sir, will not need any troublesome reference, because it is an admission I am going to make. At page 216 of the printed

Argument of the United States (you need not, Sir, trouble to refer to it, if I may be permitted to say so, because it is not a point of difference between us—it is a matter I am clearing out of the way)—the United States give up any claim to damages under that Treaty; and I have to say, on the part of Great Britain, and speaking with authority in the matter, that although they had under the earlier *modus vivendi* to pay a very large sum for damages to their Canadian sealers—a sum I think exceeding \$100,000—looking to the fact nevertheless, that under the *modus vivendi* in question a great many, at least, if not all of the sealers who would have resorted to the eastern part of Behring Sea had made catches of seals in other parts of the ocean, and although I think it might be argued that this Tribunal

is required by Article V to give damages on the basis of a limited catch or catches which might have been taken in Behring Sea—in all the circumstances of the case Great Britain does not desire to press that view upon the Tribunal, and therefore, will ask for no finding for damages upon and under that 5th article of the *modus vivendi*; but it probably will be convenient in the Award which the Arbitrators may think proper to make, to state upon its face that both the United States and Great Britain have abandoned any claim for damages under that head.

The PRESIDENT.—You are agreed also as to that, Mr. Phelps.

Mr. PHELPS.—Yes.

The PRESIDENT.—I am not quite sure, speaking for myself, that the question of compensation was referred to the Arbitrators. I am not quite sure that Article V is to be construed in that way as to compensation.

Sir CHARLES RUSSELL.—If we agree to relieve you of it, Sir, it is unnecessary to discuss it.

The PRESIDENT.—Of course, it is more easy to agree about a difficult question than to have it decided by us.

Sir CHARLES RUSSELL.—Now, Sir, I come to the important questions in the case. As regards those questions, my respect for Senator Morgan induces me to say one word. Senator Morgan has more than once, as I understood, suggested that the answers to the five points, as they are set out in Article VI, do not exhaust the duty and functions of this Tribunal as to the questions in dispute submitted to this Tribunal for adjudication. Well, if that be so,—if Senator Morgan be right in that—I need not say it would be the duty of this Tribunal to consider any question referred to them under the whole Treaty if it is not found to be dealt with, and met by, the answers to those five points. But, as I submit respectfully to Senator Morgan, they are adequately dealt with as the result, or by the result of the answers of the Tribunal to each of those questions. For instance, Senator Morgan was good enough to refer me to the introduction to the Treaty, and to the first Article of the Treaty which repeats the introduction; namely, that, amongst the questions which have arisen between the two Governments, there are some which concern the jurisdictional rights of the United States in the waters of Behring Sea; others which concern the preservation of the fur-seal in or habitually resorting to the said Sea; and others again which concern the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the Behring Sea.

Now I think, if the learned Senator will consider, he will see that every one of those questions will be in fact dealt with by the answers to one or other of those five questions. For instance, in determining what the exclusive jurisdiction if any Russia had, what recognition there was of this exclusive jurisdiction by Great Britain, whether Behring Sea was included in the phrase "Pacific Ocean", and the effect of the cession of the rights of Russia to the United States—the determination of these matters will dispose of the class of questions which have been grouped together as jurisdictional or territorial questions.

And then as to the question of the right of the United States as to property or protection in the fur-seal: equally the answer to that question would seem to me to dispose of the question, What were the rights of the respective nationals? because if the United States citizens have no exclusive or exceptional right, then the great and broad principle remains—we care not whether it is stated on the face of the Award or

not, the Award will give it no greater sanction—that all men are equal on the high sea and have the right to take from it the products of the high sea according to the measure of their opportunity and their will. Thus the whole question of the respective rights will have been determined. But if I should not be right in that, the Tribunal will themselves judge, and they will frame their answers so as to cover the view which has been suggested by Senator Morgan. I content myself, therefore, with reminding the Tribunal that at page 26 of the printed Argument, we have formulated the answers which we conceive the facts and the law justify us in calling upon this Tribunal to make. These relate to the first four of the questions.

First:

That Russia exercised no exclusive jurisdiction in Behring Sea prior to 1867; that, in 1821 only, Russia asserted exclusive jurisdiction over a part of Behring Sea along its coasts, but that she withdrew the assertion, and never afterwards asserted or exercised such jurisdiction.

That Russia exercised no exclusive rights in the seal fisheries in Behring Sea prior to 1867; that in 1821 only, Russia claimed exclusive rights, as included in her claim of jurisdiction extending to 100 miles from the coast, but that she withdrew the assertion, and never afterwards asserted or exercised such rights.

The only exclusive right which Russia subsequently exercised was the right incidental to her territorial ownership.

Then as to question 2:

That Great Britain neither recognized nor conceded any claims of Russia of jurisdiction as to the seal fisheries, *i. e.*, either (a) of exclusive jurisdiction in Behring Sea, or (b) exclusive rights in the fisheries in Behring Sea, save as already mentioned.

Mr. Justice HARLAN.—What do you mean by “exclusive rights in fisheries in Behring Sea?” You do not include the business 1200 conducted on the Islands, do you? Do you mean that Great Britain did not concede Russia’s exclusive right on the Islands?

Sir CHARLES RUSSELL.—Not at all; we are not dealing with the rights *ratione soli*: those are not in dispute. We deny the existence of any exclusive rights outside territorial limits. Our contention is that the only rights which Russia had or exercised were such rights as were incidental to her territorial ownership.

Lord HANNEN.—The words are, “save as already mentioned”.

Sir CHARLES RUSSELL.—That is so. The form of the Treaty is curious. It may have escaped notice that the first question in Article VI deals with exclusive rights in the seal fisheries, and therefore we have adopted the language of the question; whereas question N^o. 5 alters the phraseology and says “protection or property in the fur-seals”. The answer, therefore, is adapted to the phraseology of the question.

Now for the third answer, (which Mr. Blaine told us would be decisive of the matter), we contend that the answer should be:

That Behring Sea was included in “Pacific Ocean” in the Treaty of 1825.

That Russia neither held nor exclusively exercised any rights in Behring Sea after the Treaty of 1825, save only such territorial rights as were allowed to her by international law.

Then the answer we suggest to question 4 is:

That no rights as to jurisdiction or as to the seal fisheries in Behring Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, passed to the United States under that Treaty, except such as were incidental to the islands and other territory ceded.

In other words, that no more passed (and it is not contended that more did pass to the United States) than Russia possessed, and that Russia’s rights were the rights of a territorial owner and no more.

There will then remain the 5th question, the answer to which is formulated on page 63 of the printed Argument, thus:

That the United States have no right (a) of protection, or (b) of property in the seals frequenting the islands of the United States in Behring Sea when they are outside the ordinary three-mile limit.

Now, I have only one other word to say. I have been dealing solely with the question of legal right; I have not said one word, nor shall I say one word, in this connection, with a matter entirely distinct, to be approached from an entirely different standpoint,—the question of Regulations. I will only say what I have previously said, what the correspondence of the representatives of Great Britain justifies me in saying, that Great Britain is now, as she has always professed to be, ready to consider the question of Regulations upon a fair basis,—upon the basis of a common interest to be safeguarded.

Very little remains now for me to say, Mr. President. I have to submit that in none of the forms in which this claim has been presented, shifting and varying as they have been, is that claim maintainable in point of law, whether it is to be regarded as a claim by derivative title from Russia which was the case originally put forward, 1201 but which has now been allowed to recede largely into the back ground: or whether it is a case of property in the individual fur-seal or in the fur-seal collectively, or in an industry said to be founded on the fur-seals with, or apart from, a claim of property in the fur-seals themselves.

In every form in which it can be put, or in which human ingenuity can suggest that the claim can be put, we submit that it is untenable. It is opposed to that great principle which lies at the very root of this whole controversy, the principle of the freedom of the sea, the principle that upon the sea the ships of all nations are equal, whether they be ships of a great power or ships of an insignificant power; the principle that upon the high sea the ships of each nation are part of the territory of that nation; the principle that upon the high sea the nationals of every nation can take at their will, at their pleasure, according to their ability, from the products of the sea.

And, Mr. President, it is no light matter that this is the first time in the history of the world that any nation, or any individual of a nation, has ever claimed a right of property in any free-swimming animal in the ocean, that this is the first time in which an exception has been sought to be made in the case of the fur-seal from the right of all mankind to take from the ocean the fish and the animals that it contains.

The advancement of these propositions is grave enough; still graver the sanctions which are invoked, forsooth, in the name of international law for the vindication and for the defence of these extravagant and unfounded pretensions. For what are those sanctions? They are the affirmation of the right on the part of the United States, and for all time, to search, to seize, to condemn, vessels of a friendly Power engaged in pelagic sealing or about to engage in pelagic sealing, or which have been engaged in pelagic sealing and to take from them the seals that they have acquired, or to drive them from the waters, with a show of force, to the ports from which they sailed. In other words, it is no less than this—the assertion in support of this supposed right of those acts of high authority on the high seas which are only permitted by international law to belligerents, or only allowed to be exercised against pirates with whom no nation is at peace.

Mr. President, I have endeavoured to argue this question with as much closeness of reasoning as I could command. I have not indulged in

vague speculation, nor embarked upon metaphysical discussion. I have felt it to be my duty to try and assist the Tribunal in ascertaining what the Law is, because, as I have previously taken the opportunity of saying I conceive it to be the function of this Tribunal not to make a law but to declare the law; not to consider what the law ought to be; but to say, upon their responsibility, what the law is,—not to formulate new rights, but to affirm what, in their judgment, they believe to be existing rights.

In this domain of law, the armoury of argument is full. Here, indeed are the weapons of Achilles; but where are the strength and skill to use them with their full force and effect?

1202 I have dealt with the law as I believe it to be. I am content to think that that law, as it has come down to us, fashioned by the wisdom of ages modified by the experience of Human Society, in its evolution is a fitting and noble instrument to serve the just purposes and uses of Mankind in the adjudication of their rights.

My friend, Mr. Carter, in his impressive opening, well said that this submission to arbitration was a great fact. Mr. President, it is a great fact—a fact of weighty moral significance.

There are two great Powers before you: One, a representative of the civilization of the Old World, great in its extent of dominion, greater still in its long enduring traditions of well-ordered liberty and in the stability of its ancient Institutions; the other a young but stalwart member of the Family of Nations, great also, in its extent of territory, in the almost boundless resources at its command, great, too, in the genius and enterprise of its people, possessing enormous potentialities for good on the future of the human race. These Powers are in difference. Great Britain conceives that she has been wronged by these seizures, as we submit justly so conceives, that her sovereignty has been invaded; her rights upon the high sea, represented by her nationals, set at nought. Happily the dread extremity of war was avoided. These nations have not sought to turn their ploughshares into swords to settle their differences. They are here before you, friendly litigants, peaceful suitors in your Court, asking by pacific means the adjustment and the determination of their rights in times of peace. This is, indeed, a fact of great moral significance.

Peace hath her victories not less renowned than war.

This arbitration is, who will gainsay it? who can gainsay it?—a victory for peace. Will your award be a victory for peace? You, Gentlemen of this Tribunal, alone can answer.

It will be, it must be, a victory for peace if, as I cannot permit myself to doubt, it conform to and leave untouched and undoubted the principles of that law which have been consecrated by long usage and stamped with the approval of generations of men: that law which has, after all, grown up in response to that cry of humanity heard through all time, a cry sometimes inarticulate, sometimes drowned by the discordant voices of passion, pride, ambition, but still a cry, a prayerful cry, that has gone up through all the ages, for peace on earth and good will amongst men.

The PRESIDENT.—Sir Charles, we have to thank you for the great pains you have taken in making clear the very intricate questions brought before us for decision. You have reaped so much applause in the course of your profession as a lawyer and far-famed speaker, that what I might add would be but of small purport. I will merely say that the vigour and incisiveness of your argument have been fully appreciated. We feel that England has done honor to this Tribunal when she chose as her counsel in this memorable case one of her ablest and most powerful legal debaters.

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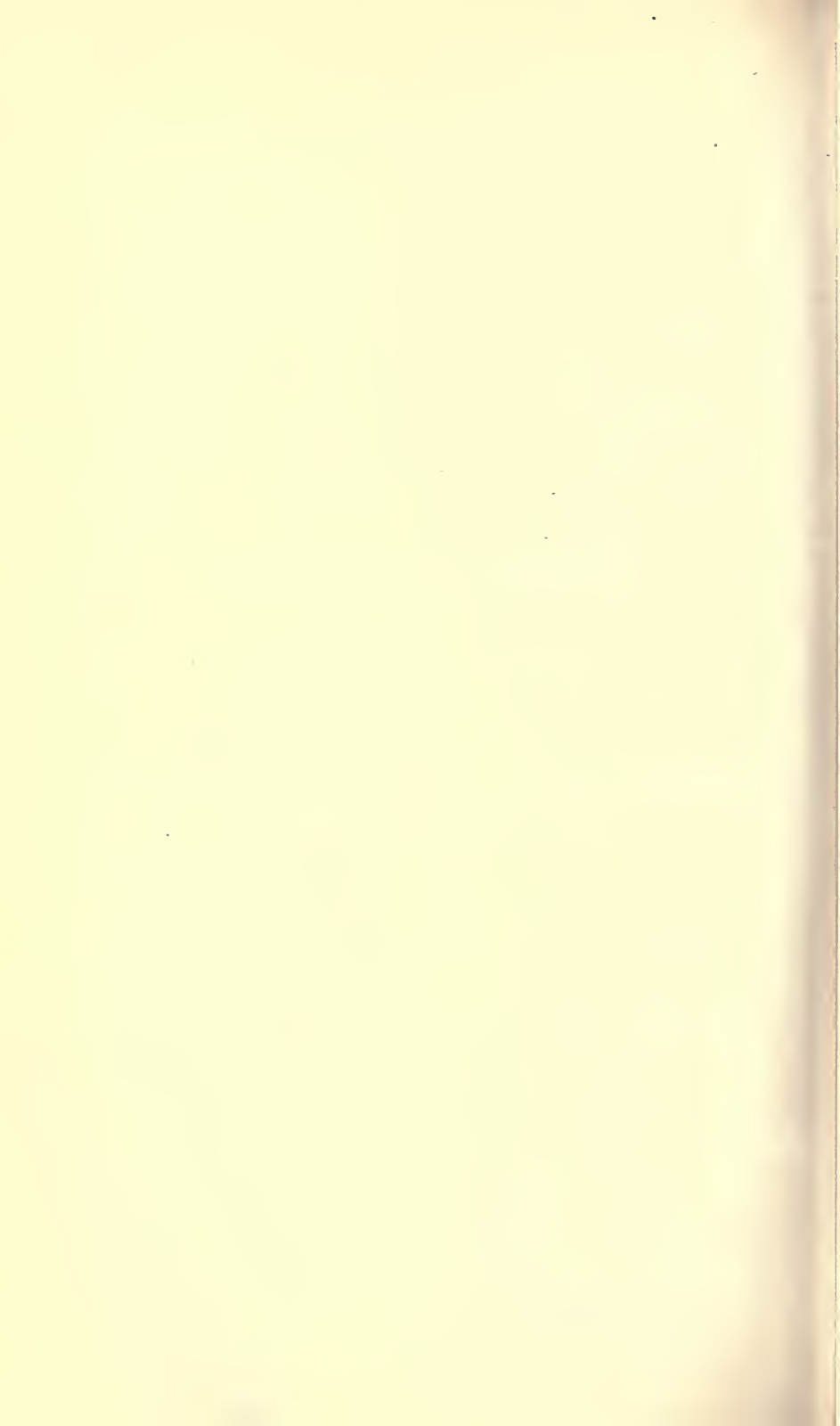
FUR-SEAL ARBITRATION.

ORAL ARGUMENT

OF

SIR RICHARD WEBSTER, Q. C., M. P.,

ON BEHALF OF GREAT BRITAIN.



THIRTIETH DAY, MAY 31ST.

Sir RICHARD WEBSTER.—Mr. President, if I were to obey the dictates of my own inclination, I should state at once frankly to the Court that it was not in my power to assist them by fresh or additional observations in following, or attempting to follow, the argument that has been addressed to you by my learned friend, the Attorney General. I say it without the slightest shadow of reservation; I am not aware of a single point that has not been touched, or of a single ground that has not been urged, or of any substantial principle upon which the United States Case is based, which my learned friend has not attempted to attack and grapple with.

And yet, Mr. President, in all probability, I should not be altogether fulfilling my duty if I were to remain absolutely silent in connection with this discussion before this Tribunal. Having been chiefly responsible for the framing of the original Case, there are certain points upon which, in all probability, those who instruct me would think it right that I should endeavour, even at the risk of some repetition, to put forward before the Tribunal a summary of the argument which my honourable and learned friend, the Attorney General, has so admirably presented to you.

I propose to rely largely, nay, almost entirely, on the intimate knowledge that this Tribunal must have of the documents and the correspondence which are in the voluminous papers that are before the Court. I propose with very few exceptions, indeed, to rely upon the memory of the Court of documents which have now for many days been under their eye and the contents of which have been discussed before them. I will only say I ought to have—I will not say that I have—at the present time, a pretty intimate knowledge of these documents myself; but if either of my learned friends on the other side who are good enough to listen to me, think that in making any statement with regard to the contention I am urging, I am not wellfounded either in fact or in regard to the contents of any particular document, I hope they will be kind enough to indicate it to me.

Mr. President, I am not unmindful of the extreme attention and the unvarying courtesy that has been displayed by every Member of this Tribunal to those who preceded me, and I know full well that that will be extended to me.

Will you forgive me, Mr. President, as I wish to waste no time at all, if I go at once to the questions in issue with but one preliminary observation—an observation I address not so much to you, Sir, as to those of the Tribunal who have practised in years gone by in the profession in which I have laboured now for a good many years. Those who have been advocates will, I am sure, appreciate that the work I have been doing during the last six weeks has not been perhaps the best fitted to enable one to present what I may call a finished address to the Tribunal. I have been doing, I hope, not altogether without some success, work which I have not been permitted to do for seven years, namely, that of

a junior counsel; but notwithstanding that I have by the accident of my position for the last seven years not been called upon to fulfil those duties, I have endeavoured to fulfil them at any rate to the best of my ability. But I desire the Tribunal to understand—I know the lawyers will—that that kind of work is not the best preparation for an address such as one would wish to deliver. Having made these very brief introductory observations, I will ask you now to permit me to go at once to the particular points upon which I have to address you: and without, so far as I may avoid it, any circumlocution whatever.

I propose this afternoon to address myself to the first four questions of Article VI. I hope that I can in the space of to-days' sitting bring before the notice of the Tribunal all that it is necessary for me to urge with regard to them. It is scarcely necessary, Mr. President, that I should add, that, as my learned friend the Attorney General has done, I decline to argue the question of Regulations at all as a part or a branch of this subject. In my opinion, it would be contrary to the scheme of the Treaty; it would be contrary to the compact made between the parties before they were in Court; and although in the exercise of that discretion and of that courtesy which is recognised among members of our profession, on the wish being expressed by my learned friends on the other side that they should be permitted to mix up their arguments in one and deliver them at the same time, we did not think it necessary further to stand on our strict rights under this Treaty, we think that we should not have been doing our duty if we were, in anything we say on the five questions mentioned in the 6th Article, to trespass or trench upon the subject matter of Regulations.

Now, Mr. President, Senator Morgan will forgive me if I refer to an observation that has fallen from him more than once, and which was alluded to by the Attorney General this morning, expressing a little doubt as to whether the five points mentioned in Article VI are really exhaustive of the questions of right submitted to this Tribunal.

I make an admission at once, perhaps going a little way beyond what the Attorney General has said, namely, that if the United States had desired to raise any additional question of right beyond those five questions, and had put them either in their Case, their Counter Case, or their Argument, we should have been bound to meet them. I shall not suggest that, under the points to which I will call attention directly, it was not open to the United States to have raised before this Tribunal any substantial question of right upon which they desired to invite the decision of the Tribunal; but the point which I desire to bring out prominently in relief, before I call attention to the learned Senator's remark, is this, that at no stage of this case, in the Case, the Counter Case, or the Argument, have the United States justified or attempted to justify their action except upon something which is fairly covered by and within the ambit of those five questions.

Therefore if any point is to be started, if it is to be suggested that the United States have other rights under and by virtue of which they can maintain their position, or can justify their seizures, it would be started after the oral argument on both sides, except the reply, had been completed. I have not the slightest reason to believe that anything of the kind will be done. I believe that perfect candour and fairness have been shown by my learned opponents,—if they permit me to call them my learned friends I shall desire to do so—in connection with this matter; but I cannot help saying that if it were thought that there was some other justification of the action of the United States than that which is indicated in general in Article VI, expanded in particular in the Case Counter Case and Argument, one would have

expected to find some trace of it; and with such industry as I have been able to bestow upon this case I am not aware there is any ground of justification put forward which has not been touched upon either by my learned friends Mr. Carter or Mr. Coudert, or indicated in writing by my learned friend Mr. Phelps, to all of which as I have already said my learned friend the Attorney General has addressed his argument.

Now the learned Senator has more than once directed attention to the difference between the words "question" and "point"; and I will ask leave to read once more the opening words of Article I, for I am not sure that he always had them in his mind, when he was making the observations so courteously to us. They are practically for this purpose the same as the preamble, but in order to omit nothing I had better read the preamble first:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of America, being desirous to provide for an amicable settlement of the questions which have arisen between their respective Governments concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters, have resolved to submit to arbitration the questions involved.

I do not think it can be denied that what is there meant to be referred are the questions which have arisen between the Governments respecting the jurisdictional rights concerning the preservation of the fur-seal and the rights of the citizens, and if I turn to Article I the words, though not actually *verbatim*, are for all substantial purposes identical.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea and the rights of the citizens and subjects of either country as regards the taking of fur seal in or habitually resorting to the said waters shall be submitted to a Tribunal of Arbitration.

The whole scheme, the whole statement, the whole sentence, is governed by the opening words "the Questions which have arisen". I am sure the learned Senator will not think that I desire in any way to narrow the rights of the United States. I admit freely that they are entitled to raise in this Arbitration any justification of their action which appears either in their Case, Counter Case, or Argument, and fairly within the meaning of language there used.

Senator MORGAN.—Sir Richard, will you pardon me for saying that my purpose was to arrive at what the duties of the Arbitrators are with respect to the rights of either party, not the rights themselves.

Sir RICHARD WEBSTER.—I quite follow; and it was for that reason I wished to call your attention to this. I submit that the duty of this Tribunal is to determine the questions as to jurisdiction, to determine the questions as to preservation, and to determine the questions as to right—

Senator MORGAN.—That are submitted.

Sir RICHARD WEBSTER.—That are submitted; and I ask that the Tribunal in considering the matter will, at any rate, I am sure in fairness to those before them, if any other idea passes through their minds, indicate it to us, because when I come later on to examine the contentions of my learned friends, Mr. Carter, Mr. Coudert and Mr. Phelps, you will find that they are all within the ambit of the five points which are referred to in Article VI.

Now, a few words only with regard to the origin of the points in Article VI. I am not going through the history again, because, some days ago, the Attorney General read the letters to you. They were framed originally, almost in the shape in which they now stand, by the United States. The fifth question was the one that was altered, because in the form originally proposed, it appeared to Lord Salisbury to assume too much right, to give too large a concession to the United States as regards their rights; and, therefore, the fifth question in the shape in which it now appears was framed about the middle of 1891, the earlier form of it having been proposed by Mr. Blaine at the beginning of 1891; it was framed in that shape, so that while it should not limit in any way the rights which the United States might claim, yet still it should not, on the face of it concede to the United States any position which Great Britain was not prepared to give them.

These observations, Mr. President, when the Tribunal comes to frame its decision, will, I submit, be found not to be without their significance; because my learned friend, Mr. Phelps, going, I am sure, as far as he could go and wishing to go as far as possible, indicated to you many days ago that, although he had no authority, to speak for the present Government of the United States as an Executive Officer, and though his position here was that of Counsel merely for the parties who instructed him, said he had no moral doubt in his own mind that the finding of this Tribunal, with regard to the five Questions submitted in Article VI, would be respected by the Government of the United States and be upheld in so far as it was necessary to consider the questions which might ultimately arise under Article VIII.

I think I am correctly representing my learned friend the Attorney General when he said that of course with regard to any claim which Great Britain might make under Article V, the Government would feel bound to admit against Great Britain, if necessary, any finding of this Tribunal which arises in answer to the five points mentioned in Article VI. But what is the significance of this? Surely it is this, that if the United States had any right or any claim of right under which they could justify, or under which they were entitled to justify, their action, they must do it in their Case, Counter Case and Argument. They cannot ask from this Tribunal any finding, or the insertion of any words to indicate that behind the justification put forward in the five points mentioned in Article VI, there is some other justification not to be gathered from the written papers, not to be gathered from the oral argument, but to be held in reserve and to be used if necessary. I therefore ask the Senator, in common with every other member of this Tribunal, who I know will give what weight they think any observation of mine is entitled to—I will ask the Senator to let me assume—I say no more than that, for the purpose of my argument, that the justification for the acts of the United States is to be found in the five points enumerated in Article VI, and provided we are able to show to the satisfaction of this Tribunal that no one of those five points construed in its largest sense, giving to the language embraced in the points the full meaning such as is sought to be given to that language in the written and oral argument of my learned friends,—if we show that the claims which have been made to justify the action of the United States fail either on the ground of law, or because there are not facts to support the particular question or particular point urged on behalf of the United States, we are entitled to have that stated, as was indicated to you this morning, and entitled to have that found by the very terms of this Treaty; for you are directed to place in your

award a distinct decision on each of the five points, and you are further told by the language of Article VIII that you are to find upon any question of fact involved in the claim, though, of course, you are not to award judgment for a specific amount, nor are you to direct the United States Government, or the British Government, as the case may be, to make any particular payment.

Now, what, is the meaning of these five Questions? I need only in two sentences repeat what my learned friend, the Attorney General, put before you many days ago. We understand the first four Questions to be pointing to the original title of Russia and the derivative title of the United States as the successors of Russia.

Perhaps there is one view of the fifth Question which I do not think my learned friend, the Attorney General, meant to exclude, but in respect of which I should be perhaps prepared to go a little further than his enunciation, as it appeared to me at any rate, to go.

The learned Attorney General was asked by you Mr. President whether, if we construed the fifth question in the way in which he was inviting you to construe it, it would not amount to a repetition of the first four Questions. Now, it seems to me to be quite clear, and only fair to the United States to say and I do not understand that my learned friend, the Attorney General, to say anything the contrary of this, that there is a view of the 5th Question upon which the United States are entitled to rely which is different altogether from the first four Questions. The first four Questions are conversant with rights asserted and exercised by Russia, with recognition by Great Britain of those rights, with the question of whether there was not, in the Treaty of 1825, a particular bargain between Russia and Great Britain about those rights, and whether or not the United States did not get unimpaired everything that Russia had. But there is this view of the 5th Question to which I am later on going respectfully to address the attention of the Tribunal. It may be that Russia never asserted or exercised her rights, and yet had them all the time. That question was undoubtedly intended to be submitted to this Tribunal by the fifth Question. It may be that the occasion for the assertion had not come,—that the occasion for the exercise had not come. The fifth Question was meant, in my submission, to ask the Tribunal whether or not the United States does, in fact, possess either by virtue of the United States own position as a Nation, by virtue of the possession of the Islands, and, indirectly if you like, by virtue of her being the successor of Russia as well—does or does not the United States possess any exclusive right of protection or property in the fur-seals referred to in that Question?

There is one view—I only give it as an instance in which that question might become most material. You are well aware that there has been a discussion, many years ago—rather a burning discussion—as to whether or not the nation owning a particular territory had the exclusive right of fishing in the ordinary territorial waters. At one time there was some question about it. It is quite immaterial for my purpose to consider what are the rights or wrongs of that matter. It does not ultimately become material to this question. But assuming that the United States could have supported their contention originally put forward that either the whole of Behring Sea, or belts of 100 miles from the coasts of Behring Sea, were to be regarded as being in the position of territorial waters, it then would have followed that they might have exclusive rights in the fishery of seals in those waters, as distinguished from the fishery of seals in the high seas. Without in

any way going back upon that part of the case which to me, at any rate to day, has no more than historic interest, namely as to what the particular contention was that was put forward from time to time by the United States, on looking at the question broadly as to what rights the United States had at the time of the signing of the Treaty—if the United States could have made out that either by the acquiescence of Great Britain, or from the general position of the sea and the Islands or upon any other ground known to international law, they were entitled to the exclusive use of a strip of the sea outside the three-mile limit, then the questions of exclusive right of protection and property would have arisen just in the same way as they have from time to time arisen with regard to bays, with regard to enclosed waters and with regard to the strip next to the coast, be it three miles or more, as from time to time Nations have varied in the width to which they would claim exclusive jurisdiction. I therefore, point out for the purpose of my argument that when I deal with the rights of the United States as distinguished from the rights asserted and exercised by Russia, I shall propose to give the largest meaning to the five questions, in order that if the United States have any exclusive right either of protection or property in those fur-seals, they may have the benefit of raising that question before this Tribunal and of having an adjudication upon it.

Now I will take you for a very few moments back to the early history of this matter, and it is essential, at any rate in order to make my point clear, that I should ask you to go with me a little back in order of time. My learned friend Mr. Carter, in his most interesting argument before you, told you more than once that for the purpose of the negotiations which were going on from 1821 to 1825, or rather, in order to be more accurate, from 1821 to 1824 between Russia and the United States, and from 1821 to 1825 between Great Britain and the United States, the North-West Coast was to be regarded as the strip of land shown on the map in pink colour and accurately represented in language by my learned friend the Attorney General as the *lisière*. Mr. Carter, I think, without proving the statements, told you that whatever may have been the claims of Russia originally under the Ukase, whatever may have been the assertions in 1789, or 1821, that for the purpose of the bargain between the parties the north-west coast meant that and nothing more than that.

MR. CARTER.—Not quite that. I did not confine it to the *lisière*.

SIR RICHARD WEBSTER.—If my learned friend will pardon me, I think if he looks at latitude 60°, which was the point he took, this is how I understood it, but I am sure I take the correction—he said the North-West Coast went from 60° to 54°-40.

MR. CARTER.—No, further down.

SIR RICHARD WEBSTER.—I see my learned friend's point now.

MR. CARTER.—The southern boundary is infinite.

SIR RICHARD WEBSTER.—That points my observation, and, if possible, makes my point stronger when I come to develop it, that the North-West Coast extended northward of 60°, and the southern boundary may have been at 55° or elsewhere. I am obliged to my learned friend for the interruption. I did not mean to misrepresent him; but my mind was concentrated on what was the northern termination of the North-West Coast. I shall point out presently, and I hope this will not be lost sight of in my argument by the Tribunal, that as between the United States and Russia there never was any dispute about the northern boundary of Russia at all; further, that as between Great Britain and Russia there never was any dispute at all about the northern

boundary of Russia; the sole question was at what point the *lisière* should break away, so to speak, and give Russia the whole of the continent to the North-West. When I presently show its application you will find this is of extreme importance, and, I may venture to repeat myself, between the United States and Russia there was a discussion whether the boundary should be 51° . I only put this figure hypothetically. It makes no difference whether it is at $51^{\circ}.50$, or $54^{\circ}.40$, or at one time, as the United States said, as high as 57° or 58° . It makes no difference to my purpose. From beginning to end of the whole controversy during the years 1821 to 1825, no question ever arose between the United States and Russia as to whether the northern boundary should be up at 60° or at Behring Straits, or at Nushagak, or at any other point, in fact the discussion which has attempted to be imported into this controversy by my learned friend Mr. Carter, who has gone, if he will forgive me saying, the extraordinary length of saying that the United States and Russia agreed that the North-West Coast, for the purpose of the Treaty, meant that little bit, the *lisière*—that after the southern point was fixed when in the Treaty of 1824 they talk of the North-West Coast, they meant the *lisière*—he has gone the length of saying that although Great Britain had no knowledge of it, yet Great Britain inherited as a sort of heir-loom, a *damnosa hæreditas*, if I may use the expression, a construction of the clause which upon its face the words will not bear, from the United States, because the language of a particular article was originally taken from the American Treaty.

I cannot help reminding you, Sir, that when pressed by a question from the Tribunal, "should you, Mr. Carter, say that if in the correspondence between Great Britain and Russia it was clear that the words had been used in another sense?" Mr. Carter, with a frankness I should have expected, and which we all should have expected from him, said at once, "No, I should not". Then, said the Member of the Tribunal, the question is, what was the meaning which had been put upon those words in the correspondence between, not the United States and Russia, though that for this purpose would not make any difference, but between Great Britain and Russia. Upon that we did not hear one single word of argument from Mr. Carter or from Mr. Coudert in following him.

Now let me take you to the earliest period of time, so far as it is material. Is it the fact that when the parties began to assert their claims and rights respectively, they were between themselves, so to speak only referring to the North-West Coast, meaning thereby nothing north of 60° ? I will not involve the question again by trying to fix a southern boundary; that is immaterial for my purpose, were they speaking of a coast which was to have nothing on it north of 60° or of an ocean which was not to go north of the Aleutian Islands. I have ventured to put upon a map,—I will hand you a copy and lend one to my learned friends, and perhaps they will be good enough to lend it to the Court afterwards—it is my own work and therefore I will take the responsibility for any faults that there are—I have put what was the state of things so far as the case shows prior to the year 1821. The whole of this is taken from the British Case, and it shows, I think at a glance, that the statement made that all that the people knew about or cared about in connection with the North-West Coast was south of latitude 60° is not accurate.

You will observe what has been done. I will not take it in order of date; it would occupy a little time, but I will take it in the order that the information is given on the map. If you start at Sitka, I have

drawn a red line, and I have put the names of the vessels, the "Caroline" and "Eliza;" and the place where that is to be found in the British Case is page 20. The year is 1799. The nationality, so far as it could be ascertained, which is indicated by an initial, in that case happens to be American. That was a case in the year 1799, when the "Eliza" visited Sitka. The next in 1802 was a vessel called the "Jenny"; and then if you will look at Behring Bay, you will find the "Jackal", a British ship, 1792 to 1794. Then opposite Mount St. Elias, which was mentioned in reference to it, you will find La Pérouse went in a French vessel in 1786, mentioned in the British Case at page 17.

Now I desire to call attention to two localities well-known now, Cooks Inlet and Prince William's Sound; and I call attention particularly to this, Prince William's Sound is about 200 miles to the westward of the line of boundary, or latitude 60°; and Cooks' Inlet is considerably further.

Then, Mr. President, if you will observe with reference to Prince William's Sound, there are several cases of vessels going there. The "Phoenix", which was a British ship; the "Fidalgo", a Spanish vessel, both in 1790. Portlock and Dixon were there in 1786 to 1789; and Vancouver in 1794. Then, if you go to Cook's Inlet, Douglas was there in the year 1791, the name of his vessel was, I think, the "Iphigenia"; and Portlock and Dixon also and Vancouver. Then, the Spaniards visited Kodiak, in 1788; and in 1800 the "Enterprise" and in 1808 the "Mercury", both being British ships. Then, if you will run your eye along to Unalaska, you will find that was visited by the Spaniards in 1788; and by a man whose voyages are well known, Meares; and the Island of Atka was visited—also by Meares in the years 1785 and 1786.

Then, on the coast of Kamschatka, you will find two voyages to a place now known as Petropaulovsk—in 1792, the "Haleyon" and the "Flavia" and, as you will be good enough to run your eye to the extreme North, where you will find a mark put of Pigott's voyages (to which I shall make reference later) as far as Kotzebue Sound; and I shall show you, by the correspondence, he had been trading all along the coast of Kamschatka as well as visiting parts of the coast of America in Behring Sea.

Now I may be permitted to remind you that the whalers of 1842 were in Behring Sea. I have merely indicated it and given the reference to it. It is in the British Case, page 83, so that even from what we are able to trace in respect of a district comparatively speaking, of course, little opened up, there had been substantial trading, and this will be found to have been the main ground of the attempted action by Russia—there had been substantial trade to various places well to the north, using the expression of my learned friend, Mr. Carter, of latitude 60°.

Therefore, upon the face of this information, you would not expect to find the North-West Coast was to have the limited meaning which my learned friend, Mr. Carter, wishes to give to it.

Mr. Justice HARLAN.—Is this a copy of a map of any particular date as to the names and spelling, and so on?

Sir RICHARD WEBSTER.—It is the Map N° 1 of the United States Case—Behring Sea, North Pacific. I do not think they give the date. I merely used it because it happened to be the most convenient to put the names on. It has no value beyond being distinctly authentic as coming from the United States—but upon that I wrote down those names, taking them myself from the Case—the dates, boats, and the voyages; and I desire, before I break off to point out that while I am going to show you that complaints of trade along these coasts led to the action of Russia, it is idle to suppose that we know anything like

the whole of the vessels trading along the coast. There was no reason as is observed in the British Commissioners' report and in the Case for the vessels registering their names—there was no reason for their names being known. I do not suppose that ports of registry existed on this coast, at any rate there was very little indeed to lead these vessels to record the places that they called at when trading with the nation, but even with the limited means of information that we have we are able to show that when Russia began to make her complaint the position was that there had been substantial navigation, substantial trading and substantial interference with the rights which she very properly desired to protect far away to the north of the point which according to my learned friend Mr. Carter's argument was the only point the parties cared about.

Mr. Justice HARLAN.—Did the contest between Great Britain and Russia at that time embrace any settlement on either side of what is now called Behring Sea.

Sir RICHARD WEBSTER.—I do not think so.

Lord HANNEN.—As a matter of fact Captain Cook took possession of certain portions in the Behring Sea.

Sir RICHARD WEBSTER.—I should have said with reference to Mr. Justice Harlan's point I think it is obvious that at that time the parties were not relying strictly and solely upon their right of first possession because Great Britain had, if it had been a contest as to territory, probably an earlier claim to parts in Behring Sea than Russia, but that brings out the point to which the Attorney General called the attention of the Tribunal many days ago, that Great Britain cared very little about the coast—in fact it was comparatively immaterial provided the right of free navigation and free fishing was not interfered with and was enjoyed by her subjects after the year 1821 as they had been before.

Mr. Justice HARLAN.—Your argument is that the North-West coast extended all around there to these different points visited by the British vessels.

Sir RICHARD WEBSTER.—I say the North-West Coast extended right up to Behring Straits. I say that of this contention of Mr. Carter's, for the purpose of the Treaty in 1825, that that is the North-West Coast, there is not a trace to be found in any original document or contention. This is not to depend on the assertion of counsel. If the document exists showing the word North West Coast at that time was understood to mean that, that document would have been produced; and, of course, when it is produced I will deal with it. I am prepared to refer if necessary to any documents to which my learned friend can call attention.

I shall refer pointedly to one, which is the Baron de Tuyl's communication, which shows that the Company tried to get a limit put, not on the words North West Coast, but on the right to visit during 10 years. I assert, and I beg the Tribunal to take it as my recollection of the reading, that from beginning to end of this correspondence there is not a document indicating that North West Coast was understood by Russia, the United States, or Great Britain, as stopping at any point whatever north of $54^{\circ} 40'$. It went from whatever the southern boundary was— 55° at one time in the days of 1799—right away up through Behring Sea; and it is the simple fact, and you will find it of great importance, that between the United States and Russia there was no contention whatever as to the northern boundary of Russia. The whole point was, how far south can we stop Russia coming to? And as between Great Britain and Russia you will find,—except to ascertain the point of departure where that line running north was to go up so that Russia

had everything to the west of it—there was absolutely no contention between Great Britain and Russia as to the point on the coast to which the Russian possessions went.

The PRESIDENT.—If you say that the contention merely bore on those parts of territory and seaboard, how can you imply that Behring Sea was contained and comprised in those definitions?

Sir RICHARD WEBSTER.—I am afraid I have not made my meaning clear. I say the contention bore from whatever point in the South you liked to fix right to the extreme North.

The PRESIDENT.—There was nothing in question as to Behring Sea coast?

Sir RICHARD WEBSTER.—Nothing, except the right of navigation and fishing. I must have expressed myself very badly if I had not conveyed that.

The PRESIDENT.—As regards the coast, there was no contention except as to what?

Sir RICHARD WEBSTER.—As regards navigation and fishing, and the right to visit uninhabited points in accordance with international law. The whole area, up to the North, was in question.

Mr. Justice HARLAN.—There were no conflicting settlements?

Sir RICHARD WEBSTER.—There were no conflicting settlements on the coast between Great Britain and Russia. There was no question of a claim to territory by Great Britain on the coast of Behring Sea.

If you would look at page 38 of the British Case, you will find Russia's description of the North-West Coast at the time of the Ukase, the attempt to exclude other nations from exercising then right:

Section 1. The pursuits of commerce, whaling, and fishery, and of all other industry, on all islands, ports, and gulfs, including the whole of the Northwest coast of America, beginning from Behring Straits to the 51st of Northern latitude.

Therefore, I do not start with that, because it does not happen to be quite the earliest document; but there is a document, which I am going to make allusion to where our construction of "North-West Coast" is put by Russia, and there is not a single document in which a trace can be found of a different definition of "North-West Coast", not a single document; yet my learned friend, Mr. Carter, says that "North-West Coast" is to be regarded as beginning at 60°, if I may use the expression, and coming downwards, after the Treaty he says, ending at 54° 40'. My whole point is, there was no discussion as to the point on which Russian possessions ended on the coast itself away to the North.

The Tribunal then adjourned for a short time.

Sir RICHARD WEBSTER.—Mr. President, I find that by inadvertence I made a mistake in regard to that map. I had originally put the red marks on the "number one" map in the United States Case. When I directed a copy to be made for Mr. Phelps and the court there were no copies of "number one" to be had, and therefore those red marks had to be put upon a map of ours. Mine is on the original; but there is no difference. There is nothing upon the map except agreed matter. I only desire to correct a mistake I made by inadvertence, not remembering that they had not been plotted on the same map as the one of the United States.

The PRESIDENT.—I believe it is on your map which is in the Appendix?

Sir RICHARD WEBSTER.—I am not sure if it is even that. Yes, you are right, Mr. President. It is the one which is in the 4th volume of the Appendix to the British Case. There are only two maps which were exhibited.

I am with the permission of the Tribunal, directing their attention to the period before 1821. I am not upon the period of 1821 at all. Two matters were prominently brought forward in the United States case during this period as bearing upon the assertion and exercise by Russia of certain rights; and I call the attention of the Tribunal to page 42 of the United States Case. You will see in a moment, Mr. President, when I read this language, the importance that they attach to the exercise by Russia as distinguished from the assertion; and on page 42 of their Case, which still stands not withdrawn, there occur these words. I believe that the Tribunal have seen the copy that Mr. Foster was good enough to agree upon with me, showing what was cut out from the United States Case, and therefore I need not at any time refer to anything that has been cut out. But this paragraph still stands:

The official Russian records show that after the ukase or charter of 1799, granting to the Russian American Company certain exclusive control of trade and colonization, its authorities, acting under the sanction of the Russian Government, did not permit foreign vessels to visit Behring Sea.

Now you will observe the importance of it, Mr. President in a moment. They were desirous of proving that Russia had exercised more or less jurisdiction in Behring Sea. What the character of the jurisdiction she asserted was I shall discuss later on. I speak subject to correction when my friend Mr. Phelps comes to reply, or at any time, if he wishes to correct me; but I am not now aware of any document, official or otherwise, that supports the allegation to the slightest degree that the Russian Company or Russia did not permit foreign vessels to visit Behring Sea after 1799. On the contrary as I shall show you in a very few moments on the face of the original documents it is quite clear that foreign ships were visiting and were trading in Behring Sea between 1799 and 1821; but that I may keep strictly to the order of the dates, I must again remind the Tribunal. . . for it seems to have been forgotten by my learned friends. . . how it was that the Ukase of 1799 came to be made. It is stated at page 15 of the Counter Case of the United States that the Ukase of 1799 was directed against foreigners. I ask the attention of the Court to this matter; because this is after the withdrawal of the documents which the United States most properly and frankly withdrew. They repeat their statement that the Ukase of 1799 was directed against foreigners. That is to be found on page 15 of the United States Counter Case. Upon this point a quotation is given from a letter from the Russian American Company to the Russian Minister of Finance, under date of June 12th, 1824. I ask the attention of the Tribunal to that date, not 1799 or about that date, but June 12, 1824. The quotation is as follows:

The exclusive right granted to the Company in the year 1799 imposed the prohibition to trade in those regions not only upon foreigners but also upon Russian subjects not belonging to the Company. This prohibition was again affirmed and more clearly defined in the new privileges granted in the year 1821 and in the regulations concerning the limits of navigation.

Therefore you will observe, Sir, that both in their Case they assert that official documents will show, and in their Counter Case they allege, again referring not to a contemporaneous document but to one of 1824, that the Ukase of 1799 was an executive act intended to operate against foreigners.

What are the facts? I wish to take this as briefly as possible, because if I call the attention of the Tribunal to it they will be good enough, I have no doubt, to note it as being of importance. At page 22 of the British Case will be found the history of the Ukase of 1799. I will

quote nothing which depends upon what I may call doubtful British testimony. What I am about to quote comes from Russian sources, in so far as Bancroft, among others may be said to be a Russian source. I will call your attention, Mr. President, to page 23, speaking of the period just before 1799:

Thus, on every side, rival establishments and traders were draining the country of the valuable staple upon which rested the very existence of the scheme of colonization. To the east and north there were Russians, but to the south-east the ships of Englishmen, Americans, and Frenchmen were already traversing the tortuous channels of the Alexander Archipelago, reaping rich harvests of sea-otter skins, in the very region where Baranoff had decided to extend Russian dominion in connection with Company sway.

Lord HANNEN.—What is the Alexander Archipelago?

Sir RICHARD WEBSTER.—The Alexander Archipelago is that which is in the right of the Alaska Coast, practically down the *lisière*. It is that cluster of islands. It is on that part of the coast which Mr. Carter calls the North-West Coast.

Lord HANNEN.—That was the name of it?

Sir RICHARD WEBSTER.—I think it was only the temporary name. I am not sure that it has been continued since.

Now, Mr. President, you will find—and the Tribunal will forgive me if I attempt to pass this somewhat shortly—that there was a Russian committee directed to sit upon this matter; that they reported, as stated on page 24, with reference to the petition of the right to monopolize; and that the Ukase of 1799 was in consequence of a Russian representation that the Company as it was then constituted could not compete successfully with other trade competitors; and I want to know what answer, Mr. President, is to be given to the United States view of this in the state papers in the year 1824, an extract from which is set out on page 28. To-day the United States people say the Ukase of 1799 was intended to operate against foreigners. What did they say in the year 1824? I call the attention of the Tribunal to page 28:

The confusion prevailing in Europe in 1799 permitted Russia (who alone seems to have kept her attention fixed upon this interest during that period) to take a decided step towards the monopoly of this trade, by the Ukase of that date, which trespassed upon the acknowledged rights of Spain; but at that moment the Emperor Paul had declared war against that country as being an ally of France. This Ukase, which is, in its *form*, an act purely domestic, was never notified to any foreign State with injunction to respect its provisions. Accordingly, it appears to have been passed over unobserved by foreign Powers, and it remained without execution in so far as it militated against their rights.

I appeal from the United States of 1892 to the United States of 1824; I appeal from the period of comparative ignorance to the time when knowledge must have been fresh, information easily to be acquired, and facts easy to be ascertained. And the official Minister of the United States in 1824 states that the operation of the Ukase of 1799 was purely domestic. The counsel for the United States to-day, being desirous of proving an assertion and exercise by Russia, state formally in their case that after the Ukase of 1799 foreign ships were not allowed to enter Behring Sea, and they further state that it was intended to operate against foreigners. Is it not saying too much; and I respectfully challenge my friend Mr. Phelps when he comes to reply—my assertion is worth nothing unless I support it by reference to documents—to point to any act done by Russia; to point to any exclusion of foreign ships at any time—anything, which is in support of this allegation.

Mr. Justice HARLAN.—Sir Richard, can you refer me to that document of June 12, 1824, referred to in the Counter Case of the United States, page 15, the one you read a while ago? I do not know where it is in the record.

Sir RICHARD WEBSTER.—I will in a moment, Judge. It is not printed; but that extract is correct.

Mr. Justice HARLAN.—It is correct?

Sir RICHARD WEBSTER.—Oh, yes; that extract is correct. We have only got the Russian document, not the other parts; but it is a perfectly correct extract; and I call your attention, as you have been good enough to allow me to do so, to the date as being in 1824, when, as you know, Sir, the company were doing the utmost they could to support the Ukase of 1821. Therefore I am justified in saying—and I am sure you will follow me—that in no sense, from the point of view I am following, was it a contemporaneous document.

But it is curious, Sir, that the official document of the 7th of April 1821, coming from the United States Minister at St. Petersburg contradicts that, if any reliance can be placed upon it, for in 1824 the official Minister of the United States, writing to Mr. Adams, makes that statement with the authority of his position at a time when unquestionably the company were using all the powers they had to get an extension of their privileges.

But, Mr. President, this matter is really put beyond all question by the Riccord-Pigott correspondence; and this incident in the case is a very curious one. I trust my learned friends will not misunderstand me. I am satisfied that everything that has been put forward on behalf of the United States both by their agent and their counsel has been put forward in the fullest good faith; but I shall have to call attention to the fact that when it is necessary to remove the impression of an argument which is founded on original and official documents, they are suggested for the first time in this case, after the lapse of years and years, to be either incorrect in their phraseology or to have a different meaning to that which the words themselves would indicate. That occurs more than once in the course of this case.

Now, sir, in the original case now withdrawn, the Riccord-Pigott correspondence was put forward as an instance of Russia preventing foreign trade. It is sufficient for my purpose to call your attention, Sir, simply to the fact—I read nothing from it—that on page 45 of the United States Case, the Riccord-Pigott incident appeared as under the date, quite correctly, of 1819. It ran through four pages, from 45 to 49; and it was used, perfectly legitimately—as the documents were then supposed to exist:—in order to support the case, which they then believed to be the truth, that Russia had prevented vessels from going into Behring Sea. Will you be good enough, Mr. President, to kindly let your eye run on to page 49—all is now struck out from page 45 to page 49—but at page 49 you will observe that the thread of the story is then taken up:

It thus appears from the foregoing citations that, so far as it concerns the coasts and waters of Bering Sea, the ukase of 1821 was merely declaratory of preexisting claims of exclusive jurisdiction as to trade, which had been enforced therein for many years.

That is not withdrawn. That is a statement made on evidence which they then believed to be true, that for many years the trade of foreigners had been prohibited in Behring Sea.

The Ukase of 1799 which set forth a claim of exclusive Russian jurisdiction as far south as latitude 55°, called forth no protest from any foreign powers, nor was objection offered to the exclusion of foreign ships from trade with the natives and hunt-

ing fur-bearing animals in the waters of Behring Sea and on the Aleutian Islands as a result of that ukase and of the grant of exclusive privileges to the Russian American Company. It was only when the ukase of 1821 sought to extend the Russian claim to the American continent south to latitude 51°, and to place the coasts and waters of the ocean in that region under the exclusive control of the Russian American Company, that vigorous protests were made by the Governments of the United States and Great Britain.

Therefore, Sir, there stands to-day that statement, without—I say it with great respect—a shadow of evidence to support it, that prior to 1824 the Ukase of 1799 had been used to exclude foreigners, and that in fact the only complaint was the extension of the Ukase of 1821.

Now, Sir, I have said that the Riccord-Pigott incident, struck out—honestly and fairly struck out—from their case when they found that they had relied upon falsified documents, when you look at the true documents, is an absolute contradiction of their statement as to the exclusion of foreign vessels from Behring Sea. I will take this as briefly as I can, but it is of some importance. May I ask you to be good enough to turn to page 18 of the British Counter Case. The original documents are set out in the revised translation supplied us by the United States at pages 13 to 17 of Volume one; but you need not refer to that. You will find all that is material at pages 18 and 19 of the Counter Case. Now, Sir, what are the facts?

Riccord and Pigott had made a contract with the Russian American Company to go whaling; the monopoly having been guaranteed to Russian subjects: the Government objected—not at all improperly—to an Englishman having any interest in it; and accordingly you will find at page 18 the extracts from the letters referred to, from which it appears that Riccord, the Superintendent of Kamtchatka, had made an agreement with Pigott, an Englishman, for ten years, from 1819,

with reference to fishing for whales and extracting oil from these and other marine animals on the shores of Kamchatka and on those of all Eastern Siberia, in the harbours and bays and amongst the islands.

I need not remind you, Mr. President, that Eastern Siberia is washed by Behring Sea. It is not a question of the Pacific Ocean only. It is a question of the waters right up into Behring Sea.

Justice HARLAN.—That Pigott is marked on your map?

Sir RICHARD WEBSTER.—That is marked on the map at Kotzebue Sound. That is on the other side. I was at present taking it up in the order of time. At present we have got him only as far as Kamchatka.

Lord HANNEN.—You did not read all of that. It reads “On the shores of Kamchatka”.

Sir RICHARD WEBSTER.—Perhaps I did not express myself plainly. I am now merely dealing with the Western side, Kamchatka and Eastern Siberia, not with the United States side.

Now, what is the objection which the Governor takes? I will tell you, Mr. President, if you will look at the original correspondence. It turns out that the company were unwilling to enter into the whaling trade. It did not pay or they supposed it would not pay. Whereupon they were directed to turn their attention to the whale fishery; and the Government further ordered that no foreigner should be allowed to enter a merchant guild, or to settle at Kamtchatka or Okhotsk, and that no foreign merchant-vessel should be permitted,

to trade at those places under any circumstances, or to enter the ports of Eastern Siberia except in case of distress... Furthermore, the Englishman Davis at Okhotsk, and Dobello's agent in Kamtchatka are to be informed... that the Government refuses them permission to remain at those places, or to build houses or hold real property there; the local authorities shall afford them all proper facilities for disposal of their property and leaving the country.

Sir, as time is of great importance, I will merely mention—it is not necessary to read it—the rest of the document at page 14. I am quoting from the United States translation at page 14 of Appendix I. It will appear that in the end the only prohibition was against holding land or entering the trade guilds; and more than that, that they might be in Behring Sea is obvious because they could not very well enter the ports of eastern Siberia except in case of distress, unless they were up there somewhere in the sea. I need not pause to argue that, because the facts are conclusive. If you, Mr. President, and the other members of the Court, will kindly look at page 19 of this correspondence produced to us upon notice to Mr. Foster, you will find a letter that shows that Pigott was trading on the coast of Behring Sea, and had gone up as far as Kotzebue Sound, the place I quoted when Mr. Justice Harlan was good enough to put the question to me, and a letter of January 21, 1821, puts it beyond all doubt what the fact was:

On the 29th September, 1820, the American brig “Pedlar” arrived at this port. Her captain is Meek, a brother of Meek who is well known to you. She had on board Mr. Pigott, with whom you are well acquainted. He was the supercargo or owner; for the cargo was under his control, and he directed the movements of the ship. He had come from Kamtchatka in eighteen days.

There were at that time two men-of-war on the roadstead, and this fact afforded me frequent opportunities of meeting Pigott, for he was acquainted with the officers of both of them. *They had met beyond Behring Straits in Kotzebue Sound*, and had been anchored there together. He said, in a hesitating way, that *he had been trading there*.

I must confess that *I was wrong when I said*, in a letter to Michael Michailovitch that *a single man-of-war would be sufficient to put an end to this traffic*.

It is not necessary, of course, to point out that if this were not something serious, it would not have been spoken of in this way.

To tell the truth, I did not believe it at the time; but I was afraid that a whole squadron, or at least a couple of frigates, would come down upon us. This prospect frightened me, both as Manager of the American Colonies and as a Russian. They would have eaten up all our provisions, and cost the Emperor a lot of money, without doing much good.

What hope is there that a single frigate will be able to stop this traffic on our shores, abounding in straits and excellent harbours, and so well known to these Americans that they may be called the pilots of these coasts? They will always be on good terms with the natives. . .

Is it not a little strong, Mr. President, for my learned friends, in the face of the facts that their own documents disclose, to adhere, as I understand them to adhere, in their Counter Case, to the view that prior to 1821 there had been a prevention of trade and an exclusion of foreigners from taking part in the trade within the prohibited region?

LORD HANNEN.—Was there not, Sir Richard—I am not dealing with its effect—a prohibition of trade with the natives on the shores by the Russians?

SIR RICHARD WEBSTER.—At what date, my Lord?

LORD HANNEN.—Well, from the date of 1799.

SIR RICHARD WEBSTER.—I think there was. The important point is that it was in order to prevent, if they could, access to the shores, and that it is wholly untrue to suggest, as the original Case did, that the object of the Ukase of 1799 was to prevent the vessels from navigating the waters of Behring Sea or from exercising rights upon the high sea. I think what my Lord Hannen was good enough to refer to is section 10, (on page 13 of the British Counter Case), of the Ukase of 1799:

10. In granting to the Company for a period of twenty years, throughout the entire extent of the lands and islands described above, the exclusive right to all acquisitions, industries, trade, establishments, and discoveries of new countries, etc.

I am not sure, my Lord, that in terms the Ukase of 1799 prohibited foreign trade; but it is not material for my purpose. I would assume that the general effect of it may have been to give foreign trade, as far as Russia could, to the particular company. But the point that I desire to bring out is that there is absolutely no evidence of any exercise of the right of exclusion by Russia. On the contrary, when you come to look at the documents, it is clear that there had been extensive interference with their foreign trade, which the company objected to.

Mr. Justice HARLAN.—Whatever rights were given by that Ukase were given exclusively to this company?

Sir RICHARD WEBSTER.—Certainly.

Mr. Justice HARLAN.—Whether they extended to the whole ocean or only to the coasts or islands?

Sir RICHARD WEBSTER.—So far as Russia was concerned, whatever she gave, she gave it exclusively to the company. It is quite clear that the United States view in 1821 was that it had no operation against foreigners, and I submit it would have no operation against foreigners. Its object was to consolidate the many rival companies. That is stated also in Bancroft's book, quoted in the British Case, but I do not go back upon that.

Now, Mr. President, if you will turn over to page 20 of our Counter Case, you will find there the letter from the Governor-General of Siberia:

We are familiar with the complaints made by the American Company in regard to the bartering carried on by citizens of the United States, at their establishments, and in regard to their supplying the natives with fire-arms. These complaints are well founded, but nothing can be done in the matter. It would be useless to apply to the United States Government to stop the trading: the commercial rules of the United States do not allow such interference on the part of their Government. The only thing to be done is for the Company to endeavour to strengthen the defences of the principal places in the Colonies, and for the Government, at least, not to favour this foreign trade. But the establishment of a whale fishery on the eastern shores of Siberia would undoubtedly favour it in a high degree. The establishment of a whale fishery would be a pretext for, and an encouragement to, foreign trade.

Later down in the same letter:

Mr. Riccord—

He was the Superintendent of Kamschatka—

says, in his letter, that, owing to the smallness of our forces in that part of the world, we cannot prevent foreigners from whaling. In the first place, we may not be so weak as he supposes. The occasional appearance of a single properly armed ship may be sufficient to keep quiet and disperse all these whalers.

Then on the 28th of February, 1822, you will find that the object which was recognized there was to get a footing for this purpose—for the purpose of collecting furs on the Aleutian Islands,

or on the northern islands situated in the direction of Behring Strait, that he made his proposal, of which you have already been informed, with regard to whaling and fishing for the benefit of Kamtchatka and Okhotsk.

In the face of that, Mr. President, it is not too much to say, I submit, that regarded from the point of view of information and facts gathered from every source, there is not the slightest shred of evidence beyond the withdrawn documents, now admitted to be untrustworthy and not to be relied upon, of any exercise by Russia at all prior to 1821.

Now I come to 1821; and I must be permitted to make a few observations with regard to the Ukase of 1821. I read to you, Mr. President, before we adjourned, at the suggestion of my learned friend, Sir Charles Russell, from page 38, I think, if I remember right, of the British Case,

the language of the Ukase; and I need not read it again. I may have to refer to it perhaps in another connection. Now I ask the kind attention of the Tribunal to a point made by my learned friend Mr. Carter, which, if I may be permitted to say so as an advocate, certainly was somewhat surprising. He said Russia never attempted to claim any exclusive jurisdiction in any part of Behring Sea: that it was not a claim to exclusive jurisdiction; and Mr. Carter supported his statement by printed passages in the Argument. I can give the references in case they be required.

Says Mr. Carter, it was not a claim to exclusive jurisdiction; and here again I speak with care. For the first time, for the purposes of this argument, it is suggested that the claim to exclude the ships of all nations 100 miles from the coast is not a claim to exclusive jurisdiction and exclusive dominion. I confess, so far as advocates are allowed to have feelings, that a feeling of surprise did come across me. It occurred to me that this proposition required some authority: that excluding vessels from 100 miles from the coast was not an assertion of exclusive dominion and an exercise of exclusive jurisdiction.

I desire to say here with reference to an observation made by Mr. Justice Harlan more than once to my learned friend, the Attorney-General, that I do not think that Russia had any intention of closing Behring Sea. I do not think that Russia at that time knew anything about, the actual width of the passes. I do not suppose the passes had been surveyed. They may have had sufficient knowledge to know that they might have closed it, or they might have not. That they claimed that this part of the world had all the characteristics which would have justified them in closing the whole area, there is no doubt; but I am disposed to adopt, if I may say so, the view put forward by Mr. Justice Harlan, that whatever they meant by their hundred miles, they did not have it in their mind that thereby no ship would be able to go into the middle of Behring Sea; but if once that be recognized, it strengthens my position enormously. For on what authority of text-book, judicial writer, or judgment, can my friend suggest that excluding ships, excluding navigation, from a given belt from your coasts is not making them, even something more than territorial waters, for it is an exercise of dominion. Why, Sir, may I remind this Court, every member of which, I know, is acquainted with the fact, that it has been a subject of discussion whether even within the three-mile limit there is not a right of navigation for peaceful purposes. I know Mr. Justice Harlan was good enough to read through, or look through, the judgments in *Queen v. Keyn*. There is a very considerable discussion in many of the judgments in *Queen v. Keyn* as to whether in territorial waters, that is to say in waters in which, for certain purposes, undoubtedly the country had exclusive jurisdiction and exclusive dominion, whether the right of peaceful passage was not still an international right. I believe I am not going too far in saying that all the Judges took that view; and yet in the face of that discussion, counsel are found to say that the claim to exclude ships from 100 miles of the coast is not an attempt to exercise over those 100 miles sovereign jurisdiction.

I have looked at several books, and I might really occupy as many hours as I wish to occupy minutes, in citing authorities to show that the origin of all this idea of exclusion was an extension of dominion over territorial waters, land-locked seas, and a variety of arguments that have been brought forward to give exclusive dominion; but I will content myself with reading from Chancellor Kent. I ask the Tribunal to listen to what Chancellor Kent said of this claim of Russia, which is

sufficient for my purpose. Mr. President, you know Chancellor Kent by name, the great American jurist. This is in the original edition. When I say the original edition, I am not certain it is in the first, but it is one of the editions which were edited by the great lawyer himself; and I read from the 9th edition, published in 1858, from the original page 31, the original text, volume I:

The claim of Russia to sovereignty over the Pacific Ocean, north of the 51st degree of latitude as a close sea, was considered by our Government in 1822 to be against the rights of other nations.

Mr. Chancellor Kent was not in the habit of using either vague language or uncertain language. He describes it there as the claim of Russia to sovereignty; and I want to ask this Tribunal—I must not anticipate what I have to say later on in attempted reply to Mr. Phelps' argument, but I ask again, is there the vestige of an authority for the suggestion that the right to exclude other ships from navigating a belt of water along side, on the borders of, a coast, is otherwise than an act of sovereignty? Why, the very acts that we have got to discuss later on, the acts which are properly justified as municipal statutes, Acts of Parliament, in order to protect certain interests there, are a very much less exercise of the sovereign power of legislation, and are justified and supported by special considerations. But this was a claim to exercise exclusion, or to confiscate vessels if they came within 100 miles of the coast; and yet, knowing the stress of the position, counsel suggest that that was not the exercise of exclusive jurisdiction; but was what they are pleased to call a defensive regulation.

There is not, Mr. President, as far as I know, as far as my research has enabled me to trace out this matter, a vestige of an authority, in text-book, judgment or legal writer, to indicate that exclusion of vessels from a margin of the sea—absolute exclusion—is otherwise than an act of dominion and an act of sovereignty. Why, really, if you will look at the citation at page 141 of the United States argument, from Sir Henry Maine, you will find these words. I might refer to half a dozen authorities cited by Mr. Carter; but at the bottom paragraph of the citation from Sir Henry Maine, you will find this:

At all events, this is certain, that the earliest development of maritime law seems to have consisted in a movement from *mare liberum*, whatever that may have meant, to *mare clausum*—from navigation in waters over which nobody claimed authority, to waters under the control of a separate sovereign. The closing of seas meant delivery from violent depredation at the cost or by the exertion of some power or powers stronger than the rest. No doubt sovereignty over water began as a benefit to all navigators, and it ended in taking the form of protection.

And at page 146, quoting from the opinion of Sir Robert Phillimore, in *Queen v. Keyn*:

According to modern international law it is certainly a right incident to each state to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right with respect to preventing the passage of foreign ships over this portion of the high seas.

And the passage, Mr. President, which I referred to just now is at page 40 of the same book, where in his argument upon this question, Mr. Carter states it in this way:

Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Behring Sea, beyond what are commonly termed territorial waters. She did, at all times since the year 1822, assert and enforce an exclusive right in the "seal fisheries" in said sea, and also asserted and enforced the right to protect her industries in said "fisheries" and her exclusive interest in other industries established and maintained by her upon the islands and shores of said sea, as well as her exclusive enjoyment of her

trade with her colonial establishments upon said islands and shores, by establishing prohibitive regulations interdicting all foreign vessels, except in certain specified instances, from approaching said islands and shores nearer than 100 miles.

Now, Mr. President, let us just for a few moments consider what the assertion of Russia was; and I will ask you once more to turn to the language of the Ukase of 1821, which will be found on page 38 of the British case. The statement is as conveniently set out there as at any other place.

Section 1. The pursuits of commerce, whaling, and fishery, and of all other industry, on all islands, ports, and gulfs, including the whole of the north west coast of America, beginning from Behring Straits to the 51st of northern latitude; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands, from Behring Straits to the south cape of the Island of Urup, viz., to the 45° 50' northern latitude, is exclusively granted to Russian subjects.

Section 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.

Senator MORGAN.—Does anybody know whether there is a “comma” in front of the words, “beginning from Behring Straits”, in the original text?

Sir RICHARD WEBSTER.—In this copy there is a comma in front of the second “Behring Straits”. There is no comma at the first one. It is, “beginning from Behring Straits to the 51st degree of northern latitude”—on the eastern side; and “from Behring Straits to the south cape of the Island of Urup”—on the western side. That was the claim of Russia.

Senator MORGAN.—The question I had in my mind was whether that was not a new description of the North-West Coast, adopted by Russia.

Sir RICHARD WEBSTER.—No—“from Behring Straits to South of 51° north latitude”, is the same description. It is new in one sense—that there are four or five others suggested in the course of the argument by my friends. It is no new description as far as we are concerned—it is the description of the North-West Coast of America, as far as I know, that prevailed throughout.

Senator MORGAN.—The “North-West Coast of America” might, in a certain aspect of the subject have referred to a limited portion of the shore.

Sir RICHARD WEBSTER.—Perfectly true.

Senator MORGAN.—Whereas, in giving an implied latitude to the grant of privilege there, they might have made it more specific by saying the “North-West Coast of America”, and then make a new definition, giving the beginning of it.

Sir RICHARD WEBSTER.—The words are “the whole of the North-West Coast of America”—perfectly true; and if there be a document—and I hope this will not be forgotten—giving another meaning to “north-west coast”, at any stage of this correspondence, I will read it of course, and not only read it, but will point out, (if there be such a document) its full meaning against me. But I must in deference to what you have been good enough to put to me—say that I assert again, from the time of the Ukase, down through the whole history, to the session in 1867, there is not a document that suggests that “North-West”, had the limited meaning.

Now my friends say this: “It is perfectly true that the Ukase did include the whole North-West Coast: It is perfectly true that the Ukase did include the whole Pacific Ocean and Behring Sea—(I am using that expression so as not to be thought to be begging it against

them—what they call the “Pacific Ocean”, and Behring Sea)—but the Treaty did not, and therefore, you, Great Britain acquiesced in the claim of Russia in Behring Sea”. Is that true, or is it not, Mr. President? I do not wish to do an injustice, if I can avoid it, to my friend. I will read two passages from the Counter Case and Argument which make this clear.

At page 19 of the Counter Case they say this:

The Ukase of 1831 evoked strong protests, and the character of these protests is explained at pages 50 and 51 of the Case of the United States. It is further pointed out at pages 52 and 53 that in the treaties resulting from these protests a clear distinction is intended to be drawn between the Pacific Ocean and Behring Sea, and that by formally withdrawing the operation of the Ukase as to the Pacific Ocean, but not as to Behring Sea, a recognition of its continued operation over the latter body of water was necessarily implied.

Now there is nothing much stronger than this assertion which they have attempted to prove—that inasmuch as the Treaties themselves, either on their face or by looking at documents which Great Britain could not deny—either from the Treaties and those documents, “Pacific Ocean” does not include “Behring Sea”; “North-West Coast” does not go further north than 60°. Therefore there is an ample recognition of the continued operation of the Ukase of 1821 over Behring Sea and over the North-West Coast, north of 60°.

Now Mr. President, I must address myself to this point, having full regard to the nature of this Tribunal, and not being able to dismiss it in the summary way that I should in an ordinary Court of Justice in our Country. Mr. Carter tells me that the United States Counsel are not quite in the same position as we are, but that the opinion of United States Counsel is supposed to give validity to arguments; therefore they also vouch them, and therefore I must deal with this matter. I find at page 36 of the United States Argument, this statement:

In the view of the undersigned, Mr. Blaine was entirely successful in establishing his contention that the assertion by Russia of an exceptional authority over the seas, including an interdiction of the approach of any foreign vessel within 100 miles of certain designated shores, while abandoned by her treaty with Great Britain in 1825—

I ask the Tribunal to notice this—

as to all the northwest coast south of the 60th parallel of north latitude, was, so far as respects Behring Sea, and the islands thereof, and the coast south of the 60th parallel,—

that is a mis-print, it is “north of the 60th parallel”—

never abandoned by her, but was acquiesced in by Great Britain.

It would have been more satisfactory to us (and I think it would have been more satisfactory to the Tribunal), if inasmuch as a definite finding in favor of the United States is asked on this point, Mr. Carter had found it possible to have indicated to us what the arguments were in support of that complete success of Mr. Blaine; but inasmuch as I am determined, at any rate, that the Tribunal shall know the exact position, will they give me their kind attention for a few moments while I endeavour without one word of colour of my own, to show that the confidence in the success of Mr. Blaine was not such as Mr. Carter has thought fit to indicate at page 36; and I will ask the Tribunal (if I am not unduly trespassing on them), to turn to Appendix II to the British Case, because the few documents I have to refer to happen to be set out *verbatim* there.

I turn, first, to part 2 page 1. I am not going to read the letter, but I am going to state, Sir, what it contains. It is the first announcement from the Chevalier de Poletica to the Secretary of State of the United States. It is under date of the 28th February 1822. In that letter the expression "North-West Coast", occurs six times. We are not now on the question of a charter to a company—we are not now on the question of privileges given to individuals—we are on the question of international negotiations, and there is not less good faith between nations than there is between individuals. The phrase "North-West Coast" is used six times. In every instance it is used of the coast extending from Behring Straits to whatever point in the south the Russian dominion went to.

Therefore, upon the question of what "North-West Coast" meant in the opening letter to the United States dealing with these negotiations, "North-West Coast" has a distinct and recognized meaning.

What about "Pacific Ocean?" "Pacific Ocean" occurs several times, but I will call attention, if you please, Sir, to the passage on page 3 near the end of the letter:

I ought, in the first place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend on the North-West Coast of America from the Behring Straits to the 51st degree of north latitude.

No Russian minister has ever attempted to put upon this language the construction my friends seek to put upon it. According to my friend, Mr. Carter, the bargain which followed out this negotiation, without any change of expression, is to be supposed to have intended a different meaning to these words. When that negotiation commenced, "North-West Coast" had a distinct and definite meaning for the purpose of that negotiation. "Pacific Ocean" had a distinct and definite meaning for the purpose of that negotiation. The two are consistent. If "North-West Coast" means the *lisière* only from 60°, then "Pacific Ocean" does not include Behring Sea. If "North-West Coast" does go up to Behring Straits "Pacific Ocean" does include "Behring Sea", and I am not overstating the case as you will find—in every single instance in which that occurs in that letter those are the meanings of those words.

Now that is the opening of the negotiations with the United States. Now let us look at the opening of negotiation with Great Britain.

Would you be good enough to turn back to page 1 of the first part—it is the letter from Baron Nicolay to the Marquis of Londonderry. It is in French, but perhaps I ought to refer to the two letters—Baron de Nicolay's of the 31st October, including Count Nesselrode's of the 7th October. They are at pages 1 and 3 of the first part. They are both in French, but any member of the Tribunal who will kindly run his eye down will be able to see the words in a moment in several places: *Les côtes nord-ouest de l'Amérique appartenant à la Russie; les côtes nord-ouest de l'Amérique: La côte nord-ouest de l'Amérique, depuis le détroit de Behring jusqu'au 51°.*

Then turning over the next page you will see:

Cette partie de l'Océan Pacifique, que bordent nos possessions en Amérique et en Asie.—

that is, the Pacific Ocean which bounds our possessions in America and in Asia. And further down in the same letter there is another reference to the Pacific Ocean.

Now this letter of the 7th October, from Count Nesselrode to Count Lieven, again has many references both to the North West Coast and the Pacific Ocean, and again occurs the phrase. *Les possessions Russes sur les côtes nord-ouest de l'Amérique et nord-est de l'Asie.*

And then again: *La côte nord-ouest de l'Amérique, depuis le détroit de Behring jusqu'au 51 de latitude septentrionale*—a further reference to the Pacific Ocean. Therefore, in the documents which open the diplomatic negotiations these words are used, and used in the only sense in which they could be used, as meaning the whole “North-West Coast”, the whole of the “Pacific Ocean”. Is there less good faith between nations than between individuals? I am to be followed by one whom I know to be a great lawyer and advocate and diplomatist. Will my friend, Mr. Phelps, suggest—I know he will not—that good faith between people who are negotiating, between nations, is less than between individuals? If anything—if there could be such a difference of standard—it should be higher; but at any rate it should be as high.

Now, Sir, the position of things is this—that had this been an ordinary contract between individuals and you wanted to turn round and say: It is quite true that we began the negotiation understanding what we meant by “Northwest coast”: it is quite true that we began the negotiation understanding what we meant by “Pacific Ocean”, but in the course of the negotiations those words acquired a different meaning: “North-West coast” no longer meant what we called it “from Behring Straits to 51°”, it only meant “from 60° to 54°”. “Pacific Ocean” no longer meant what we called it, it only meant “that part of the Pacific Ocean which is south of the Aleutian Islands”.

I will appeal to any judge—to any one who has any judicial or legal experience. Assuming that a negotiation between individuals starts with both parties understanding “Pacific Ocean”, and “North-West Coast,” as meaning what I have said, and one of the parties after the contract turns round and says: “Oh no, when I made the contract with you I meant something quite different by those two expressions”, what is the first thing a judge would say? It is: “Where, in the course of the negotiations did you ever call the attention of the other party” to the fact that you were using the expressions in a different meaning? I hope I have made my point clear to your mind, Mr. President—I do not wish to repeat myself—I say, starting in October 1821, through the whole course of these books (and all the original documents are here), there is not a trace of the suggestion of a change of meaning in either “North-West Coast” or “Pacific Ocean”, so that the point which Mr. Senator Morgan was good enough to put to me for my consideration tells in my favour, because they were using words in a meaning perfectly well known to the parties. But is there anything the other way?

Mr. Justice HARLAN.—Will you let me ask you, Sir Richard, if it will not interrupt you, what do you think Mr. Adams meant in his letter to Mr. Middleton of July 22nd when he said “the Southern Ocean”?

Sir RICHARD WEBSTER.—To what page are you referring, Judge?

Mr. Justice HARLAN.—To page 141 of vol. I of the Appendix to the Case of the United States.

Sir RICHARD WEBSTER.—To what passage, Judge, might I ask?

Mr. Justice HARLAN.—The third paragraph.

Sir RICHARD WEBSTER.—The paragraph commencing: “The United States can admit no part of these claims”?

Mr. Justice HARLAN.—Yes.

Sir RICHARD WEBSTER.—It says:

The United States can admit no part of these claims. Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which so far as Russian rights are concerned are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the continent of America.

I may tell you, Judge, that I am very much obliged to you for pointing it out to me—it fits in exactly with the point I was going to have urged to you later on. At this time it was a recognized principle—when I say recognized it was a principle of international law—I do not really know that it does not prevail up to the present time—but at this time it was a recognized principle of international law that you might land on unoccupied coasts, in the course of general rights of fishing and navigation. Would you kindly look again at that book. I am going to read from page 10 of the 2nd part of the same book with reference to Mr. Justice Harlan's point which he was good enough to put to me. This is a letter from Mr. Forsyth who was Secretary of State.

Mr. Justice HARLAN.—The letter is from Mr. Forsyth, Secretary of State to Mr. Dallas.

Sir RICHARD WEBSTER.—The second paragraph of the letter is this (See Appen II B. C. part 2 p. 10):

The 1st article of that instrument is only declaratory of a right which the parties to it possessed, under the law of nations, without conventional stipulations, to wit, to navigate and fish in the ocean upon an unoccupied coast, and to resort to such coast for the purpose of trading with the natives.

I do not know, Judge, whether you know that the same claim was made by the United States much later in connection with the Falkland Islands. It was at this time—I do not know that it is not still—supposed by international law that you could land upon an unoccupied coast, and without any grant or permission for the purpose of trading with the natives; and speaking of that, Mr. Wheaton at page 171 referring to this very trading says:

Admitting that this inference was just and was in contemplation of the parties to the convention—

That is about the ten years:

it would not follow that the United States ever intended to abandon the just right acknowledged by the first article to belong to them under the law of nations *i. e.* to frequent any part of the unoccupied coasts of North America, for the purpose of fishing, or trading with the natives.

Now, my answer to you, Mr. Justice Harlan, is this;—That Mr. Adams, when he wrote on the 22nd of July, said: we cannot admit your territorial claims down to latitude 51°; we cannot admit your right to prevent us from navigating and fishing, for the only possessions that you have occupied are certain Islands north of the 55° of latitude, and therefore he was again referring to what he believed to be the true view of international law, that, if the Russians had got no occupation, they could not prevent other nations from landing.

Mr. Justice HARLAN.—I do not think you quite appreciated my object in asking that question, Sir Richard. In the paragraph before, Mr. Adams describes the protection of territorial jurisdiction “from the 45th degree of North latitude on the Asiatic coast to the latitude of 51° North on the Western coast”.

Sir RICHARD WEBSTER.—You will observe, Judge, that no Northern limit is mentioned.

Mr. Justice HARLAN.—Yes.

Sir RICHARD WEBSTER.—It goes up to Behring's Straits.

Mr. Justice HARLAN.—

And they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

Then he proceeds to announce what he understands to be the principal rights of navigation and fishing of the citizens of the United States throughout the whole extent of the Southern Ocean.

SIR RICHARD WEBSTER.—That is the same thing as the “Pacific”.

MR. JUSTICE HARLAN.—That is what the object of my question was,—to know, when he used the words “Southern Ocean”, whether he meant by that phrase to include the waters of Behring Sea up to Behring Straits?

SIR RICHARD WEBSTER.—Most certainly. I am extremely obliged to you, Judge, for this, or any other question. If it be necessary to demonstrate that, I can demonstrate that the “Southern Ocean” and the “Pacific Ocean” were used as interchangeable terms repeatedly at this time; and my point is, in reference to Mr. Adams’ letter, that there is not a word to suggest that he stopped at 60°.

I did not mean myself to refer to this letter, because I was treating the correspondence as a whole; but there is not a word to indicate that he stopped at 60°, according to Mr. Carter’s contention,—that they were giving up any right, not only with regard to Behring Sea, but anything which was to the north of that point 60°. All I say is this, that no other construction can fairly be put on that language at the present time. And I think, Sir, there is conclusive proof of what I am saying. I need not trouble you to look at it, but in Volume I of the Appendix to the British Counter Case is set out a letter from Mr. Adams to Mr. Rush, on the same date, the 22nd of July, 1823, to which you referred me. Mr. Rush was the Minister to Great Britain, and, in the last paragraph but one from the bottom of page 56, it says:

By the Ukase of the Emperor Alexander of the 4th (16th) September, 1821, an exclusive territorial right on the north-west coast of America is asserted as belonging to Russia, and as extending from the northern extremity of the continent to latitude 51° and the navigation and fishery of all other nations are interdicted by the same Ukase to the extent of 100 Italian miles from the coast.

I need not say that Mr. Adams would not refer to the Ukase in two letters written upon the same day referring to it as excluding Behring Sea in one, and including it in the other. In the paragraph above that to which I call attention, he quotes the Ukase as being the claim of exclusive jurisdiction from the 45th degree of north latitude on the Asiatic coast to the 51st degree north on the American continent. He is coming all the way round, and then he refers throughout to the whole extent of the Southern Ocean, and many people at that time spoke of the “Pacific Ocean”, as being the *Southern Ocean*, because they got to it by coming round Cape Horn. Now I pass on, having, I hope, not improperly endeavoured to answer the question you were good enough to put to me. My point is, that those are the still meanings of those words. Do they change it? Will you be good enough to turn over to page 63 of the first part of vol. 2 of the Appendix to the British Case? Here, at least, I am upon safe ground. The first letter I read, Mr. President, was on October 21st.

THE PRESIDENT.—On page 63 it is not a letter, but a draft.

SIR RICHARD WEBSTER.—The actual letter is given on page 61, but to save you trouble, I was giving the page where you would find the actual document I was going to refer to. The document is a draft convention enclosed in a letter of the 12th June 1824 nearly three years—you will follow me—after the letter of October 1821. What did Great Britain understand by “Pacific Ocean”?—what did Great Britain understand by “North-West Coast” at this time? This is supposed to be, according to my friend, a communication of people who were using “north-west coast” and “the Pacific Ocean” in different senses to those which I have indicated were put upon them when the negotiations commenced. Will you kindly look at the page to which I call attention—

page 63. (Part. 2, Appen II B. C.) I will read the English translation, although both the English and French texts are cited side by side. It says:

It is agreed between the High Contracting Parties that their respective subjects shall enjoy the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Behring's Straits.

It is a little strong to suggest that the people who made the Treaty a few months after this were not getting the right of navigating and fishing in Behring Sea when they were writing on July 24th, and there using the expression Pacific Ocean in the sense of the sea extending right up to Behring Straits so as to include the sea within Behring Straits. Would you kindly turn, if I am not unduly trespassing upon you, to the *contre-projet* which is given in French, and you will find it at the beginning of page 65, there you will find no suggestion from Russia that Great Britain was using "Pacific Ocean" or "north-west coast" in a different meaning. On the contrary, the objection taken to the language, as you will remember,—the Attorney General called your attention to it—was not because Russia did not wish to give a right of navigating in Behring Sea, but because they thought that the *contre-projet* might give a right to visit places north of Behring Straits, and yet it is to be supposed that the parties were negotiating, having again put a limit to the ordinary words "Pacific Ocean" and "North-West Coast".

Lord HANNEN.—The 7th Article, as it appears to me, must point to this, that the Russians treated the Pacific Ocean as reaching up to Behring Straits.

Sir RICHARD WEBSTER.—Yes.

Lord HANNEN.—I think it is absolutely demonstrated that that is so by these three Articles V, VI and VII. It draws a distinction in the VIIIth: between the Pacific Ocean up to Behring Strait, and the sea beyond.

Les vaisseaux Britanniques et Russes navigant sur l'Océan Pacifique et la mer ci-dessus indiquée

That is the sea to the north of Behring Strait.

qui seront forcés par des tempêtes, ou par quelque autre accident à se réfugier dans les ports respectifs, pourront s'y radouber et s'y pourvoir de toutes choses nécessaires, et se remettre en mer librement, sans payer aucun droit hors ceux de port et des fauaux, qui n'excéderont pas ce que payent les navires indigènes.

Then at the end the expression is, "où il aura abordé".

Sir RICHARD WEBSTER.—Yes. Would you look at Article VI, which says:

Dorénavant il ne pourra être formé par les sujets britanniques aucun établissement, ni sur les côtes ni sur la lisière du continent comprises dans les limites des possessions Russes désignées par l'Article II.

As to every document I might take up out of some forty or fifty, the same observation might be made. I might say here—I do not court interruption—I am only giving notice to my friend Mr. Phelps—that there is not one single document of all these in which the more limited meaning is put on "North West Coast"; and, therefore, although I have endeavored to pick out the striking ones, they are by no means the only documents that support my contention. It is the fact that in negotiations extending for years between three great Powers—Russia and the United States: Russia and Great Britain—there is not a trace of this contention made for the first time by Mr. Blaine in the year 1890, in answer to Lord Salisbury.

Mr. Justice HARLAN.—Let me put this to you in that connection, if I am not interrupting. I understand both sides to contend, or to admit that Russia did not intend, by the ukase of 1821, to close Behring Sea, and that she was not so understood by either side at the time as intending to close Behring Sea, although Mr. Canning suggested that a limit should be put.

Sir RICHARD WEBSTER.—You must exclude Behring Straits, Judge. It would have closed it on the North. I am speaking of closing it from the South.

Mr. Justice HARLAN.—I understand that. Mr. Canning said the application of that 100-mile limit would close Behring's Straits.

Sir RICHARD WEBSTER.—Certainly.

Mr. Justice HARLAN.—And, therefore, would keep British vessels out of the Arctic Sea. Now, if Russia did not intend to close Behring Sea or interfere with navigation in it anywhere outside of the 100 Italian mile limit, and neither side understood her as doing more than that, why should they have had in mind any terms in the different *projets* or in the Treaty towards securing equality of rights in Behring Sea?

Sir RICHARD WEBSTER.—For two reasons. In the first place, because, whether it closes Behring Sea or not, the 100-mile limit would have practically excluded ships from a vast portion of Behring Sea, as to which the Duke of Wellington and others objected most strenuously, and the United States too. It was not a question of closing the Sea only, but a vast portion of Behring Sea.

Mr. Justice HARLAN.—But neither the United States nor Great Britain had any settlements on the Behring Sea coast.

Sir RICHARD WEBSTER.—It was not a question of settlements.

Mr. Justice HARLAN.—Or any trade.

Sir RICHARD WEBSTER.—I do not at all agree that they had not any trade—it is not a question of settlements. I have read to you, in answer to your question, a few moments ago, the statement made by the United States official, that at that time the right of navigation, was considered by international law as giving you the right to trade with natives where there was no occupation of the coast by the dominant Power. I read Mr. Forsyth's letter, and I read from Wheaton; and I could find you many traces of that in the other diplomatic correspondence.

Senator MORGAN.—Has that rule or principle of international law gone out of use?

Sir RICHARD WEBSTER.—I referred to that a few moments ago, Sir. With regard to the Falkland Islands in 1835 certainly the United States contended that they, as far as the Falkland Islands were concerned,—I am not so sure that it has absolutely gone out of use—

General FOSTER.—In that case it is not the fact that the United States admitted that it was no *mans land*—not as to Falkland Islands.

Sir RICHARD WEBSTER.—I beg General Foster's pardon. The United States said, (I will refer to the Case) that even if it belonged to the Argentine Republic we have by international law a right of fishing in the high seas and the right of landing at unoccupied places on the Coast. I must call attention to it, but I must keep myself to my point. I do not at all complain of the interruption.

Senator MORGAN.—My point was that it seemed to me from the argument here on both sides that international law, by which we are supposed to be compelled to be governed, has a formative growth and decay accordingly as it adapts itself to the necessities of mankind.

Sir RICHARD WEBSTER.—By the assent of Nations undoubtedly.

Senator MORGAN.—But how are we to ascertain whether the assent of nations has been obtained?

Sir RICHARD WEBSTER.—If there have existed at starting rights which have not been interfered with.

Senator MORGAN.—The question comes back, how long would it take to establish a principle of international law, and how long would it take for that principle to die out?

Sir RICHARD WEBSTER.—You talk of a short time and a long time according to the acts of Nations and according to the evidence of acquiescence; but I am sure, Senator, you do not want me to be taken away from my point, because it is really important that I should make my point clear without discussing collateral matters; but I promise not to forget your observations. My point was (you will forgive me for repeating it), that throughout the whole of this correspondence the navigation of Behring Sea up to the Straits is the basis upon which they are negotiating.

Now the only other document my friend, Mr. Carter, thought worthy of notice was Baron Tnyll's note; and I care not, whether I refer to the original French, or the translation. The original French is at page 37 of the British Counter Case; the translation is at page 276 of the United States Appendix, volume 1. Now here you would have expected that if the meaning of the words North West Coast now suggested was correct you must have found something pointing to it. I read from the translation:

Explanatory note to be presented to the Government of the United States at the time of the exchange of ratifications with a view to removing with more certainty all occasion for future discussions, by means of which note it will be seen that the Aleutian Islands, the coasts of Siberia, and the Russian possessions in general on the North-West Coast of America to $59^{\circ} 31'$ of north latitude are positively excepted, etc.

That is on the North-West Coast of America,—from what point? Obviously from Behring Straits. Does anybody mean to suggest that it starts at 60° ? It is so obvious! From 60° to $59^{\circ} 30'$ is only 30 miles! Does any man in his senses pretend that when they speak there of the North-West Coast of America down to $59^{\circ} 30'$ they only meant to start at 60° of latitude? This is the only document to which my learned friends can refer to indicate that there is some different construction put upon North West Coast. We are supposed, says Mr. Carter, to have inherited this construction, are positively excepted from the liberty of hunting, fishing and commerce stipulated in favour of the citizens of the United States for 10 years. I remind you that the 10 years clause was for visiting interior seas, creeks and rivers, and trading at places at which there was a Russian establishment. It had nothing to do with the rule of International law which permitted you to trade at places at which there was no Russian establishment.

Mr. Justice HARLAN.—That was restricted to a certain part of that coast.

Sir RICHARD WEBSTER.—As far as the United States were concerned it was not restricted to any part at all. I am obliged to you, Sir, for putting the question to me. I asked you to remember to-day, that as between the United States and Russia this *lisière* had no existence. This *lisière* was simply for the purpose of defining a boundary between Great Britain and Russia; so far as the United States were concerned it had no existence. You will not find a trace of it in the Treaty, or a word referring to it. What happened was this: Agreeing to $54^{\circ} 40'$, and that is the only latitude mentioned in the American Treaty, the whole of that coast was to be the subject of the Treaty. On that coast

for 10 years they are to have the right of visiting the interior waters, creeks and harbours. I will perhaps trouble you to-morrow morning by reading that clause again, but there was no limit whatever.

Mr. Justice HARLAN.—As you so kindly respond, I am tempted to ask you again to get at your precise meaning, Article VII of the Treaty with Great Britain says:

It is also understood that for the space of 10 years from the signature of the present Convention the vessels of the two Powers or those belonging to their respective subjects shall be mutually at liberty to frequent without any hindrance whatever all the inland seas, the gulfs, havens and creeks on the coast mentioned in Article III.

Now, when you turn back to Article III, does not that define and limit a particular part of that coast?

Sir RICHARD WEBSTER.—No, I am sure it was my fault, but I was not on the British Treaty. I will undertake to demonstrate that point, but your question to me was the right of visit with regard to the United States. You will not find a single word in the United States Treaty corresponding with that. That happens to come into the British Treaty because of the *lisière* which I will explain, but I was reading to you from Baron de Tuyll's note which is before the British Treaty was made in 1825, and Baron de Tuyll's note was in December 1824. He there says:

It will be seen that the Aleutian Islands, the coast of Siberia and the Russian possessions in general on the North West Coast of America to 59° 30'—

that means from the North:

are positively excepted from the liberty of hunting, fishing, and commerce stipulated in favour of citizens of the United States for ten years.

Then:

This seems to be only a natural consequence of the stipulations agreed upon for the coast of Siberia are washed by the Sea of Okhotsk, the Sea of Kamschatka and the Icy Sea and not by the South Sea, mentioned in the 1st Article of the Convention of April 5/17 1824. The Aleutian Islands are also washed by the Sea of Kamschatka or Northern Ocean. It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized as well understood and placed beyond all manner of doubt the principle—

Now will you kindly note this:

that beyond 59° 30' no foreign vessels can approach her coasts and her islands nor fish nor hunt within the distance of two marine leagues.

Not any question here of any special privilege, but an attempt to get two marine leagues fairly enough. I do ask the attention of the Tribunal to this.—my learned friends will forgive me for using the word "absurd", I do not want to, but see what the result of their contention is. Baron de Tuyll is asked to say that from 59° 30' in *this* direction you may only go within two leagues of the coast.

Mr. CARTER.—You mean he asks.

Sir RICHARD WEBSTER.—He is asked to say and he does say by his note that above 59° 30' you may go within two marine leagues of the coast. Does any man in his senses suppose that when he asked above 59° 30' he merely meant to confine that from 59° 30' to 60°. It is absolutely inconsistent with the position of the North-West Coast ending at 60°.

The PRESIDENT.—Might it not be understood in this way: All that coast of the Aleutian Peninsula and Islands, the Southern portion being settled because it was approached in that way,—as you approach 59° 30' if you go beyond you go along these Islands.

Sir RICHARD WEBSTER.—I have not the smallest objection to meet any argument of that kind.

The PRESIDENT.—Let me point out this: I am struck with it. The Aleutian Islands are also washed by the Sea of Kamschatka or Northern Ocean. If they are washed by the Sea of Kamschatka or Northern Ocean I suppose that means Behring Sea. They are washed on the southern Side by the Pacific on *that* Coast, and the Sea of Kamschatka or Northern Ocean on *that* coast. That is what we call Behring Sea. I do not understand any other possible construction of this passage.

Sir RICHARD WEBSTER.—I do not know what was in the mind of the person who framed this note which was never communicated to Great Britain (that is proved to demonstration). I am not considering whether the arguments in this note were well or ill founded,—I am not considering whether Northern Ocean meant Behring Sea or was another name for the North Pacific Ocean, but I point this out that it is conclusive against Mr. Carter's contention.

The PRESIDENT.—The Northern Sea is used in opposition to the South Sea.

Sir RICHARD WEBSTER.—I am not so sure.

The PRESIDENT.—It is a strange wording.

Sir RICHARD WEBSTER.—I will accept it, but it does not touch my point.

Mr. Carter has told you that in his opinion he is satisfied that Mr. Blaine was successful in the contention that the Pacific Ocean was excluded, and he further told you that for the purpose of this Treaty North West Coast was to be confined from latitude 60° down to $54^{\circ} 40'$ —the *lisière*: I need not mention that again. My point is that Baron de Tuyll's document is conclusive against that, because to tell us that these great nations were fighting about 30 miles of country was childish,—nobody with any knowledge of diplomacy could suggest it. The position is that the Russian Company were seeking to get the 10 years permission stopped at $59^{\circ} 30'$, not saying the words limited it, not saying the clause did not give the United States the right, but trying to get the 10 years clause stopped at that point, because the *lisière* discussion had arisen in between the time of the Treaty being agreed to in April 1824 and the date on which Baron de Tuyll's letter was written.

The PRESIDENT.—Will you allow me to state that I do not think that it is fair to consider as a principal of International law that there is any right (at least to-day and I do not think it ever was previously) of landing upon an unoccupied portion of any coast which belongs to another nation. There may be a question between occupation and possession.

Sir RICHARD WEBSTER.—That is the ground of it.

The PRESIDENT.—But where there is possession if there is not actual occupation, the Sovereign nation who has that possession has the right of doing whatever she likes with it.

Sir RICHARD WEBSTER.—I think for the last 20 years that certainly has been the rule; but there are plenty of indications that up till 20 or 30 years ago it was not so clearly understood.

Lord HANNEN.—And even then you will find it was based on possession.

The Tribunal then adjourned till to-morrow at 11.30.

THIRTY-FIRST DAY, JUNE 1ST, 1893.

Sir RICHARD WEBSTER.—Mr. President, I wish as briefly as possible to conclude what I have to say on this question of the Treaties. Perhaps I ought not to pass on without saying one word more about Baron de Tuyl's note. It has nothing but a historical interest in this case; absolutely nothing, as it is not suggested that it was ever communicated to Great Britain; and I shall show you in a moment that that is placed on record at the time. But that there must have been some mistake in the language of the note to which you called my attention yesterday, is obvious if you regard the genesis and history of the document. If I am not trespassing too much on your kindness, I will ask you to turn to page 34 of the 1st volume of the Appendix to the British Counter Case, where you will find, what I may call, the genesis or original beginning of this document. May I remind you what had happened?

The Treaty of 1824, that is the United States Treaty, had been agreed to, but not ratified, in April 1824; it was ratified actually in January 1825. A copy of it was sent to the Company,—the Russian American Company; and it gave rise to a Conference which was held in July 1824, at which Count Nesselrode was present, and it was out of this Conference or from the proceedings at it that Baron de Tuyl's note ultimately sprung. The note was mentioned first in December 1824, and delivered in January 1825, in consequence of the discussion which had arisen at this Conference.

Now, Mr. President, if you will look at page 34, paragraph 7, taking the corrected and revised translation supplied us by the United States, you will see the origin of the sentence which ultimately found its way into Baron de Tuyl's memorandum; and it shows what very little care had been taken in preparing that memorandum, and how, practically speaking, it was a document to which no substantial attention was paid. The end of paragraph 7, you will notice, reads in this way.

Moreover, the coast of Siberia and the Aleutian Islands are not washed by the Southern Sea, of which alone mention is made in the 1st article of the Treaty, but by the Northern Ocean and the seas of Kamchatka and Okhotsk, which form no part of the Southern Sea on any known Map or in any Geography.

It is quite clear that what they were speaking of there as the Northern Ocean is the *Mer glaciale* above the Behring Straits; but when the "note explicative" came to be prepared, on the face of it it is very difficult to understand exactly what it means, but it is quite clear the person who prepared it had not followed the actual directions of this representation from the Conference, but prepared a note embodying, as he thought, practically that which was what I may call the suggestion made by the Dignitaries.

It is curious, Mr. President, to note that in the original translation sent us by the United States, if you will kindly look at the end of paragraph as it originally stood, it had been translated as "Arctic Ocean" and not "Northern Ocean." If your eye goes across the page

to the bottom of the original paragraph 7 as sent to us, the translation there was—

But by the Arctic Ocean and seas of Kamschatka and Okhotsk.

And I should think it extremely probable that the Russian word would admit of either translation. But it makes no difference for my purpose. I am calling attention to the fact that this document (never communicated to Great Britain) an attempted protest by the Russian Company to try and get a restriction upon the ten years licence, assumed the form that not unaturally caused you, Sir, a little doubt as to its meaning from the person who prepared it not having followed the actual language of the representation. As it reads in the French or the extract, I read from Mr. Blaine yesterday at page 227, a full stop is put after the words 1824 and the sentence begins.

The Aleutian Islands are also washed by the sea of Kamchatka or Northern Ocean.

I pass from it with this concluding observation which is I am afraid a repetition, that the document formed no part whatever of the negotiations between Great Britain and Russia, and so far as the United States are concerned it is a distinct confirmation of what was the meaning of the language of the Treaty as it was originally understood. For this document was intended to be, and was, an attempt by the Company to get a limited and restricted meaning put upon clause IV.

Now there are only a few matters in this connection to which I need call attention, and I do so in deference to a question put to me yesterday by Mr. Justice Harlan. I will ask the Tribunal to be good enough to look at the two Treaties as they are together at page 52 of the British Case. It is the most convenient form because they can then be compared without the trouble of referring to more than one book.

Mr. Justice HARLAN.—Before you leave that may I ask whether it appears in the Case that the terms of the Treaty of 1824 were known to Great Britain when the treaty of 1825 was made.

Sir RICHARD WEBSTER.—Yes, known and adopted by Great Britain as being a conclusive answer to the attempt that was being made by Russia to get her to agree to other terms. After the 1824 Treaty had been agreed to Russia tried to induce Great Britain to limit her right of visiting during the term of ten years to the lisiere. Russia tried, as I will show you, by two documents, to get Great Britain to accept a less right of visiting than the United States had acquired. While that negotiation was going on the British Ministers received the American Treaty, upon which they put identically the same construction which every body else, up till this argument, has put upon it: namely that it did not limit the North West Coast to 59.30; and, in consequence, upon the ground that Great Britain could not be forced to accept less than the United States, they adopted that language without a suggestion made, or a single scintilla of a suggestion, that these rights were limited, and Great Britain was only getting a right to the North West Coast, as they are now pleased to call it, up to latitude 60, or anything else.

Mr. Justice HARLAN.—One other question. The United States Treaty describes it as “the Great Ocean, commonly called the Pacific Ocean or South Sea”.

Sir RICHARD WEBSTER.—Quite right.

Mr. Justice HARLAN.—The British Treaty describes it as “any part of the Ocean commonly called the Pacific Ocean”. The French of that Treaty has the word “Grand” in it.

Sir RICHARD WEBSTER.—I quite understand.

Mr. Justice HARLAN.—That is not material to the question I was about to ask. Have you any doubt that Great Britain intended by the Treaty of 1825 to cover precisely the same waters that the United States Treaty of 1824 covered.

Sir RICHARD WEBSTER.—Not the slightest doubt. It is my contention that Great Britain intended to get so far as coast rights were concerned, and so far as navigation and fishing rights were concerned, what the United States got.

Lord HANNEN.—I think that that requires some little modification. They intended to get all they believed the American negotiators had got. If they were mistaken as to what the American negotiators had got, that would not alter it.

Sir RICHARD WEBSTER.—Not in any way. Perhaps, my Lord, I had not expressed myself accurately, but I understood the Judge to be referring to the words of the Treaty.

Mr. Justice HARLAN.—That was all.

Sir RICHARD WEBSTER.—Not to anything behind it other wise my answer would have been different.

Lord HANNEN.—They thought they were getting that which, according to their interpretation, the United States had got.

Sir RICHARD WEBSTER. That is what I meant.

Mr. Justice HARLAN.—The only object of my enquiry was, to ascertain whether in your judgment the words in the Treaty of 1825 "in any part of the Grand Ocean commonly called the Pacific Ocean were" to receive any different interpretation from the words of similar import in the Treaty of 1824, by reason of the fact that the words "South Sea" were not mentioned in the one of 1825.

Sir RICHARD WEBSTER.—No difference at all.

[The President of the Tribunal here consulted with Lord Hannen, and Mr. Justice Harlan.]

Senator MORGAN.—Mr. President, I desire respectfully to suggest, with reference to a consultation between a portion of the members of this Tribunal, occupying more than ten or fifteen minutes, that it would only be just to the balance of us that we should retire and have our consultation where all can be heard that is said.

Lord HANNEN.—I think it right that the Senator should understand that the conversation which arose between some members of this Tribunal, arose entirely from the President having put a question to those who are nearest to him on the subject.

The PRESIDENT.—We should, of course, certainly adjourn for our future decision. Whatever remarks we make in exchanging points of observation which takes place between us, if it has any bearing as to our decision we would, of course, make it known in our recess when we adjourn.

Senator MORGAN.—I supposed from the length of the conversation that it must necessarily have some bearing on this case, and when that is the fact I think the entire Tribunal ought to have the benefit of the observations that are exchanged between members of the Tribunal.

The PRESIDENT.—As we are approaching the end of our hearings altogether, perhaps it would be better not to bring in any new procedure. Personal observations exchanged between one member of the Tribunal and another are merely considered as quite informal. If there is anything in them which has any substance which may be useful to bring to notice before the final deliberation between us, you may be sure that we shall do so. These personal observations which have been

exchanged were really for the private understanding of certain points between different members of the Tribunal. I myself was in doubt as to certain questions of fact, and I enquired from my neighbors what they thought of the two translations. Perhaps, Sir Richard, you will proceed.

SIR RICHARD WEBSTER.—I understood, in the answers that I gave to the learned Judge's question, that he was asking me as to what I may call the geography of the matter,—as to whether I meant to draw any distinction between “the part of the Ocean commonly called the Pacific Ocean” and, “the part of the Great Ocean commonly called the Pacific Ocean or South Sea” in the 1st Article of the United States Treaty. It was in that sense, and in that sense only, that I answered the question. If there was something behind that I do not understand, I am quite sure that the learned Judge will let me know. That is how I understood the question put, and that is how I answered it.

Now I will ask the Tribunal to look at the Treaty. I care not whether I work by the French or the English text myself; but I think I had better take the English so that all the Members of the Tribunal will follow me more easily. If they will be kind enough to look at page 52 of the British Case, there they will see an English version of the United States Treaty sufficiently accurate for my purpose,—at any rate, sufficiently accurate to enable my point to be made clear. On the next page, you will find the British Treaty. It is a mistake to suppose that either Nation thought they were getting any grant under Article I,—and I am confining my observations now to the United States Treaty: whether it be international law or not, now, both Nations in the years 1824 and 1825 were contending, and contended for long after that time, that by international law the right existed to land on unoccupied coasts; and it is not necessary to go further with the language of this Article 1 to enable one to see it. It says:

It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following Articles.

That was an agreement that the interference attempted by Russia over the whole area as to which it had been attempted, should be withdrawn and should be no longer persisted in. It was no grant; it was no permission—it was, in favor of the United States, a withdrawal of the claims of Russia put forward by the Ukase of 1821, objected to by the protest of the United States, no longer continued after the year 1824.

Now Mr. President will you look at the words of the next Article.

THE PRESIDENT.—Do you believe that this first Article implied that Russia had a property on the inhabited coasts?

SIR RICHARD WEBSTER.—I think the first Article implied that the United States did not care to dispute Russia's title to the coasts, because you will observe if I may say so—I am a little anticipating—that by the third Article they agreed to make no settlement north of 50° 40'. Of course the United States knew perfectly well that they could not determine the question between Russia and other nations; but so far as the United States were concerned they did not care about raising the question of whether Russia's rights to the coast above 54° 40' could be disputed. That is what my understanding of the Articles is.

The PRESIDENT.—You would construe that as recognizing an exclusive right of Russia to take possession, rather than an actual recognition of the actual property of Russia?

Sir RICHARD WEBSTER.—That I believe is the proper construction of this Article—recognizing a right of Russia without let or hindrance—by the United States, to take possession of the coast, without considering whether her possession up to that time was complete; and reserving to the United States the right by international law, which was then believed to exist, that in the absence of possession being taken—in the absence of Russian establishments—there was a right of trading with the nations, and, if necessary of landing for the purpose of trading. It was a recognition of rights and not a grant of any fresh rights whatever. It was in consequence of the action of Russia in 1821 necessitating protests by the United States, and necessitating the withdrawal by Russia of the claims which she had set up which would have interfered with the United States rights.

Now if you will let me read the second Article, you will observe that my first point comes out with greater clearness still there. It says:

With a view of preventing the rights of navigation and of fishing, exercised upon the Great Ocean by the citizens and subjects of the High Contracting Powers, from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian Establishment, without the permission of the Governor or Commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any Establishment of the United States upon the north-west coast.

Now you will observe, Sir, from the point of view of future establishments, no fresh establishments were to be made by Russia south of $54^{\circ} 40'$ —no fresh establishments were to be made by the United States north of $54^{\circ} 40'$. This clause shows that the rights of navigation and visit, (which were recognized as extending to unoccupied coasts), were not to be exercised where there was a Russian establishment, or United States establishment without communication with the Commandant of the respective Governments; and is inconsistent, as I shall show you in a moment, with any idea of this being limited to $54^{\circ} 40'$ or $60''$, it being necessary that the right should extend all the way round that territory, and should be exercised, subject to the control of Article II all the way round that territory north of $54^{\circ} 40'$ right up to the Behring Straits which had been included in the Ukase.

Now will you look at Article III? It says:

It is, moreover, agreed that hereafter there shall not be formed by the citizens of the United States, or under the authority of the said States, any Establishment upon the north-west coast of America, nor in any of the islands adjacent, to the north of $54^{\circ} 40'$ of north latitude.

Now do the United States Counsel contend that the north-west coast was limited in the Article? There was a vast extent of coast running away to the west of where you find there the pink colour, right down to the Aleutian Islands. According to the contention of Mr. Carter "north west coast", where it occurs in this Treaty, lies between latitude 60° and latitude, $54^{\circ} 40'$. Now I ask you whether this contention, never raised by Russia, never suggested by Russia, is to prevail in the face of that Article III where there is a prohibition against the United States for establishing a settlement on the north-west coast of America north of $54^{\circ} 40'$? What does that mean? That for good consideration, the United States agreed that they would not make fresh establishments from north of $54^{\circ} 40'$ right up to Behrings Straits, and, for that matter, beyond. It is not important for my purpose, because so far as we are now considering, up to Behring Straits is far enough.

The PRESIDENT.—Do you believe by that article that the United States forfeited the right to settle on the more southern Islands of the Aleutian group?

Sir RICHARD WEBSTER.—Certainly.

The PRESIDENT.—Yet they are not north of 54° .

Sir RICHARD WEBSTER.—That is exactly what I desire to bring out. They were dealing with the coast line and they were saying "There shall be a line drawn upon that coast at $54^{\circ} 40'$. They meant the United States settlement to stop at $54^{\circ} 40'$ and the Russian settlement to stop at the same line. That was the dividing point for them.

The PRESIDENT.—They speak of the Islands on that coast.

Sir RICHARD WEBSTER.—That is the observation I had in my mind. However, it is unimportant—that is why $54^{\circ} 40'$ came in.

The PRESIDENT.—It is not quite so unimportant, because your interpretation of this Article has to be taken together with your interpretation of what you said yesterday about the $59^{\circ} 30'$ parallel, when you said it could not certainly apply to the 30 miles remaining between $59^{\circ} 30'$ and 60° .

Sir RICHARD WEBSTER.—No.

The PRESIDENT.—I believe in the same way as you said to day, that the people who made these Treaties were thinking of the coast line, and considered that going, say, from San Francisco all along the coast to Kadiak and the Unalaskan part they went on going north as it may be that they meant when they spoke of doing nothing above $59^{\circ} 30'$.

Sir RICHARD WEBSTER.—They may not have remembered that this peak came down so far. We do not really know whether the map was correctly plotted at that time.

The PRESIDENT.—That is how you interpret both cases?

Sir RICHARD WEBSTER.—Certainly.

The PRESIDENT.—And the one you mentioned yesterday.

Sir RICHARD WEBSTER.—But surely, if I may be allowed to say so—I do not want to justify myself—it is the strongest argument in support of what I said yesterday, that it was ridiculous, of course, to suggest that they drew any distinction between $59^{\circ} 40'$ and $60'$ for this purpose. $59^{\circ} 40'$ and 60° for the purpose of a dividing line were practically the same from the point of view of the coast line.

Mr. Justice HARLAN.—Does it anywhere appear from the correspondence of either of the three Governments, that either Great Britain or America disputed the right of Russia to the Aleutian Islands or to any parts of the coast north of $59^{\circ} 30'$ or $60'$?

Sir RICHARD WEBSTER.—I do not think it does except in this sense, Judge—that I think that in all probability there was not the amount of agreement as to what possession had, in fact, been taken by Russia; but I agree with the Attorney General that, from the British point of view, they were content to stop at $54^{\circ} 40'$ in the sense of $54^{\circ} 40'$ used by the President but a few moments ago.

The PRESIDENT.—You would not interpret all this Treaty as a delimitation of territory actually occupied, but rather of what you call today the sphere of influence.—that is the right of taking possession.

Sir RICHARD WEBSTER.—Yes, I ought to say, if I was concerned to discuss it, in the beginning of the negotiation Mr. Adams distinctly disputed it; but I was rather looking at the ultimate result of the negotiations than the preliminary discussion which seemed of less importance.

Now, I desire to call the attention of the Tribunal to Article IV.

It is, nevertheless, understood that, during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to

their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbours, and creeks upon the coast mentioned in the preceding Article, for the purpose of fishing and trading with the natives of the country.

That was independent, so to speak, of what I may call the general right of trading with natives on unoccupied coasts. It was something which would apply to what may be called interior seas and waters of the territory in future to be recognized as Russian as distinguished from the United States.

Now, I desire, to the best of my power, to avoid repetition; but with reference to what you have been good enough to put to me, showing you were kindly appreciating my argument yesterday, what reason can be given for saying that that privilege stopped at latitude 60° —there is not a vestige of a trace of a suggestion of the kind in the correspondence between Russia and America, but for the purpose of this case to support an argument of Mr. Blaine which had better, when examined, have been abandoned, with all respect to my learned friend, Mr. Carter,—he puts it in his written argument, and says that the Northwest Coast is, because he says it, to be construed as being from 60° to latitude 54° , and so on, further south. May I ask to read one document which shows how Russia, at any rate, would never have attempted to put that construction on the language! It is not a diplomatic document, but still it is of equal importance because it emanated from Count Nesselrode. I mention it for the purpose of showing that our contention is no afterthought; but this coast is referred to by Russia with the meaning we put upon it and not the meaning that the United States put upon it. If you turn to page 30 of that same book, the 1st Appendix to the Counter Case, which you were good enough to refer to when I was speaking of Baron de Tuijls memorandum, you will find Count Nesselrode's letter of the 11th of April, 1823, which is written seven days after the Treaty was agreed and signed in the terms I read,—not ratified, but signed. It was done at St. Petersburg on the 5th of April, 1824.

Now the letter of the 11th of April, 1824 (and I read from the revised translation), at page 30 of Vol. I Appendix to British Counter Case, about a dozen lines below the break which begins "having thus denoted", with reference to Article III of the American Treaty it is said:

In Article III the United States recognize the sovereign power of Russia over the western coast of America, from the Polar Seas to $54^{\circ} 40'$ of north latitude.

Sir, would you glance once more at the language of Article 3? "Any Establishment upon the Northwest Coast of America"; my learned friend, Mr. Carter, is driven from the necessities of his position to say that in Article III the "Northwest coast of America" means from 60° to $54^{\circ} 40'$; and Count Nesselrode speaking of it a few days afterwards says that it went to the Polar Seas. It is not too much to say that this contention could not have been made by Russia,—could not have been made by anyone who was not driven to the stress of supporting an untenable position taken up by Mr. Blaine in order to support a proposition,—the meaning of which the words do not permit of. You will not find any dispute about the northern boundary of the Russian possessions; and it is the key to the whole of this correspondence and this construction, that the United States were only anxious about the southern boundary and cared not a bit about the northern. Therefore, you find in this Treaty no trace of 59° , or 60° , or anything that corresponds to it.

The PRESIDENT.—Except for reserving the right of free navigation and trade on unoccupied points, which I would call rather a conventional arrangement than international law.

SIR RICHARD WEBSTER.—And you observe, from the point of view of the dividing line, it equally applies north and south of $54^{\circ} 40'$. $59^{\circ} 30'$ or 60° does not enter into this Treaty at all, and there is not one word on which my learned friends can hang their point.

I am glad to think that my points come out clearly as I go along, and not at too great length.

THE PRESIDENT.—Might I beg to ask incidentally, what is the position of the United States as to the double translation of these documents published in the first Appendix to the British Counter Case? You see there are two translations.

SIR RICHARD WEBSTER.—The first was the original one sent us by the United States. The revised translation is also sent us by the United States. You will disregard the lefthand column altogether.

GENERAL FOSTER.—Of course, Mr. President, you must disregard it, because it is not now in the Case.

SIR RICHARD WEBSTER.—We were obliged to do it—the United States admit we were,—to call attention to the inaccurate translation. We could not help doing it; but we printed them, so that the eye might see where the inaccuracy occurred,—both the original and the revised.

Now, would you be good enough to turn back to page 11 (App. I B. C.C.) of that Appendix, and you will there find the explanation.

The lefthand column contains the translations originally furnished by the United States Government in Volume I of the Appendix to their Case. In the righthand column revised translations are given. Nos. 1 to 10, 12 to 15 having been withdrawn by the United States, the revised translations of these documents have been made for Her Majesty's Government from the *fac-similes* of the original Russian text annexed to the Case of the United States. Of the remainder, namely Nos. 11, 13, 14, and 16 to 31, the amended versions, recently supplied by the United States, have been adopted. Where any material differences between the original and revised translations occur the passages have been underlined, with the addition of brackets in the case of interpolations.

For my purpose, I accept the position taken by my learned friends; and I refer entirely to their revised translation.

Now, Sir, may I resume the thread of my observations; that, with reference to the Treaty itself, there is not a word in it upon which the contention of the United States now made can be founded. But it may be said, though that may be perfectly true, Great Britain understood it differently,—that Great Britain understood “Northwest coast” in the limited sense that the United States are contending for, “and therefore, we shall rely upon what Great Britain thought”.

Here I would remind the Tribunal of my learned friend Mr. Carter's answer to Lord Hannen to be found at page 359 of the revised note. I need not trouble the Tribunal to look at it because I mentioned it yesterday. Mr. Carter was arguing, that because we had adopted the language of the 1st Article of the American Treaty, we must be taken to have inherited its limited meaning; and Lord Hannen puts this to Mr. Carter:

Would you say the English Government was bound by the interpretation which you say had been put upon it by the Russian and American Governments if the correspondence between the English Government and the Russian Government showed that they understood the words “Pacific Ocean” in a different sense?

And my learned friend, Mr. Carter says:

No, my Lord, I would not in that case.

And, of course, one would have expected Mr. Carter to have made that answer.

Now I will complete what I have to say about these Treaties by showing that beyond all question the British Government did not under-

stand either Pacific Ocean as excluding Behring Sea, or North-West Coast as limited to what was south of latitude 60, and will the Court be good enough to take the volume I had yesterday, Appendix 2 to the British Case, and let me put two letters which, in my submission, put this matter beyond the slightest question, and to which I crave the attention of my learned friend, Mr. Phelps, when he comes to reply. You will remember, Mr. President, that I yesterday called attention to page 63 where the words occur. "Along the whole extent of the Pacific Ocean comprehending the sea within Behring Straits". It is put both in French and English.

Mr. Justice HARLAN.—The value of that depends on what he meant by the words "Pacific Ocean" in that first article.

Sir RICHARD WEBSTER.—He must have meant Behring Sea. He could not have meant anything else, for it is the right of free navigation along the whole extent of the Pacific Ocean comprehending the sea within Behring Straits.

Mr. Justice HARLAN.—Need he have referred to it if, as both sides admit, Russia had no purpose to exclude either the United States or Great Britain from the open waters of Behring Sea.

Sir RICHARD WEBSTER.—He must have referred to it for in any contention the 100 miles from Asia and from Alaska and from Siberia would have overlapped long below.

Mr. Justice HARLAN.—He specifically refers to Behring Straits for that reason.

Sir RICHARD WEBSTER.—Everybody agrees that the 100 miles would have excluded from the coast on the east side—and the coast on the west side—ships coming within 200 miles of Behring Straits and therefore from the point of view of this letter he is speaking of the navigation of something which will take him up to Behring Straits. What does he call that—the Pacific Ocean? If it can be suggested against me,—if you could suggest that the 200 miles from Behring Straits would have reached down south of the Aleutian Islands, there might be something in the suggestion but the fact that the person who penned this document is speaking of the Pacific Ocean as taking him up to Behring Straits shows conclusively in his mind he was arguing about the space of water which abutted so to speak upon Behring Straits, the 100 miles having disappeared altogether. May I trouble you kindly to refer to it. They actually speak in the same Article of two marine leagues thus at p. 63, App. II, B. C. we read.

It being well understood that the said right of fishery shall not be exercised by the subjects of either of the two Powers nearer than two marine leagues from the respective possessions of the other.

And, therefore, it contemplated going quite close up to the shore of Behring Straits within two marine leagues. Again I may be met with this: That is what Great Britain said; is it what Russia said and I will ask Mr. Justice Harlan to look at page 69. I will translate (and the President will correct me) the opening words of Article III at page 69 of the counterdraft of the Russian Plenipotentiaries, "that in the possessions of the two Powers which are designated or described in the preceding Articles, and particularly so far as 59° 30' of North latitude, but not further, the respective vessels shall have the right of visiting for ten years." Therefore Russia was asking not that Northwest Coast should have a different meaning, but that there should be a special limitation of the right of visit by Great Britain not above 59° 30' for the ten years. They sought to limit the ten year period of visit to this

very coast that my learned friend Mr. Carter has been speaking of, not on the ground that it was called Northwest Coast. Nothing of the kind. They knew perfectly well that Northwest Coast meant a great deal more than that. They sought to put in terms of prohibition against visit beyond that point.

The PRESIDENT.—That excluded, of course, visiting Kadiak and Unalaska.

Sir RICHARD WEBSTER.—It excluded everything.

The PRESIDENT.—I thought it was more south.

Sir RICHARD WEBSTER.—Yes, I think it is a little more south.

The PRESIDENT.—Yet you consider that part as excluded?

Sir RICHARD WEBSTER.—Unquestionably from the point of view they were bargaining Russia tried to limit it to that latitude, and they had a reason for it, because between Great Britain and Russia there was a discussion about the *lisière* which only came into existence from the point of view of the British Treaty. It has no relation to the United States Treaty at all.

Now let me read Article V (see p. 69, App. II, B. C.):

The High Contracting Powers stipulate moreover that their respective subjects shall freely navigate on the whole extent of the Pacific Ocean as much to the north as to the south without any hindrance, and that they shall enjoy the right of fishing on the high sea, but that this right shall not be exercised within a distance of two marine leagues from the coasts or possessions, be they Russian or be they British.

Now again I ask, what ground is there for suggesting that the coasts and possessions of Russia are to be limited to 60° or that the Pacific Ocean does not go right up to Behring Straits? What argument can be adduced in support of such contention except the assertion of Counsel, which is not argument at all for this purpose.

Senator MORGAN.—Is that Treaty now in force?

Sir RICHARD WEBSTER.—This is not the Treaty: It is the Russian *projet*. I am endeavoring to show that Russia understood Northwest Coast and Pacific Ocean through the whole of this in exactly the same sense that Great Britain understood it. Article VI is, the Russian Emperor wishing to give more proof of his regard for the interests of the subjects of His Britannic Majesty, and to give all success to useful enterprises which result from the discovery of the Northwest Passage of the Continent of America, consents that this freedom of navigation, mentioned in the preceding article, extends under the same conditions *au détroit de Behring*, and the sea situate to the north of it. Now, I ask Mr. Justice Harlan's kind consideration to this. The 100 miles has disappeared in this document. There is not a trace of the 100 miles, and they themselves proposed two marine leagues, and they speak of the right of navigation and of fishing, which is to extend within two marine leagues of the coast, as going right up to Behring Straits; and yet in the face of this the successors in title of Russia allege a right to say that the navigation at this time was understood by Great Britain as meaning to be confined to that which was south of the Aleutian Islands, and not to extend to these thousands of miles of water which extended from the Aleutian Islands up to Behring Straits.

Then Article VII provides that the Russian vessels and the British vessels navigating in the Pacific Ocean and the sea above indicated, that is the Arctic Ocean, as well when they are driven by tempests or by damage had taken refuge in the respective ports of the High Contracting Parties. In the Northern Ocean and Pacific Ocean they might get around to British possessions, and therefore up to the latest date Russia (and this points my observation) is seeking to get Great

Britain to agree to the ten years clause being limited to the *lisière* with regard to all the Articles—the Pacific Ocean and the Northwestern Coast—in the meaning which would include the coast up to Behring Sea.

Now Mr. Justice Harlan put a question, was the Treaty communicated to Great Britain before the other Treaty was signed will you be good enough to turn to page 72 of the same book (App. II B. C.) where will be found Mr. George Canning's communication with regard to the American Treaty, and that brings out in the clearest possible relief the arguments which I have been endeavouring to put before the Tribunal.

Article IV of the United States Treaty is thus summarized—I had better read the summary of both III and IV.

The third Article fixes the boundary line at 54° north of which the United States are not to form establishments and south of which Russia cannot advance.

There is no reference to 60° or any northern boundary or any southern boundary.

The fourth Article allows free entrance to both parties for ten years into all the gulfs, harbours etc. of each for the purposes of fishing and trading with the natives.

The contention of my learned friends now is that Great Britain only thought that under the words "North-west coast" in the Article of the British Treaty they were getting the right to fish up to latitude 60°. Now what does Mr. Canning say? It was present to his mind—because as I have shown to you but a few moments ago, Russia had been trying to get those things agreed to by Great Britain. He writes to Count Lieven who was the Russian Minister I believe in England.

I cannot refrain from sending to your Excellency the inclosed extract from an American newspaper, by which you will see that I did not exaggerate what I stated to you, as the American construction of the convention signed at St. Petersburg.

It is to this construction that I referred, when I claimed for England (as justly quoted by Count Nesselrode) whatever was granted to other nations. No limitations here of 59°.

There never had been any attempt to get Great Britain to limit the right of navigation or fishing except to the two leagues which is mentioned before. But with regard to this point of the north-west coast there had been the distinct attempt to get her to limit her 10 years clause to the very strip which Mr. Carter now suggests she agreed to limit it to.

MR. JUSTICE HARLAN.—What you read is a newspaper account of the Treaty. What you want I think is the letter of Mr. Addington on page 29.

SIR RICHARD WEBSTER.—For my particular purpose I do not want anything more than that summary. It is a true summary. It makes no difference for my purpose.

MR. JUSTICE HARLAN.—I thought you were reading it to show the British knew of the Treaty.

SIR RICHARD WEBSTER.—Well so I think they had as a matter of fact.

MR. JUSTICE HARLAN.—No they did not get it till the letter of Mr. Addington which shows he transmitted it I think to Mr. Canning.

SIR RICHARD WEBSTER.—You are right. I was perhaps endeavouring to take it a little more shortly than I need; but my argument is as strong whether it is a communication through a newspaper or any other channel. My point is that Great Britain knew the terms of the Treaty, and the moment the terms of the Treaty between the United States and Russia were called to Mr. Canning's attention, Mr. Canning said, "No

limitation here of 59°," and demanded for Great Britain that which Russia had given to the United States; and yet, Sir, in the face of this you are solemnly asked to-day by written and oral argument to say that Great Britain acquiesced in the claim by Russia that the Pacific Ocean was to be excluded, and the north-west coast was to be confined between latitude 60° and latitude 54°.

Sir I cannot allow myself to occupy your time by reading that which only brings this out over again, but there is one sentence at the bottom of page 73:

For reasons of the same nature—

(This is in Mr. George Canning's letter to Mr. Stratford Canning).

we cannot consent that the liberty of navigation through Behring Straits should be stated in the treaty as a boon from Russia.

And the last sentence is—

No specification of this sort is found in the Convention with the United States of America, and yet it cannot be doubted that the Americans consider themselves as secured in the right of navigating Behring Straits and the Sea beyond them.

Is that consistent with Behring Sea being excluded from the operations of the Treaty of 1824?

Lastly, the actual language of the Treaty was sent to Mr. Canning in Mr. Addington's letter of the 29th of January, which is to be found on page 75, wherein it is said to be—

For defining the extent of the rights of either nation to the navigation of the Northern Pacific, and their traffic and intercourse with the north-western coast of America.

But, perhaps, I ought to have read one other paragraph first, on page 74.

Perhaps the simplest course after all will be to substitute, for all that part of the "projet" and "counter-projet" which relates to maritime rights and to navigation, the first two Articles of the Convention already concluded by the Court of St. Petersburg with the United States of America, in the order in which they stand in that Convention.

Then:

The uniformity of stipulations *in pari materiâ* gives clearness and force to both arrangements, and will establish that footing of equality between the several Contracting Parties which it is most desirable should exist between three Powers whose interests come so nearly in contact with each other in a part of the globe in which no other Power is concerned.

And then, on page 81, is the letter of Mr. Stratford Canning to Mr. George Canning from St. Petersburg; and here, Sir, is the answer to the suggestion that we inherited this construction in 1824, which never saw the light until Mr. Blaine, or some of his advisers, evolved it in the year 1890.

Referring to the American Treaty I am assured, as well by Count Nesselrode as by Mr. Middleton, that the ratification of that instrument was not accompanied with any explanations calculated to modify or affect in any way the force and meaning of its Articles. But I understand that, at the close of the negotiation of that Treaty, a Protocol, intended by the Russians to fix more specifically the limitations of the right of trading

(that was perfectly true, because it referred to the 10 years' clause)

with their possessions, and understood by the American envoy as having no such effect, was drawn up and signed by both parties. No reference whatever was made to this paper by the Russian Plenipotentiaries in the course of my negotiation with them; and you are aware, Sir, that the Articles of the Convention which I concluded depend for their force entirely on the general acceptance of the terms in which they are expressed.

Will you kindly turn now to the British Treaty on page 53 of the British Case, and I will endeavor to take it as shortly as possible. It will not be waste of time to run through it without reading the articles at length. The scheme of that Treaty is of some little importance in order to complete my argument upon the point. Article I corresponds with, and I say is the same as, Article II in the United States Treaty. Articles III and IV find no place in the United States Treaty. They relate to the *lisière*. It is not necessary that I should do more than explain in one sentence what it was, that my story may be complete. It was necessary to determine a land boundary between British America and Alaska, and accordingly Articles III and IV relate solely to what that land boundary should be. Article V corresponds with Article III of the United States Treaty. It is an agreement between Great Britain and Russia as the previous agreement existed between the United States and Russia, that no establishment should be formed by Great Britain north of the line of delimitation. Then Article VI refers to the rivers crossing the *lisière*. It was necessary because it finds no place in the United States Treaty, because there was no *lisière*.

It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the continent shall for ever enjoy the right of navigating freely, and without any hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in Article III of the present Convention.

Perhaps, it would not be inconvenient if I read to you the French version of that Treaty, which you will find—and you can put them side by side—at the end of the B. C. Appendix, Volume 2, Part III to which I have just been referring.

The PRESIDENT.—It would be better to look at the French original, as this was a translation. What you have just read is the English translation.

Sir RICHARD WEBSTER.—You are right, Sir. In both cases the originals of this Treaty were in French. What General Foster said later on about the 1867 Treaty did not apply to the one of 1824.

If you would look if you please, Sir, at Article VI, on page 3, of part 2, you will find this.

Mr. Justice HARLAN.—It is in the Appendix to the American Case, volume I, pages 39 and 40.

Sir RICHARD WEBSTER.—Quite true. It is this:

Il est entendu que les sujets de Sa Majesté Britannique, de quelque côté qu'ils arrivent, soit de l'Océan soit de l'intérieur du continent, jouiront à perpétuité du droit de naviguer librement et sans entrave quelconque, sur tous les fleuves et rivières qui, dans leurs cours vers la mer Pacifique, traverseront la ligne de démarcation sur la lisière de la côte indiquée dans l'Article III de la présente Convention.

Therefore, when you look at the original, there is not any doubt about it at all, because they refer, most properly, to the "*lisière de la côte*"; and if you will turn back to Article III you will find there the *lisière* described.

Mr. Justice HARLAN.—What are the English words in Article VI corresponding to *lisière*?

Sir RICHARD WEBSTER.—I will read it:

May cross the line of demarcation upon the line of coast.

The expression "line of coast" is not the proper translation—it ought to be "*strip of coast*". "Strip" is the correct translation of "*lisière*", if I may be permitted to say so Mr. President, and no doubt if I am wrong you will correct me. "*Lisière*" is "*selvage*"—"strip"—like the edge of cloth—"border".

Lord HANNEN.—You might suggest yet another word—"margin".

Sir RICHARD WEBSTER.—I will read now Article VII, which corresponds with the American Article IV.

It is also understood that, for the space of ten years from the signature of the present Convention, the vessels of the two Powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in Article III, for the purposes of fishing and of trading with the natives.

Not the *lisière*; and if you look at the French, which is perfectly plain description, the words are:

Les golfes, havres et criques sur la côte mentionnée dans l'Article III—

Without any reference to "lisière" at all. The only feeling I have in dealing with this matter, is that it is a little cruel to my friends to be exposing the impossibility of maintaining the argument by which Mr. Carter has said, in his opinion, Mr. Blaine, to his entire satisfaction was completely successful in showing that Behring Sea was excluded from the Pacific Ocean, and that Northwest coast had this meaning by those treaties.

Mr. Justice HARLAN.—Would you turn to Article III and tell me what is the "coast" mentioned there.

Sir RICHARD WEBSTER.—Yes. The coast mentioned in Article III, is—

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west.

That is from about $54^{\circ} 40'$ right up to the point where 141° West longitude strikes the Arctic Ocean, and I submit there is no question about it.

The line of demarcation runs behind the *lisière* until it gets to Mount St. Elias, and then it goes straight up.

Mr. Justice HARLAN.—What do you say is the point of the shore referred to as the "coast" in Article VII?

Sir RICHARD WEBSTER.—The "coast" is the whole of the coast up to Behring Straits.

Mr. Justice HARLAN.—Up to Behring Straits?

Sir RICHARD WEBSTER.—The line of demarcation is a complete line. It divides the British possessions from the Russian possessions; it has nothing to do with the *lisière*.

Now I will read the translation, and perhaps, Mr. President, you will kindly follow it in French. I am reading from page 54 of the British Case. It is not my translation but I believe it is correct. It is this:

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west, shall be drawn in the manner following:

Commencing from the southernmost part of the island called Prince of Wales' Island, which point lies in the parallel of $54^{\circ} 40'$ north latitude, and between the 131st and the 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the 141st degree of west longitude "of the same meridian"; and, finally, from the said point of intersection, the said meridian-line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

I submit (remembering that the line of demarcation was to be complete with reference to the coast referred to as the north-west coast of

the continent, and the Islands of America to the north west), that nobody who can take an impartial view of this matter can come to any other conclusion than that the coast referred to in Article VII is the whole coast; and when we remember that in the United States the expression *lisiere* does not occur at all, and that Article III of the United States treaty speaks of the north-west coast of America north of 54° 40', and that I am justified in saying that Mr. George Canning believed that he was getting the same for Great Britain as the United States had got from Russia—there is not any answer, at any rate, apparent (unless I have made some grave blunder) to the contention that the right of Great Britain to visit, during ten years, inland creeks, and harbours, and to visit for the purpose of navigation and fishing the seas which washed the American coasts extended right away from 54° 40' up to the point to which I have called attention.

Now it is not necessary for me, unless my friends tell me so, to refer to the other Articles of the Treaty. They relate to the sale of spirits, and to Sitka, and New Archangel, and to other matters, which are specially referred to, but have no bearing on the discussion which is now before you.

There are two matters in this connection which have not received notice, and to which I ought to direct the attention of the Tribunal, not in any way as qualifying or even as strengthening what in my submission to this Court is so absolutely plain, but I refer to it in order that it may not be thought that I have overlooked my friend, Mr. Carter's, point. Mr. Carter said, for the purposes of this Treaty, they were not concerned with what the previous correspondence had been. They said "the Ocean commonly called the Pacific Ocean"—I think I have quoted the language quite correctly—and accordingly they meant by that "south of the Aleutian Islands". It would have been a little satisfactory, at any rate to us who have to answer my friend, if he had gone on and told us where he got the common reputation of Pacific Ocean to be that south of the Aleutian Islands; but, at any rate, I will put the material before the Court. I must not read it, because it would be simply a waste of time, in one sense—not a waste of time as far as the information is concerned, but it would be trespassing on the indulgence of the Court to read it. There are several collections of what I may call information of considerable use, if this matter came to be discussed. I call attention first to the 1st volume of the Appendix to the Counter Case, because it happens to be most complete, and will ask you to look at page 88. Now there you will find, Mr. President, that which we believe to be the most complete record (and they have been selected without any regard to taking anything that is for or against us) of the maps and geographies which have ever been collected in connexion with this matter. The list sent by Mr. Blaine to Lord Salisbury was found, when it came to be examined very deficient indeed. This is very much larger, and it includes a great many more; and Mr. Blaine's list did not call attention to the way in which the names were used.

Would the Tribunal kindly look at page 88 of App. I to British Counter Case. In the margin there you will find the date put of every reference made. I will read down the dates first. 1795; 1802; 1803; 1804; 1808; 1815; 1819; 1822; 1823; 1826; showing that they are pretty contemporaneous. Now, Mr. President, let me read you a specimen of two or three of them:

"Kamschatka Sea is a large branch of the Oriental or North Pacific Ocean."
"Behring's Straits, which is the passage from the North Pacific Ocean to the Arctic Sea."

“Behring’s Island. An island in the Pacific Ocean.”
 “Kamschatka. Bounded east and south by Pacific.”

That is a most important matter :

Bounded east and south by Pacific.

Then it says :

Kamschatka. Bounded on the North by the country of the Koriacs, on the east and south by the North Pacific Ocean and on the west by the Sea of Okotsk.

Behring’s Island. In the North Pacific Ocean.

Behring’s Island. An island in the North Pacific Ocean.

Kamschatka. River, which runs into the North Pacific Ocean.

The Kamschatka River runs into Behring Sea North of the Commander Islands. Then there is the date of 1819. I have not read the dates against each. I might have done it perhaps in that way. Then it goes on :

“Pacific Ocean considered as the boundary of the Russian Empire, washes the shores of the Government of Irkutsk, from Tschukotsky Noss, or Cook’s Straits, to the frontiers of China; or, in other words, from the mouth of the River Aimakan that is, from 65° to 45° North latitude. It is divided into two great parts. That lying eastwards from Kamschatka, between Siberia and America, is eminently styled the Eastern, or Pacific Ocean; that on the west side, from Kamschatka, between Siberia, the Chinese, Mongolia, and the Kurile Islands, is called the Sea of Okhotsk. From the different places it touches it assumes different names, e. g., from the place where the River Anadyr falls into it, it is called the Sea of Anadyr, and above Kamschatka the Sea of Kamschatka; and the bay between the districts of Okhotsk and Kamschatka, is called the Sea of Okhotsk, the upper part of which is termed Penjinskoye More, that is, the Penjinskian Sea, as it approaches the mouth of the River Penjine.”

I might occupy a great deal more time than the importance of the question merits, in going through these documents. If you will turn to pages 92 to 105 you will find a consecutive record of maps, without selection, from which it will appear that though at times portions of the North Pacific were called, and properly called, Beaver Sea, Behring Sea, Sea of Kamchatka, and some other names, that in the vast majority of cases the common appellation given to the whole district of the ocean right up to the Behring Straits is Pacific Ocean.

Mr. Justice HARLAN.—Sir Richard, do you regard the phrases “North Pacific Ocean” and “Pacific Ocean”, as identical all through that volume?

Sir RICHARD WEBSTER.—I think, Sir, that “North Pacific Ocean” is for this purpose identical with “Pacific Ocean”: “South Sea” was another name for it for a particular reason. South Pacific Ocean would really begin south of the equator. I have not studied the actual point where South Pacific would end, but I understand that North Pacific Ocean merely means the northern part of the Pacific Ocean.

Mr. Justice HARLAN.—I have seen a good many maps on which the waters south of the Aleutian Islands are marked distinctly “North Pacific Ocean”, while the waters north of them were marked sometimes Sea of Kamtchatka, and sometimes Behring Sea. It is quite true, as you say, that there are maps both ways.

Sir RICHARD WEBSTER.—There is a large number of maps on which Pacific Ocean appears as going over the whole, and Behring Sea appears, above it, in small type as being the sea which was what I may call the part of the Pacific Ocean that had got that name.

You will find a map of the North Pacific Ocean below the Aleutian Islands hanging behind you, and Behring Sea put in its place. At any rate, it should not be thought that we have created evidence for ourselves. It is known all over the world that particular seas and parts of

the ocean get local names; but for this purpose we have got to consider what the parties meant when they wrote it in that treaty. I trust I have not failed in bringing to the mind of the court the demonstration that they did mean the part of the Ocean right up to Behring Straits.

Lord HANNEN.—To what extent do you say this list is exhaustive?

Sir RICHARD WEBSTER.—As far as the maps are concerned, my Lord, I believe it contains every known map that could be found.

Mr. Justice HARLAN.—Oh, no; there are a great many of the maps not given. Mr. Blaine, in his correspondence with Lord Salisbury, gives 105 maps.

Sir RICHARD WEBSTER.—There are 136 in this list, Sir; but not all of Mr. Blaine's are included because later Editions were inserted.

Mr. Justice HARLAN.—More than half of Mr. Blaine's I think, are not mentioned in your list.

Sir RICHARD WEBSTER.—I do not think that is correct, Judge.

Mr. Justice HARLAN.—I may be wrong.

Sir RICHARD WEBSTER.—I do not think that is correct; but I really have not examined it personally.

Lord HANNEN.—I wanted to know because I find—if you are right, you know—that down to the year 1825, according to your statement, the Behring Sea is never mentioned. You stated that this is exhaustive. Behring Sea is not mentioned in any of these geographies.

Sir RICHARD WEBSTER.—It would perhaps be convenient to say a word or two about the maps themselves.

Lord HANNEN.—These are all the geographies?

Sir RICHARD WEBSTER.—I believe, my Lord, that the list of geographies has been made as chronologically accurate as it could be. I do not pretend to say we found every book that exists, because it is not possible; but at any rate it was endeavored to be done impartially; and so far as we could, they were taken from the books which could be found.

Lord HANNEN.—Take the third: "Behring Island, an island in the Pacific Ocean". Then there is added "Behring Island in the Behring Sea".

Sir RICHARD WEBSTER.—That is the first name given to it.

Lord HANNEN.—That is added?

Sir RICHARD WEBSTER.—That is our commentary, put in brackets. It is the first time Behring Island was mentioned, and we desired to show where it was.

Mr. Justice HARLAN.—Behring Island is to the left of the Copper Island.

Sir RICHARD WEBSTER.—Mr. President, I had not intended to trouble you with the maps; but I should like to pick out a few as I pass, in order to shew you the importance of them. Of course in these early days people naturally borrowed from one another. There was not so much known about the maps, and you would not expect it. If you will kindly look, Sir, at the earliest on page 92.

A general chart, exhibiting the discoveries made by Captain James Cook, etc. This is the original of the chart in the 8^{vo} edition. Behring Sea appears without names, though Olutarskoi sea, Beaver Sea, Gulf of Anidir, Shoal Water, Bristol Bay, appear as local names of equal rank. The three first close in to the Asiatic coast.

Behring Strait, North Pacific Ocean.

Then at number 4.

Chart of the N. W. Coast of America and the N. E. Coast of Asia. Explored in the years 1778 and 1779. Prepared by Lient. Roberts under the immediate inspection of Captain Cook. Published by W. Faden, Charing Cross, July 24, 1784.

Behring Sea named Sea of Kamchatka.

Beaver Sea close in to shore of *Kamchatka*.
Sea of Okotsk, equivalent in rank to *Sea of Kamchatka*.
Gulf of Anadyr, *Bristol Bay*.
Northern Part of Pacific or *Great South Sea*.
 The Aleutian Islands are very imperfectly shown.

It is most important, when you refer to those maps, to see whether they wrote the names large or small, in order to see the importance they attach to them.

Then you will find page 94, 1794, No. 15, an important map

Prepared by Lieut. Henry Roberts under the immediate inspection of Captain Cook, London. Published by William Fadden, Geographer to the King.

Mr. Justice HARLAN.—Before you get to that, there is a similar reference, on page 93.

Sir RICHARD WEBSTER.—Will you kindly give me the date?

Mr. Justice HARLAN.—It is number 4, on page 93 the year being 1784. There *Behring Sea* is named *Sea of Kamchatka*, and then there are other seas there. Then there is the *Northern part of the Pacific* or *Great South Sea*. Have you got that chart itself, so we can see how they are divided?

Sir RICHARD WEBSTER.—I do not know whether we have but I may be able to obtain it for you.

Mr. Justice HARLAN.—I desired to ask in that connection how many more of those maps, by name and in words, speak of the Pacific as the *South Sea* or *Great South Sea*.

Sir RICHARD WEBSTER.—I have not worked it out. I know the name *Great South Sea* disappeared very soon; but about what date I could not tell you. I will try and have it worked out, Judge, if I can.

Mr. Justice HARLAN.—I do not know that it is important. We can do that.

Sir RICHARD WEBSTER.—Yes. If you will look at 1794, which is a very important map, you will see that it is one which undoubtedly made what I may call a record at the time. It is number 15. The advertisement was:

The interesting discoveries made by British and American ships since the first publication of the Chart in 1784, together with the hydrographical materials lately procured from St. Petersburg and other places, have enabled Mr. de la Rochette to lay down the numerous improvements which appear in the present edition.

Mr. Justice HARLAN.—That is the second edition of the map to which I have just called attention.

Sir RICHARD WEBSTER.—You are quite right:

The main body of *Behring Sea*, which in the first edition was styled *Sea of Kamchatka*, here appears without any distinctive name.

Sea of Kamchatka is written on the waters immediately adjacent to the peninsula.

Sea of Anadyr replaces the *Gulf of Anadyr* of the 1st edition.

Sea of Okotsk appears as a name of equal right with *Sea of Kamchatka* and *Sea of Anadyr*.

Beaver Sea is written in smaller characters along the Kamchatkan coast to the north of Petropaulovski.

Behring Strait, *Bristol Bay*.

North Part of the Pacific Ocean or *Great South Sea*.

At that time it appears that the name *Great South Sea* still continued to be used.

Then I have marked a good many; but I think I might perhaps indicate the numbers without reading them, of those that are clearly important. There are numbers 17 and 18, two of the French maps in which *Behring Sea* is not named, but the whole of the North Pacific is called *Grand Ocean Septentrional*, and *Grand Ocean*. Then there are 24 and 25.

Mr. Justice HARLAN.—It was named the Sea of Kamchatka in 1817.
 Sir RICHARD WEBSTER.—No, Sir; not in number 17.

Mr. Justice HARLAN.—On page 99. I thought you meant the year 1817.

Sir RICHARD WEBSTER.—No; I was giving the number of the map. No. 17 on page 95, in the year 1798. They are numbered consecutively; and number 18 is in the same year. Then I should call attention to 24, 25, 26, and 32.

Mr. Justice HARLAN.—I see that in number 24 Behring Sea is known as *Beaver Sea* and the North Pacific is named *Southern Ocean* or *Still Sea*.

Sir RICHARD WEBSTER.—I do not know whether you have noticed it; but *Beaver Sea* which is written across in some maps is in the more correct maps written as a small local name close to the coast of Kamchatka. It is mentioned in more than one place in these maps, and written in smaller characters along the Kamchatkan Coast to the north of Petropaulovski.

Then there is number 40, which is an important map, on page 96:

Arrowsmith's Chart of the Pacific Ocean. This is a large and important Map in nine sheets, specially devoted to the Pacific Ocean. Originally published in 1798. This edition with corrections to 1810. The northern edge of the Map runs about latitude 62 degrees north, and it includes the greater part of Behring Sea but shows it as a large blank unnamed space. *Bristol Bay* alone is rather prominently named. By contrast, the *Sea of Okhotsk*: *Sea of Japan*, and other enclosed seas are named.

If you will kindly look, Mr. President, at the map of the Pacific, it takes you up to 62 degrees. It would be a little south of the Yukon River, and therefore includes a great deal more than nine-tenths of Behring Sea as now understood. That is to say, it is some 500 miles north of the Pribilofs, and would practically be, for all substantial purposes, the whole of Behring Sea, except the part immediately running into the neck of Behring Straits; and that was a chart of the Pacific Ocean as early as the year 1810.

Mr. Justice HARLAN.—The map published by that same man according to Mr. Blaine's list, in 1811, in London, gives the Sea of Kamchatka.

Sir RICHARD WEBSTER.—I think, Sir, that is number 46 in our list.

Mr. Justice HARLAN.—Yes; that is the same one.

Sir RICHARD WEBSTER.—(Quoting):

Hydrographical Chart of the world. A. Arrowsmith, 1811.

Behring Sea named Sea of Kamchatka.

Behring's Straits. North Pacific Ocean.

We would have to look at that map to see how the words "Sea of Kamchatka" were used; but I do not think it in any way strengthens the contention of my learned friends to suggest that what I may call varying names are sufficient to differentiate this from a part of the Pacific Ocean.

Lord HANNEN.—What is that intended to indicate, Sir Richard, "*Bering's Strait, North Pacific Ocean*"? They are written in italics. Does it merely mean that Behring Strait is put in, or does it indicate at all how far out the North Pacific Ocean extends?

Sir RICHARD WEBSTER.—I do not think it indicates anything more than that Behring Strait is put in. The names that appear are *Sea of Kamchatka* and *Behring Strait*.

Mr. Justice HARLAN.—It does not show their relation to each other. Right along in those years the Sea of Kamchatka seemed to be all one name with Behring Sea.

Lord HANNEN.—Have you got any one of the maps which would illustrate what is meant by this collocation of Behring Straits and North Pacific Ocean?

Sir RICHARD WEBSTER.—I will find out, my Lord. I cannot answer it off-hand, because the work of examining them is so heavy that I cannot say for certain whether any of those are actually accessible.

Then, Mr. President, a great deal of information is given on page 105 as to the meaning of the words "Northwest Coast"; and again there is not any evidence to be found of Northwest Coast being used in this limited sense in any of the existing books. It simply is a question of instance after instance of either Northwest Coast being specially defined for the purposes of the book, indicating a particular part, or Northwest Coast being used as including the whole. Nowhere is there any evidence of Northwest Coast being recognized as being the piece between latitude 60° and latitude 54° 40'. I will now give you a reference to the pages. You will find that fully examined on pages 105 to 108 of that Appendix; but I can put that a little more briefly before the Tribunal, if they will kindly refer to page 66 of the British Case. This is a book published in 1840 by Mr. Greenhow, whom you will find is admitted by the United States people, at that time, at any rate, to be a great authority. At page 66 is set out the extract from his work of the year 1840:

The Northwest Coast—

And these italics are Greenhow's own.

is the expression usually employed in the United States at the present time to distinguish the vast portion of the American continent which extends north of the 40th parallel of latitude from the Pacific to the great dividing ridge of the *Rocky Mountains* together with the contiguous islands in that ocean. The southern part of this territory, which is drained almost entirely by the River Columbia, is commonly called *Oregon*.—

I believe the Columbia River comes in—I see it marked there a little way down the red color, Mr. President.—

From the supposition (no doubt erroneous) that such was the name applied to its principal stream by the aborigines. To the more northern parts of the continent many appellations which will hereafter be mentioned, have been assigned by navigators and fur traders of various nations. The territory bordering upon the Pacific southward, from the 40th parallel to the extremity of the Peninsula which stretches in that direction as far as the Tropic of Cancer, is called *California*, a name of uncertain derivation, formerly applied by the Spaniards to the whole western section of North America, as that of *Florida* was employed by them to designate the regions bordering upon the Atlantic. The Northwest Coast and the West coast of California, together form the *west coast of North America*; as it has been found impossible to separate the history of these two portions, so it will be necessary to include them both in this geographical view.

Mr. Greenhow here gives the following note:

In the following pages the term "coast" will be used sometimes as signifying only the seashore, and sometimes as embracing the whole territory, extending therefrom to the sources of the river; care has been, however, taken to prevent misapprehensions, where the context does not sufficiently indicate the true sense. In order to avoid repetitions, the *northwest-coast* will be understood to be the *north-west coast of North America*; all latitudes will be taken as north latitudes, and all longitudes as west from Greenwich, unless otherwise expressed.

The Memoir continues as follows:

The northern extremity of the west coast of America is *Cape Prince of Wales*, in latitude of 65 degrees 52 minutes, which is also the westernmost spot in the whole continent; it is situated on the eastern side of Behring's Strait, a channel 51 miles in width, connecting the Pacific with the *Arctic* (or *Icy* or *North Frozen*) *Ocean*, on the western side of which strait, opposite *Cape Prince of Wales*, is *East Cape*, the

eastern extremity of Asia. Beyond *Behring Strait* the shores of the two continents recede from each other. The north coast of America has been traced from *Cape Prince of Wales* north eastward to *Cape Barrow*.

The relations of *Behring Sea* to the Pacific Ocean are defined as follows in the "Memoir":

The part of the Pacific north of the Aleutian Islands which bathes those shores is commonly distinguished as the *Sea of Kamchatka*, and sometimes as *Behring Sea*, in honour of the Russian navigator of that name who first explored it.

Then he refers to *Cape Prince of Wales* as follows:

Cape Prince of Wales, the westernmost point of America, is the eastern pillar of *Behring Strait*, a passage only 50 miles in width, separating that continent from Asia, and forming the only direct communication between the Pacific and Arctic Oceans.

The part of the Pacific called the *Sea of Kamchatka*, or *Behring Sea*, north of the Aleutian chain, likewise contains several islands.

In the year 1845 the Government of the United States sent Mr. Greenhow's book "The History of Oregon and California and the other territories of the Northwest Coast of America" to the Government of Great Britain as being in some sense an official document, evidently desiring it to be regarded as containing very accurate information. We happen to have that original book here, the one which was sent at that time; and it is at the service of any one of my friends or any one of the Tribunal. It would simply be a matter of reading page after page and extract after extract in which you will find both the "Pacific Ocean" and the "Northwest Coast" are used by Mr. Greenhow in his works as referring to the part of America extending right away from about latitude 51°—perhaps a little lower than that; 50° would be perhaps more correct—right away up into the Arctic Ocean.

It does seem to me a little difficult for those who desire so to contend that this indicates or supports the views that the Pacific Ocean was commonly known as including *Behring Sea*.

You will remember, Sir, that Lord Salisbury in his dispatch of the 21st February 1891 points out that it has been the constant practice all over the world to call seas, bays and other parts of the ocean by local names, and yet they may all be covered by the generic name which covers the whole of it. There is a clear and important passage contained on page 89 of part 2 of volume 3; but I will not trespass upon your time by reading it at length. But Sir, it does appear to me a little strange that the United States should raise this contention.

The Tribunal here adjourned for a short time.

SIR RICHARD WEBSTER.—Mr. President, a question was put to me by Mr. Justice Harlan upon the maps, to which, perhaps, I ought to refer only for one moment, just to show the impossibility of relying upon matters of this kind without full examination. In page 265 of the first volume of the United States Appendix will be found an extract from Mr. Blaine's letter with reference to the maps, and I refer to one of them:

English statesmen of the period when the treaties were negotiated had no complete knowledge of all the geographical points involved. They knew that on the map published in 1784 to illustrate the voyages of the most eminent English navigator of the eighteenth century the *Sea of Kamchatka* appeared in absolute contradistinction to the Great South Sea or the Pacific Ocean. And the map, as shown by the words on its margin was prepared by Lieut. Henry Roberts under the immediate inspection of Captain Cook.

If you will refer to the list of maps to which I was calling attention before, namely, page 94 of the first volume of the Appendix to the

Counter Case you will see that map referred to. It is page 93, number 4:

Chart of the North West coast of America and the North East Coast of Asia explored in the years 1778 and 1779. Prepared by lieutenant Roberts under the immediate inspection of Captain Cook, published by W. Faden, Charing Cross, July 24th, 1784.

That is the map, Mr. Blaine refers to. Now, if you will be good enough to turn over to page 94 you will find Mr. Blaine has overlooked the fact that 10 years later the 2nd edition of that map was published also prepared by Mr. Roberts [No. 15] and also published by Faden in which distinctive use of the name has disappeared altogether. May I ask you to look at page 93, No. 4 where you find the words "Behring Sea named Sea of Kamchatka" and if you look 10 years later the next edition of that map 1794 to which no reference is made by Mr. Blaine.

The main body of Behring Sea, which in the first edition was styled Sea of Kamchatka, here appears without any distinctive name, Sea of Kamchatka is written on the waters immediately adjacent to the peninsula.

So that you will observe that the whole point of Mr. Blaine's argument disappears if you look at the second edition of that map published in 1794. He is referring to the edition of 1784.

This was called to my attention during the adjournment, and I mention this for the purpose of enforcing the fact. Unless you have the maps before you and see how the words are used, no inference can be drawn from them; whereas, in the statement in the "Gazetteer", you have the specific statement made on the authority of the Geographer, whoever it is, telling you exactly what is meant, though, of course, it depends on your knowledge of the man as to the amount of authority to be attached to the statement.

Now, when the Tribunal adjourned, I was about to call attention to other uses of the Northwest Coast which are consistent only with our view and inconsistent with that of the United States; and I desire, if I possibly can, to put it as shortly as possible, and I will a little vary the order of my observations.

I will ask the Tribunal to take before them pages 40 and 41 of the 1st Volume of the Appendix to the British Case, which will enable me to give them several references without turning from one volume to another.

I am now upon the period subsequent to the Treaties of 1824 and 1825. I am reading from the historical review of the formation of the Russian American Company by Tikhmenieff, published in St. Petersburg in 1863. You will observe that the year 1842 is referred to; and you will observe there that reference is made to reports by Governor Etolin of the continuous appearance of American whalers in the neighbourhood of the Harbours and Coasts of the Colony; and you will find that a statement is made that in the year 1841 there had been whalers to the number of 50, and that large quantities of whales had been secured; and you will find that the Foreign Office, in reply to energetic representations made by the company, had replied:

The claim to a *mare clausum*, if we wished to advance such a claim in respect to the northern part of the Pacific Ocean, could not be theoretically justified. Under Article I of the Convention of 1824 between Russia and the United States, which is still in force American citizens have a right to fish in all parts of the Pacific Ocean. But under Article IV of the same Convention, the ten years' period mentioned in that Article having expired, we have power to forbid American vessels to visit inland seas, gulfs, harbours, and bays for the purposes of fishing and trading with the natives. That is the limit of our rights, and we have no power to prevent American ships from taking whales in the open sea.

Then:

From 1843 to 1850 there were constant complaints by the Company of the increasing boldness of the whalers. They were not content with landing on the Aleutian and Kurile Islands, cutting wood wherever they chose, boiling blubber on the shore," then 10 lines lower down "Traffic in furs was openly carried on between the natives and the American Captains, and when the Colonial authorities made some whalers leave Novo Arkhangelsk (N P) on that account, they quietly continued the traffic in the Bay of Sitka, and disregarded all protests. The following case also deserves to be noticed; in 1847 one of the whalers came to Behring Island, and on the Captain being told that he must not traffic in seal-skins on a neighbouring small island, he ordered the overseer of the island to be turned off his ship, and immediately went on shore with his men, with the evident intention of disregarding the prohibition.

It was only when active steps were taken to resist them that the whalers left, but before going they cut down a plantation which had been grown with great trouble, the island being without other trees or shrubs. Few of the districts of the colony escaped the visits of the whalers, which were everywhere accompanied by acts of violence on their part.

Whenever complaints of such acts reached the Company, they took all the steps in their power to protect the country under their administration; but all their efforts led to no satisfactory result. In 1843, almost immediately after the first protest of the Company, the colonial authorities were alarmed at the large number of whalers engaged round the shores of Kadiak, as the Company's fur trade was certain to suffer from their presence.

And there was a request for a cruiser made to prevent the vessels from interfering and going into the territorial waters of Russia.

Then lower down, there is this.

In 1847 a representation from Governor Tebenkoff in regard to new aggressions on the part of the whalers gave rise to further correspondence. Some time before, in June 1846, the Governor-General of Eastern Siberia had expressed his opinion that, in order to limit the whaling operations of foreigners, it would be fair to forbid them to come within 40 Italian miles of our shores, the ports of Petropaulovsk and Okhotsk to be excluded, and a payment of 100 silver roubles to be demanded at those ports from every vessel for the right of whaling. He recommended that a ship of war should be employed as a cruiser to watch foreign vessels. The Foreign Office expressly stated as follows in reply. We have no right to exclude foreign ships from that part of the Great Ocean which separates the eastern shore of Siberia from the north-western shore of America or to make the payment of a sum of money a condition to allowing them to take whales.

I need not remind you, Mr. President, as my learned friend, the Attorney General, pointed out, that could only be and is only the Behring Sea, no other part of the Great Ocean corresponds with that.

Then, at the bottom of the page, going on to the year 1853, you will actually find the instructions to cruisers:

The cruisers were to see that no whalers entered the bays or gulfs, or came within 3 Italian miles of our shores, that is, the shores of Russian America (north of 54° 41'), the Peninsula of Kamchatka, Siberia, the Kadiak Archipelago, the Aleutian Islands, the Pribilof and Commander Islands, and the others in Behring Sea, the Kuriles, Sakhalin, the Shantar Islands, and the others in the Sea of Okhotsk to the north of 46° 30' north. The cruisers were instructed constantly to keep in view that "our Government not only does not wish to prohibit or put obstacles in the way of whaling by foreigners in the northern part of the Pacific Ocean; but allows foreigners to take whales in the Sea of Okhotsk, which, as stated in these instructions, is, from its geographical position, a Russian inland sea".

Now in the face of that brief summary which I have been fortunately able to take from one document, referring to 1842, 1843, 1847 and 1853, it is obvious, and cannot I submit be denied by the Counsel for the United States, that there were at this time no acts supporting the contention that Russia never withdrew her prohibition with regard to navigation and fishing in Behring Sea, that Great Britain had recognized that the prohibition extended to Behring Sea. I will read it if you please, Mr. President, from pages 56 and 57 of the United States Case which still stands.

But neither in the protests negotiations, nor treaties is any reference found to Behring Sea, and it must be conceded from a study of those instruments and the subsequent events that the question of jurisdictional rights over its waters was left

where it had stood before the treaties, except that the exercise of these rights by Russia had now, through these treaties, received the implied recognition of two great nations; for while, by the Ukase of 1821 Russia had publicly claimed certain unusual jurisdiction both over Behring Sea and over a portion of the Pacific Ocean, yet in the resulting treaties which constituted a complete settlement of all differences growing out of this Ukase, no reference is made to this jurisdiction so far as it related to Behring Sea although it is expressly and conspicuously renounced as to the Pacific Ocean.

Will you for a moment consider what that case means? I must assume that I have demonstrated to this Tribunal that the suggestion that there was no reference made to Behring Sea in the negotiations or the treaties is unfounded, but the fact that they have distinctly stated in their case that in regard to what they are pleased to call the Pacific Ocean there was an express withdrawal by Russia of her attempt to limit the rights of navigation and fishing, points and certainly accentuates the observations I have ventured to make as to what was going on, after 1824 and 1825, in this part of the sea referred to by them as being part of the Great Ocean which separates the Eastern Coast of Siberia from the north western part of America, from which they had no right to exclude navigation or fishing vessels of the United States and Great Britain.

If the Tribunal will be good enough to look at page 51 of the British Counter Case you will find certain contemporaneous uses of the word north-west, in the face of which I submit, it is impossible for my learned friends effectively to maintain their contention.

Let me remind the Tribunal of what their contention is.

That although the coast of which we are speaking is in fact the Northwest Coast, yet the term Northwest Coast had such a technical meaning that it is to be confined to the space between latitude 60° and latitude $54^{\circ} 40'$, or south of it—nothing north of latitude 60° .

At page 51 the Tribunal will see that by Treaty of 20th December 1841 (the reference to Hertslet is given and we have Hertslet here)—Great Britain, Austria, France, Prussia and Russia entered into a Treaty for the suppression of the Slave trade and in no case was the mutual right of search to be exercised upon the ships of war of the High Contracting Parties. It is sufficient for my purpose that one of the contracting parties was Russia. By section 8 of the annex to that treaty this exemption was extended to vessels of the Russian American Company, such vessels to have a patent and prove their place of origin and of destination.

Perhaps it would not be out of place if I reminded you here of a most extraordinary contention that appears in the argument of the United States for the first time—that the Russian American Company had no monopoly after 1824 and 1825 of the eastern shore of America. It is one of the instances in which the United States have thought it necessary to suggest that an important official document is wrongly worded, and have without justification, as we shall submit, altered the wording to support their meaning. But at present, to make my point clear, I call attention to the fact that the Russian American Company had at this time, as I shall show you, the monopoly from Behring Straits on one side down to latitude $54^{\circ} 40'$ on the other, and from Behring Straits on one side down to the Island of Urup on the Asiatic Coast—their vessels were to be exempted from search and each vessel was to have a patent; a form of this patent is set out at page 51 of the British Counter-Case:

Upon this ground the Administration of the Russian American Company, being about to dispatch their ship *blank* named *blank* built in the year *blank* of *blank* tonnage and commanded by *blank* to the north-western coast of America to the colonies settled there, with the right to enter all ports and harbours, which necessity may

require, considers it conformable to the above cited Article of the Instruction that besides the patent authorizing the hoisting of the Russian flag by merchant ships in general, the said vessel of the Company should be provided with this special patent to secure her against the visit of the cruizers of the contracting parties.

Mr. President, is it reasonable to suggest that in the patent given to these vessels, Northwest Coast there meant between 60° and $54^{\circ} 40'$? Is it not perfectly obvious that they were referring there to the whole length of the Northwest Coast of America from $54^{\circ} 40'$, as far as the Russian dominions extended, and I call your attention, and you will see the reference upon the same page, to this, that in the year 1843, that Treaty having been made in the year 1841, the Treaty of 1825 was renewed in these words:

It is understood that in regard to commerce and navigation in the Russian possessions on the Northwest Coast of America, the convention concluded at St. Petersburg on the 16th February, 1825, continues in force.

Would anybody suggest that only means the portion of the Northwest Coast to which my learned friend, Mr. Carter, asks you to attribute the limited meaning to which I have referred.

Senator MORGAN.—My suggestion, Sir Richard, was in reference to the question whether it included the hunting of animals that were fur-bearing.

Sir RICHARD WEBSTER.—I quite follow you, Sir. As I have said more than once, I never relied upon these Treaties as a grant at all. I have always relied upon them as an undertaking by Russia not to interfere, but it does not touch the point you referred to when you suggested what must be found in the Treaties. Then the Treaty of the 12th of January 1859, between Great Britain and Russia, Article XIX, says.

In regard to commerce and navigation in the Russian possessions on the North West Coast of America, the Convention concluded at St. Petersburg on the 16th (28th) February, 1825, shall continue in force.

Mr. President, you are infinitely better acquainted with diplomatic matters, even after the study that I have had with regard to this case, than I could ever hope to be; but it does seem a strong thing to suggest that North West Coast, in these renewed Treaties, did not refer to the whole North West Coast from $54^{\circ} 40'$, the power of settlement becoming more and more probable, yet according to my learned friends' contention the North West Coast is used in a different sense in these Treaties, and the phrase "North West Coast", as invented by Mr. Blaine finds no place in the history of these matters.

If one could use the expression with reference to this matter as making a thing plainer which in my submission is perfectly plain. I would ask you to turn to pages 63 and 64 of the Counter Case where there appears again that which we submit, is utterly inconsistent with the narrow use of "north-west coast" contended for. In 1799 the Russian American Company got on the American side from Behring Straits to latitude 55° ; it is sufficient for my purpose to deal with the American side; the Asiatic side did not vary. In 1799 the Russian Company got in terms the monopoly from Behring Straits down to latitude 55° . In 1821, just seven days after the Ukase, they got from Behring Straits down to latitude 51 ; that is to say Russia attempted to push the southern boundary lower than 55° . In 1829, after the Treaty—and now I will ask you to refer to page 61—you will find the reference to the 1821 charter at the bottom of that page:

The privilege of hunting and fishing to the exclusion of all other Russian or foreign subjects throughout the territories long since in the possession of Russia on the coasts of North-west America, beginning at the northern point of the island of Vancouver, in latitude 51° north, and extending to Behring Strait and beyond. . .

I notice in passing, so that I need not call attention to it again, that this is the only charter in which the words "foreign subjects" appear. It was in consequence of the attempt by Russia to extend her rights under the Ukase of 1821. If you will now turn over to page 62, you will find how the area of the monopoly of the Russian Company was described in the year 1829 after the Treaty. 51° was no longer possible, because they had agreed with the United States that the southern limit of their operations should be $54^{\circ} 40'$.

The limits of navigation and industry of the Company are determined by the Treaties concluded with the United States of America, April 5 (17), 1824, and with England, February 16 (28), 1825.

(3) In all the places allotted to Russia by these treaties there shall be reserved to the Company the right to profit by all the fur and fish industries to the exclusion of all other Russian subjects.

Could anybody produce the slightest authority for the suggestion that the Company lost their monopoly on the east side of Behring Sea? There is not a vestige of evidence, and I speak challenging correction by my learned friend Mr. Phelps, and asking him to refer to any document showing that it was not intended to convey the monopoly to the Russian Company from Behring Straits to $54^{\circ} 40'$. In 1799, it was down to 55° ; and, in 1821, it was down to 51° in terms; and, in 1829, it is the whole area assigned to Russia. It must have been, and was, the whole North-West Coast of America above $54^{\circ} 40'$, which was the part exclusively assigned to Russia, as compared to that below, which was exclusively assigned to the United States. Observe that $54^{\circ} 40'$ was to be the dividing line, and yet it is necessary, for the purpose of my learned friends' argument, for them to contend for the first time that of which there is not a trace during 100 years of the history of this matter, that the Russian Company had not the monopoly on the eastern shore of Behring Sea.

Now, look at page 63 of the Counter Case, where you will observe the renewal suggested in the year 1865:

The Minister proposed, in paragraph 15, to reserve to the Company the exclusive right of engaging in the fur-trade as defined within the following limits:

On the peninsula of Alaska, reckoning as its northern limit a line drawn from Cape Douglas, in Kenia Bay, to the head of Lake Imianna; on all the islands lying along the coast of that peninsula; on the Aleutian, Commander, and Kurile Islands and those lying in Behring's Sea, and also along the whole western coast of Behring's Sea.

I had better show you where that is. The line goes across the Alaskan peninsula; and what they intended to give to the Russian Company was the Peninsula and the Aleutian Islands in Behring Sea, the west coast and what they proposed to take away from them was, down to $54^{\circ} 40'$ and the eastern side of the Behring Sea. And the United States suggest the Russian people did not know what they were talking about, and that "eastern" meant "western"; the words are—

in the district to the north-east of the peninsula of Alaska along the whole coast to the boundary of the British possessions—

that, of course, means from about Kadiak Island, where the line comes out, to $54^{\circ} 40'$,—

also on the islands lying along this coast, including in that number Sitka and the whole Koloshian archipelago, and also on land, to the northern extremity of the American Continent, the privilege granted to the Company of the exclusive prosecution of the said industry and traffic.

Or, in other words, they were to have nothing on the North-West Coast of America south and east of Kadiak Island or north of the

boundary of the Alaskan Peninsula there described as Cape Douglas, which is in Kenia Bay, which is just about the northern end of Kadiak Island, and the other Bay is over towards Bristol Bay.

Therefore, it proceeded to withdraw from the monopoly the eastern side of Behring Sea, and to retain to them the western.

Now, this is a conclusive argument against the United States contention, and how do they deal with it. I am afraid I must trouble you to look at page 77, volume I, United States Appendix, paragraph 15. This is the proposal for renewal in the year 1865. They proposed to reserve—

to the Russian American Company until January 1st, 1882, the exclusive right of engaging in the fur trade within the following limits, only: On the peninsula of Alaska, taking for its northern boundary the line from Cape Douglas, in the Bay of Kenai, to the upper shore of Iliamna Lake; upon all the islands situated along the coast of that peninsula, namely, the Aleutian Islands, the Commander Islands, the Kurile Islands, as well as upon the islands situated in Behring Sea, and along the whole western shore of Behring Sea.

And then, with a boldness to which in other Courts I might give a stronger name—but I will not before this Tribunal use any other word than boldness—they put a foot note,

it is clear from the context that it is intended to refer to the eastern shore of Behring Sea.

There is not the slightest warrant for it, if you will read on what they were going to withdraw:

As regards the region stretching northeast of the Alaska Peninsula, along the whole of the coast up to the boundary line contiguous with the possessions of Great Britain, and on the islands situated along that coast, including Sitka and the whole of the Koloshian archipelago, and likewise, on the continent of the northern part of America—

That was the eastern part of Behring Sea—as to which the privilege is to be abolished. Therefore, Mr. President, the stress of the argument leads the United States to this position, that they are obliged to rely upon a contention for which there is no affirmative support in the whole of the original documents, from the year 1820 up till the year 1865, and they are obliged to alter and change a word in an original Russian document, so as to make it meaningless, or otherwise their contention about the North West Coast falls to the ground. I submit that when a contention requires such arguments as that it is not one that will receive judicial support.

Now I will assume, for the purpose of my argument that I have satisfied you that Behring Sea was included in the words "Pacific Ocean" in the Treaties of 1824 and 1825, and that the only assertion of right which was made by Russia was the right contained in the Ukase of 1821 to prohibit the access of ships within 100 miles of her coasts on both eastern and western shores of Behring Sea as well as further down upon the coast.

Let me for a few moments remind you of the questions I have been examining before I pass on. The first Question as you know by heart is this:

What exclusive jurisdiction in the sea now known as the Behring Sea and what exclusive right in the seal fisheries therein did Russia assert—

It is not too much to say that Russia asserted nothing except that which is contained in the Ukase of 1821. That is the only assertion to which my learned friends are able to point—

—“and what exclusive rights in the seal fisheries therein did Russia assert and exercise?”

up to 1867? Mr. President, this is a Court in which, although the rules of evidence are fortunately in one sense lax—though matters of history, matters of repute and matters of report have been examined—although the widest range has been permitted to the United States to bring before this Tribunal anything which they can prove or produce in support of their allegation or assertion of an exercise by Russia, from beginning to end of the papers as they stand to-day—the Case, Counter Case, and oral or written argument—there is not a single act of exercise proved or even suggested by Russia. We stand in this position, that the Ukase of 1821, as was proved by my learned friend the Attorney General—and I will not go over that ground again—was never exercised or acted upon. The Ukase was withdrawn.

Senator MORGAN:—Before you leave that Sir Richard, how could Russia withdraw something she had never asserted?

Sir RICHARD WEBSTER.—The point would be this. I should be entitled to claim a wider finding on the part of Great Britain than I was prepared to admit, I was going to say, from the point of view of mere assertion.

Senator MORGAN.—I was speaking of the use and enjoyment for a great many years of the products of fur-bearing animals.

Sir RICHARD WEBSTER.—All I can say is this; speaking of this as exclusive jurisdiction, and assertion and exercise, there is not upon the high seas, or outside territorial waters, the suggestion of any exclusive enjoyment.

Senator MORGAN.—Then she had nothing to surrender.

Sir RICHARD WEBSTER.—I am sure it was my fault, but I was not speaking of surrendering; I never used the word “surrender”. I say the Treaty of 1824 and 1825 was a bargain by Russia she would not impede or interfere with the rights of the United States and Great Britain on the high seas. There is no question of surrender—there was nothing to surrender. Russia attempted to interfere. That interference had been protested against; that interference had been abandoned; and then there is the promise that Russia will not interfere again. But that is not a surrender; that is a statement made in the most solemn manner,—an acknowledgment that the attempted interference could not be insisted upon. But that is no surrender.

Take the case of my own country years ago, when she used to order that vessels should lower top-sails within a certain distance wherever they met a British ship or within some arbitrary limits. Ultimately a nation says: “I am not any longer going to do it.” To a nation that has never been put under that restriction, it is no surrender to say: “We will no longer *insist* on your doing it—it is an acknowledgment that we are not trying to enforce a right against you”. With great deference, the whole distinction is this: That the first Article of that Treaty did not grant or give to the United States, or to Great Britain, anything—they only acknowledged that Russia—I will not use the expression, had been *wrong* if it be thought that that be too much to say of a great Nation—that Russia no longer insisted upon a claim which, in a moment of inadvertence at the dictation of the Russian American Company she had thought fit to make. I do not call that a *surrender*—she had no rights which she was surrendering—she was simply saying: “I will not put a gate up; I will not hinder you from pursuing your lawful right.” I have (to put an illustration) the right to go along a certain road. A man puts a gate across it and stops me. I say to that man: “Take that gate down.” He says: “Yes, I will take it down; I will not put it up again.” That is no surrender. There-

fore I submit you have not to consider the question of anything more, for this purpose, than the assertion and exercise of exclusive rights in Behring Sea and in the Seal fisheries in Behring Sea—(not on the *islands*; nobody suggests we are talking about the islands in Behring Sea)—by Russia prior to the cession to America in 1867.

Senator MORGAN.—If you will allow me to call attention to it, you identify this fishery with the right of navigation and whale fisheries, or other fisheries if you please; and it is a matter open to argument to say the least of it, whether Russia in her Treaties of 1824 and 1825 intended to abandon what she had so long exercised,—the right of controlling the taking of fur bearing animals within Behring Sea.

Sir RICHARD WEBSTER.—With great deference, Russia had never controlled, or exercised any control over seal fisheries on the high seas of Behring Sea at all.

Senator MORGAN.—That is assumed by the other side.

Sir RICHARD WEBSTER.—Forgive me putting it to you—where is the evidence of it? Russia had never lifted hand nor foot with reference to the seal fisheries on the high seas, and I absolutely deny for this purpose, there is any difference between whales and seals. There is no greater crime committed by a person who shoots a seal on the high seas, than by a person who harpoons, or spears a whale. Do not ask me to argue the question of property at the present moment—I am not upon it; but with reference to the observation—I submit to you we are dealing with rights alleged in the seal fisheries properly so called in the high seas of Behring Sea,—Russia as to these had done nothing; and therefore arguing on the premiss with which you were good enough to start, couched in some general terms, that Russia had done everything to control the seal fisheries in Behring Sea, I submit—she had done nothing.

Senator MORGAN.—I am not making the assertion on my own part, I am only asserting what I suppose to be insisted on by the other side.

Sir RICHARD WEBSTER.—My word is no better and no worse than that of my friends Mr. Phelps and Mr. Carter—and I say their saying “Russia asserted and exercised rights,” does not prove it. Through the whole length and breadth of the books which I have read more than once—there is not a trace of Russia controlling or exercise any rights in seal fishing outside territorial waters in Behring Sea—not a vestige. Whenever Russia asserted rights—such as the notice to her cruisers to prevent people from landing—to prevent people going in territorial waters—to prevent persons from occupying places upon the land and becoming members of guilds and things of that kind—this notice had nothing in the world to do with the exercise of rights upon the high seas.

The PRESIDENT.—I think there are parts of documents which I have already alluded to whilst Mr. Carter or Sir Charles Russell was arguing—which implied, I will not say the assertion as Mr. Carter disclaimed the word, but the affirmation of the right by Russia of controlling the whole of Behring Sea—the theoretical affirmation at any rate of Russia considering herself as being in a manner *authorized* to control the whole of the Behring Sea.

Sir RICHARD WEBSTER.—Mr. President, I did not for a moment imagine you would think I was overlooking that. If it had been necessary for me to argue that Russia claimed to close the whole of this sea, there is distinct proof that she did so claim. Mr. de Poletica said in his letter—I quote from memory but I do not think I am quoting inaccurately—I would have you know that this sea has all the incidents of

shut seas—mers fermées. But my friends disclaim it. It is in my favor, Sir, to make that contention. Upon the mere question of assertion I care not how wide the claims of Russia were—my point was entirely upon *exercise*.

The PRESIDENT.—I suppose under the Treaty it is our duty to deal the question of assertion as well as the exercise of it?

Sir RICHARD WEBSTER.—I did not venture to dictate to you as to what construction you would put upon Russia's assertion. If you will remember, I spoke of it as an assertion of right by the Ukase of 1821. If that was an assertion of right, or if all the documents with which it was accompanied shew that it was an assertion of right to treat Behring Sea as a closed sea, I agree, it is your duty so to find. But my friends will not have that. My friends in the exercise of their judgment have thought fit to say: "Russia never did assert that right: Russia only asserted the right to exclude vessels 100 miles from its coasts as a defensive regulation; and they are pleased, in the exercise of their wisdom to say that was not—"

The PRESIDENT.—Sir Richard I am asking you for help if you please and if you can give it to me I am sure you will help us.

Sir RICHARD WEBSTER.—Certainly.

The PRESIDENT.—Suppose neither of the parties said that Russia asserted such a right, and that in our personal conviction Russia did assert such a right, what do you think the finding ought to be?

Sir RICHARD WEBSTER.—I think the finding ought to be in accordance with your conviction, Sir. But Sir, do not misunderstand me. I have not suggested that Russia did not assert a right—I simply said that the only assertion by Russia was contained in the Ukase of 1821, and that on the most narrow construction put upon that Ukase by my friends, it was an exercise by Russia of exclusive jurisdiction to the extent of 100 miles from its shores. If you are of opinion (and I cannot say you are not justified), that the real assertion of Russia was a right to close Behring Sea and more than the sea, and that the restriction to the 100 miles was in her discretion by the making of the law which she thought fit—I hope I make my meaning clear to you, Sir.

The PRESIDENT.—Perfectly clear.

Sir RICHARD WEBSTER.—I should have thought—but that is not for me—that it was your duty to express on the Award, what the assertion of Russia was. Of course the word "assertion" may be used in two senses. It may be used in the sense of asserting that which one intends to act upon, or it may be used as a theoretical assertion not intended to be acted upon.

The PRESIDENT.—More as an affirmation than an assertion.

Sir RICHARD WEBSTER.—Exactly.

Senator MORGAN.—Will you allow me to say that an assertion might be defined by acts of exclusive enjoyment and ownership without any declaration at all.

Sir RICHARD WEBSTER.—I am not at all certain from the point of view of assertion, if exclusion mean the exclusion, the shutting out other people it would not be the best form of assertion you could possibly conceive.

Lord HANNEN.—It would be exercise also.

Sir RICHARD WEBSTER.—It would then be exercise and assertion also.

Senator MORGAN.—Is not exercise the strongest form of assertion? The law of prescription in your country and in mine—in England and in the United States—is based on occupancy, on a property right or privilege existing for 20 years.

SIR RICHARD WEBSTER.—That really is involved in what I said, and Lord Hannen has, practically speaking, pointed it by the observation he was good enough to make.

In their Counter Case they say this. I am reading from page 19.

The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation on the other hand, to preserve for the use of citizens its interests on land by the adoption of all necessary even though they be somewhat unusual measures, whether on land or at sea, is so broad as to require no further exposition.

It is a very convenient thing to say that a thing is so broad that it requires no further exposition. I remember in one part of the case they say that something is much easier felt than expressed. But if you have not got a thing it is very much easier to feel it than to express it—I shall have to call attention to that on the question of property: but here they say the most simple minds can feel it, and therefore it is so broad as to require no further exposition. Then the passage proceeds:

It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

Now, Mr. President, in order that you may understand the fullness of my meaning, I would adopt any form of words with regard to "assertion" which would commend itself to this Tribunal upon consideration. I care not for my purpose whether the assertion amounted to an assertion of right to close Behring Sea—I care not for my purpose whether it meant only an assertion to exclude vessels within 100 miles from the shore—it is equally immaterial, because whatever it was, was contained in a written document, namely, the Ukase of 1821. The action under that Ukase was never persisted in, on the contrary:—I do not think you want me to go again through the Duke of Wellington's letters and those other letters which show that it was not acted upon.

The PRESIDENT.—No it is not necessary.

SIR RICHARD WEBSTER.—I am sure they are quite present to your mind and I submit that the so-called surrender was not a *surrender* of anything—it was an acknowledgment of the withdrawal of an assertion which Russia had thought fit to make according to the influences then controlling her, and no doubt as the Attorney General pointed out influences largely controlled and dictated by the Company.

The PRESIDENT.—Whether it is a surrender or a withdrawal makes no practical difference.

Mr. Justice HARLAN.—What you mean to say is that whatever, in the Ukase of 1821, was inconsistent with the Treaty of 1825, was annulled.

SIR RICHARD WEBSTER.—Now the second question is: How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? That is the next contention.

Senator MORGAN.—Before you get to that I would like to suggest this to you: That the common law of England (which is adopted also and practised in the United States: at least, adopted as a measure of right in the United States in regard to a great many privileges and powers and rights of property) contains a doctrine of title by prescription—20 years title by prescription.

SIR RICHARD WEBSTER.—I have heard of it, Sir.

Senator MORGAN.—Under which the Courts will presume the existence of a statute, will, grant, or deed, or anything, in order to secure the repose of society, and a quieting of litigation. Now with that as the origin or basis of the application of the doctrine of prescription,

nothing is needed at all, except to point to undisputed possession for 20 years.

Sir RICHARD WEBSTER.—*Exercised.*

Senator MORGAN.—Exercised, that is all that is needed. I understand an assertion by Russia of a right to property for instance, or a right of jurisdiction in Behring Sea might, as against the United States and Great Britain, to say the least of it, possibly be maintained—I do not say that it could; but it may be said as a ground of argument that it might be maintained on the ground that they had exercised these rights in respect of fur-bearing animals in Behring Sea—the right to control them, to take possession of them, make grants of monopolies or charters, upon the basis of the existence of such property there, and that that would amount perhaps to such an assertion as is mentioned in the first point in this 6th Article of this Treaty.

Sir RICHARD WEBSTER.—If I may respectfully attempt to answer you—I submit you do not help or elucidate the consideration by covering it up with generalities. Prescription is an undoubted principle both of the law of Great Britain, and, I believe, of the United States. Whether it has any application as between nations is a very much more doubtful point; but assuming it for this purpose—I think it an extremely doubtful point whether prescription has any application in such a case; but my answer, however, is a broader one—that in order to prove prescription, you must prove the existence of the right in respect of which the prescription is claimed and the exclusion of other people from that right.

Senator MORGAN.—There is no question of that.

Sir RICHARD WEBSTER.—And, in order to make one step in the direction of prescription, Russia (for I am speaking of Russia and the United States her successors) must prove this: that they alone enjoyed the right of catching seals on the high seas, and that they excluded other people from the right of catching seals on the high seas. I assert that you do not move one step towards arriving at the existence of a prescriptive right on the sea by proving you have killed seals on the land.

Senator MORGAN.—Possibly you might, by proving that you claimed the right to catch them in a certain area and that nobody else has interfered with you.

Sir RICHARD WEBSTER.—What area?

Senator MORGAN.—Behring Sea.

Sir RICHARD WEBSTER.—Now, we get much nearer the point, you will not find in the United States written Argument, a claim to exclusive jurisdiction all over Behring Sea. I could have understood this case in law, if the United States had had the courage of the convictions of some of her original advisers, and had claimed it as *mare clausum*,—I could have understood the contention which you have been good enough to put before me. But, Sir, with deference, I submit to your judgment that the moment you get to what my friend, Mr. Phelps, calls defensive regulations,—I am a little bit anticipating, but I cannot help it because you have been good enough to put the question to me,—the moment you get to what are called defensive regulations, or, in other words, the right to defend interests upon land—the right to defend these interests in territorial waters, you abandon and cut away the idea that you have a prescriptive right then to claim the area outside. The whole strength and virtue of Mr. Phelps' argument, to which I shall address myself to-morrow, in reference to defensive regulations, is that they have got no rights upon the high sea

itself; but, as he has said, even assuming they have no right in the seal, no right in the seal herd, only a right to carry on the trade on land, he contends, in accordance with principles that we think erroneous, that he has a right to defend that interest by certain acts on the high seas which he endeavours to justify.

But in answer to your question I do not hesitate to put before you and I do not hesitate to submit to your judgment that an assertion and exercise of rights upon land, an assertion and exercise of rights in territorial waters, cannot detract one iota from the rights of other people upon the high seas.

Senator MORGAN.—I admit that.

Sir RICHARD WEBSTER.—You can test it in a moment. Supposing the Indian fishermen or the native Americans had been catching these seals at sea, and it was desired to stop them. The United States could not stop them on the ground of prescription. There is no greater prescription against the pelagic sealer than there was against the Indian. Stop them by legislation, possibly; stop them because they are United States citizens, possibly; stop them upon the ground that you have a right to interfere with their action within certain distances from the shore, possibly: these would be the exercise of sovereign dominion. But upon the point of view of prescription—I do not hesitate to say that a claim based upon prescription or upon an assertion that exercise on land gives foundation to a claim upon the high seas, not only will not bear investigation or examination, but it is fair to my learned friends to say that you do not find any trace of that contention in their arguments, written or oral. I confess I think it would have required very considerable boldness for any lawyer to stand up and contend that a right exercised upon the Pribilof Islands or in the territorial waters of the Pribilof Islands could by prescription give a right to the seal off Vancouver, or off Cape Flattery, or four thousand miles off in the Pacific Ocean. I shall endeavour to meet, of course, the arguments upon which that claim of property is attempted to be justified when I deal with question five.

My answer, Mr. Senator Morgan, has been a little longer than I desired it to be, but I wished, out of respect for you, to indicate an argument which should answer the suggestion you made.

I come back to the point upon which your question was founded, the second question, or rather to the point at which I was speaking when you interposed your question.

How far were these claims as to the jurisdiction of the seal fisheries recognized and conceded by Great Britain? A man cannot recognize and concede that which another person does not do. You cannot recognize and concede a right of which you have no knowledge. This recognition and concession must mean recognition and concession of a right to exclude a British ship, recognition and concession of a right to stop pelagic sealing, recognition and concession of a right of property in the seals claimed by the United States. Sir, there is not from beginning to the end of this long chapter even a suggestion by my learned friends of a recognition of any right in that sense. Recognition that the islands belonged to Russia, yes. Recognition that the territorial waters belonged to Russia, yes. Recognition that those same rights of territory and waters belonged to the United States, unquestionably. But that we have recognized what was intended to be claimed here under the first question—what I submit to this Tribunal is that there is no evidence of either recognition or concession by Great Britain in any legal or—I was going to say—any moral sense

of the word; because no act of interference with the rights of Great Britain upon the high seas from the beginning to the end of this chapter has been indicated.

The PRESIDENT.—You mean to say that Russia did not attempt to interfere before the Treaty of 1825?

Sir RICHARD WEBSTER.—Or after, Sir.

The PRESIDENT.—The period after that time was regulated by the Treaty.

Sir RICHARD WEBSTER.—That is my point, Sir. I pointed out that the Treaties gave Russia no exclusive jurisdiction on the high seas in Behring Sea; and therefore I point out that there can be no recognition or concession by Great Britain of any exclusive jurisdiction by Russia on the high seas, either in respect to the seal fishery or anything else; because from the beginning to the end of the chapter there is no assertion by Russia followed up by exercise of anything which Great Britain has conceded at all.

The PRESIDENT.—I admit that is true since 1825, since the Treaty; but before the Treaty, would it be equally true?

Sir RICHARD WEBSTER.—Equally true. They do not suggest any act of interference before 1821, excluding the paper Ukase.

The PRESIDENT.—Do you not believe that the Ukase of 1821 was the original cause of the Treaty of 1825?

Sir RICHARD WEBSTER.—I think it was absolutely the cause. The treaties were a disclaimer by Russia of the Ukase—a disclaimer at the instance of Great Britain.

Lord HANNEN.—What you say is that though Russia may have asserted some rights she never exercised them?

Sir RICHARD WEBSTER.—And Great Britain never recognized them. I have passed for the moment, Lord Hannen, from exercise to recognition and concession.

Lord HANNEN.—I know you have.

Sir RICHARD WEBSTER.—And I was pointing out that the paper Ukase was protested against by Great Britain and was withdrawn at the instance of Great Britain.

The PRESIDENT.—But this paper Ukase which was in force from 1821 to 1825 was an attempt at exercise.

Sir RICHARD WEBSTER.—It depends upon what you call in force. Writing a piece of paper which is never acted upon is not putting a thing in force. The correspondence to which attention has been called by my learned friend Sir Charles Russell, shows that from the very earliest time instructions were sent to the Russian cruisers not to act upon the Ukase. I do not want to go into that further because I think it is in your mind. You remember, Sir, that it was stated—Sir Charles Russell read it more than once, I know—that the Ukase is practically suspended; that is to say from 1821. That is Mr. George Canning's letter.

The PRESIDENT.—That is what you call no exercise.

Sir RICHARD WEBSTER.—No exercise.

The PRESIDENT.—Perhaps it would be better to call it no assertion.

Sir RICHARD WEBSTER.—I was not referring to assertion; there is I submit no meaning in recognition and concession of an assertion. You recognize and concede the right. Of course you recognize that the assertion has been made. A man says, "I possess those fields." Of course you recognize his assertion the moment it is made; but...

The PRESIDENT.—I did not say that England recognized it; but perhaps a refusal of recognizing clashed with a pre-existing state of right or of assertion.

SIR RICHARD WEBSTER.—I must make my answer clear to you, Sir. I assert that before 1821 there is no instance of exercise at all; nor, for the matter of that, is there any assertion at all.

THE PRESIDENT.—I think we know about what went on at that time; that is as to the facts with which you are concerned, I mean.

SIR RICHARD WEBSTER.—I call your attention to the fact that from 1799 right away up to 1821 British vessels and American vessels were navigating and were trading in the waters affected by the Ukase; and more than that I called attention yesterday to the fact that Russia justified the making of the Ukase on the ground that the trade of the Russian-American Company was interfered with by foreign traders. I need only to remind you of it, Mr. President. My contention is that before 1821 there was neither assertion nor exercise by Russia; that in 1821 there was assertion, withdrawn in 1824–25 at the instance of the two countries, evidenced by the signing of the Treaties; that after 1821 there never was an exercise by Russia at any time.

MR. JUSTICE HARLAN.—You mean to say there was an assertion in 1812 to the extent of 100 Italian miles from the coast?

SIR RICHARD WEBSTER.—Or further, if it means further: it is not for me to say whether it means that or not—the learned President has been good enough to point out to me that the 100 miles might be merely a limit of their rights. It may be treated as an assertion of a still greater right; but for my purpose it is sufficient to say that there was an assertion of whatever the Ukase contained.

MR. JUSTICE HARLAN.—I think the printed documents in both cases agree in fact that it did not assert in 1821 jurisdiction over the open seas, outside of the 100 mile limit.

SIR RICHARD WEBSTER.—I am bound to say that M. Poletica in his letter says in so many words that the character of the coast and waters is such as to justify them in making it a shut sea and rather puts it as a matter of favour they did not extend their right.

MR. JUSTICE HARLAN.—He stated that they could assert it if they cared to do so, but that they did not care to do it.

SIR RICHARD WEBSTER.—That only involves the meaning of the word “assert” and what may have been meant by it.

I ask your attention for one moment only to make this concluding observation upon this. Supposing that ten years afterwards, we will say, in the year 1831, Russia had been minded to close Behring Sea or to close it down to latitude 51°, on the ground that it was a shut sea. I do not think that, assuming there was no Treaty, what M. Poletica said would be any bar to their attempting to close the sea at that time. I do not think that such a contention as this could be advanced on behalf of either Great Britain or the United States—“You indicated that you were only going to enforce your rights to 100 miles, and that prevents you from enforcing them further.” Had there been no Treaty, to use the language of a lawyer, Russia would not have been estopped from again setting up the case of *mer fermée*. I hope I have answered the question put to me. I have endeavored to do so, but I do not know that I have brought my meaning clearly to the minds of the Court.

THE PRESIDENT.—You have done so with great clearness.

SIR RICHARD WEBSTER.—I thank you. I need not argue again on question 3, “Was the body of water known as Behring Sea included in the phrase ‘Pacific Ocean’?”. I have argued that at length.

But I must say a word upon question 4. I confess, Mr. President, that I admire the courage of those who framed this Case and Counter Case. I must not distribute the merit too much; but I think General

Foster may claim a great part of the merit of the Case. But there is almost an amusing incident in connection with this fourth question.

The fourth question is whether the rights of Russia pass unimpaired to the United States; "Did not all the rights of Russia as to jurisdiction of the seal fisheries in Behring Sea east of the water boundary in the Treaty pass unimpaired to the United States?" Of course they did. There is no doubt about it, Sir. But that is not the way in which the question is attempted to be interpreted by my learned friends when they framed their case. As Lord Salisbury pointed out, and as they in their case remind us, Lord Salisbury said it was no part of Great Britain's contention that the United States did not get all the rights that Russia had. The question was what right had Russia asserted and exercised. But that is not sufficient for the United States. True to their instincts they desire to press it a little further; and on page 70 of the United States Case occurs a very remarkable statement:

On March 30, 1867, the Governments of the United States and Russia celebrated a treaty whereby all the possessions of Russia on the American continent and in the waters of Behring Sea were ceded and transferred to the United States. This treaty, which, prior to its final consummation, had been discussed in the Senate of the United States and by the press, was an assertion by two great nations that Russia had heretofore claimed the ownership of Behring Sea, and that she had now ceded a portion of it to the United States; and to this assertion no objection is ever known to have been made.

Sir, there is a very great deal of meaning in that word "ownership". I cannot help thinking that the very clever gentleman who drew this Case, thought that it might be prudent even still to keep open the question of *mare clausum*. The occasion might arise when the question of the position of the waters would be important. But what does "ownership" mean; because I am entitled to look at this, as matter of substance. The argument is this, Sir: The great nations, two of the greatest on earth, the United States and Russia, are making a bargain. That bargain is declaratory of some rights, and among others, the ownership in Behring Sea, and you, the other nations of the earth,— have objected to it. You have to come and make your objection, or otherwise it will be treated against you as a public assertion that Russia claimed the ownership of Behring Sea. What does it mean? I think, Mr. President, with your known experience in diplomatic matters, if you had had your attention called to that clause before I read it, you would have been a little startled, if you had been the representative of France, of your nation, or if the Marquis, as the representative of Italy, or Mr. Gram had happened to be the representative of Norway, and had been told that you had conceded the ownership of Behring Sea to Russia, and through Russia, of a portion of it to the United States, because you did not object to the Treaty. I may be wrong. It may be an accidental statement; but I confess, knowing what was passing, knowing some of the other paragraphs in this Case, it was meant to be used as an admission of ownership, in the sense of a right to the waters, on the sea as well as territorial. It is very curious that on page 72 they make use in this connection of Lord Salisbury's very candid statement:

The conclusion is irresistible from a mere reading of this instrument that all the rights of Russia as to jurisdiction and as to the sealeries in Behring Sea east of the water boundary fixed by the treaty of March 30, 1867, passed unimpaired to the United States under that treaty. In fact, the British Government has announced its readiness to accept this conclusion without dispute.

That is perfectly true, and I do not go back from that in any way. I should not be entitled to, and I do not; but that is a very different thing to a statement made that the two nations were asserting ownership in Behring Sea, and that the world is bound by it.

There is no difference in this matter, Mr. President, between Spain and France and Great Britain and China and Japan. All these nations, if this is a declaration of ownership, are bound by it—a declaration of ownership in the sense of meaning that the waters belonged originally to Russia, and now belonged to the two countries. But will you kindly look at the Treaty, sir? Does the treaty permit of such a contention? Again we find that the most ordinary and proper language, has, for the purpose of the necessities of the United States Case, been construed as conveying a great deal more than to an ordinary reader they would be thought to convey. I read from page 43 of the United States Appendix, Volume I; and I will take the English version, which is what Mr. Foster tells me is to be regarded as an original document, and I will not in any way attempt to complicate the matter by an examination of the French:

The United States of America and His Majesty the Emperor of all the Russias, being desirous of strengthening, if possible, the good understanding which exists between them, have, for that purpose, appointed as their plenipotentiaries: the President of the United States, William H. Seward, Secretary of State; and His Majesty the Emperor of all the Russias, the Privy Counsellor, Edward de Stoeckl, his Envoy Extraordinary, and Minister Plenipotentiary to the United States.

And the said plenipotentiaries having exchanged their full powers, which were found to be in due form, have agreed upon and signed the following articles:

ARTICLE I.

His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit:

That, Sir, does not look like an intention of Russia to sell the ownership of the waters of Behring Sea; and, mark you, Mr. President, if there is anything in this point, Russia has parted with the ownership, whatever it may mean, of the waters, in the sense of excluding herself. If there are to be any exclusive rights given to the United States by this Treaty, it is not a question of Great Britain alone, and the other Powers, but it is a question also of Russia.

Then the line is set out. That line, Mr. President, is our old line of demarcation, running along the *lisière*, and up to the 141st parallel of longitude. Then the western line of boundary is thus defined:

The western limit within which the territories and dominion conveyed are contained, passes through a point in Behring's Straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest, through Behring's Straits and Behring Sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Komandorski couplet or group in the North Pacific Ocean.

It is quite clear, Sir, that they thought the Komandorski group was in the North Pacific Ocean when this Treaty was made:

To the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Komandorski couplet or group in the North Pacific Ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian.

Would you let me run the pointer along that line, Mr. President? It goes over 20 degrees of latitude, right up to the North Pole. They have got all the islands on the right hand side of that line. If there are islands on the east of that line whatever they are, the United States have got them. Do they contend that the ownership of these seas was bargained for, publicly bought and sold, at auction, put up by Russia and sold to the United States, the highest bidder; and, to use their own expression:—“No objection was ever known to be made to this assertion of ownership of Behring Sea by Russia.”

Well, Mr. President, if my friend, Mr. Foster, will permit me to say so, it looks as if he had in his mind that it might be well not to close the door too much against *mare clausum*, in the event of it being able to hold water. That is not a very good expression for *mare clausum*, I suppose. There must be some way out. But still, in the event of the argument being able to be supported, it was rather prudent to allow that assertion of *mare clausum* to remain on the face of this case.

When you come to look at it from a common sense point of view, Mr. President, what is it? The islands in the east of the Sea are unknown. Many of them were not named. The number of them was not known. It was desirable that there should be no contention as to which island belonged to Russia and which belonged to the United States; and accordingly they say, all the islands east of that line—when I say east, I mean east in a general way, south and east of that line, on the right hand side of the line looking north—belonged to the United States. All the islands on the west, to the left hand side of that line, looking north, belonged to Russia. That is the extent, Sir, to which dominion over the seas was asserted. And I say again that it would be a sad thing for diplomacy, and a sad thing in the interest of the peace of this world if nations could create title for themselves by entering a document of that kind, and then say “You did not make objection to it”, when no reasonable being reading that Treaty, either in the French or in the English, would have drawn any other conclusion from it than that the islands and the territories on the right hand side belonged to one Power, and the islands and territories on the left hand side belonged to another Power.

Sir, Mr. Senator Morgan made an observation many days ago in this case that really points to the significance of the observations that I am making. He indicated that there had been cases in which, as between themselves, nations had agreed to make certain parts of the ocean territorial waters, and as between the United States and Russia, if they had agreed between them that for the purposes of their respective nationals the eastern side should be United States territorial waters, and the western side should be Russian territorial waters, no objection could be made at all so far as their nationals were concerned. That has been done in other parts of the world, as matter of contract. For example, Great Britain has agreed that the fishermen of France should have exclusive rights at certain distances from the French coast, and so France has agreed with regard to English fishermen, and so on, in other parts of the world. Therefore, in the point of view of a mere contract, it would have had no effect as regards other nations. But to suggest that a document which upon the face of it was framed in this reasonable and proper manner in order to avoid dispute in regard to territory is to be regarded as an assertion of ownership and a claim by Russia of ownership of Behring Sea, which all the nations of the world interested in the matter are supposed to have conceded, is pressing the matter rather far.

Senator MORGAN.—The case that I had the honor of referring to on that occasion was a Treaty agreement between the United States and Great Britain for the division of the Straits of Fuca, which are in the North Pacific Ocean, an open sea, and where the lines of demarcation between the two countries is sometimes 50 miles away from the shore, and never as close to the shore as 6 miles.

Sir RICHARD WEBSTER.—Mr. Senator, I think your recollection is a little inaccurate. But really, from the point of view I am contending for, I do not desire even to criticise what you have said. I only desire to say that the observation having fallen from you, I endeavoured to make myself acquainted with the matter. The Treaty you referred to is the Treaty of Washington, of 1846, which provided:

“That the 49th parallel should be the international boundary between the United States and British North America, from the Rocky Mountains to the middle of the channel which separates the continent from Vancouver Island.” The following is the text of Article one of said Treaty:

From the point on the 49th parallel of north latitude where the boundary laid down in existing treaties and conventions between Great Britain and the United States terminates, the line of boundary between the territories of Her Britannic Majesty and those of the United States shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver Island; and then southerly through the middle of the said channel of Fuca Straits, to the Pacific Ocean: provided, however, that the navigation of the whole of the said channel and straits south of the 49th parallel of north latitude remain free and open to both parties.

I do not know whether I have read it absolutely correctly. It has been extracted for me from the Treaty.

Senator MORGAN.—That is right.

Sir RICHARD WEBSTER.—I ought to mention that there was a subsequent dispute as to what channel was meant. That was referred to His Majesty William I, Emperor of Germany, who made an award with regard to the actual lines of the channel.

I should have thought it very doubtful—but of course I speak with great deference—whether the description given by the Senator as to this being clearly non-territorial waters was quite sound. Here is the map. Perhaps, Mr. President, you will take it before you. I remember it well enough. Remembering that which is undoubted, that many of the fiords of Norway and Sweden running up into the country for a great many miles, have been regarded as inland waters, embayed waters, I should have thought it very doubtful whether against other nations there was not what was regarded as territorial waters belonging either to one country or two countries, according as there might be one or two. But for my purpose, I really do not care to discuss it. I think you will find, Mr. President, that the Southern Boundary is Cape Flattery; there is a light-house there; and I am told that the widest place across is 40 miles, but it really makes no difference to my argument. I will take it from the Senator if he says I am wrong. In various places it is less, and in various places it runs up to 40 miles. It runs a very long way up into the land, Mr. President. From my recollection I should think it would be some hundred miles, at least.

What happened was this: that Great Britain and the United States agreed that there should be a boundary line between those nations, and that the navigation, as I read just now, should be left open. Has that any bearing whatever upon the question of what I may call international law with regard to the high seas?

Sir, if, as I have said, more than once today, the courage and convictions of the Senator had inspired the minds of those who framed the Case, and they had nailed their colors to the mast, and had brought up *mare clausum* in this Tribunal, I think that possibly then, a very slight argument might have been founded upon the Straits of Fuca Treaty; but I confess when *mare clausum* has been repudiated and scoffed at by my learned friends on the other side, I do not think they can get much argument in favor of their contention. Two great countries desiring to settle matters amicably agree as between their two possessions that the boundary of their territories should be a certain channel and a certain meridian.

As a matter of fact, sir, it was a case very parallel to the 1867 agreement. There were a large number of islands at the eastern end of that map. When you go towards the right hand end of the channel or the eastern end of the straits there are a very large number of islands. I think that map has the award line upon it, Mr. President. There was a discussion as to which channel was meant and the only effect of the treaty for our purpose was again to determine whether the islands upon one side of the channel should be British and the islands on the other side of the channel should belong to the United States.

Senator MORGAN.—You cannot abrogate the three mile limit.

Sir RICHARD WEBSTER.—That is so.

Senator MORGAN.—I merely mention this, Sir Richard—that in places the shores are 40 miles away from each other, and that has been considered the open sea ever since the discovery of the country, that is the place where pelagic hunting of seal was first practised and to which they resort now. It is a proper consideration for this Tribunal, I think, whether the parties have made it so by their pleadings or not. As suggested by the President of the Tribunal, it is a proper consideration as to whether that is not a part of the open sea which has been disposed of by two countries who claim the right to abrogate the three mile limit and claim the property on either side of the line in the open sea.

Sir RICHARD WEBSTER.—Well, Mr. Senator, it may have a bearing on the argument. If I could see it I would try and appreciate it, and if I could appreciate it I would deal with it; but answering your question to the best of my ability, I am unable at present to say that what might be called the three mile limit is abrogated in the section; but even if it were it would amount to nothing more than that as between those two nations, and as to that particular place, there should be a conventional line of division and a conventional line of territorial waters.

But may I be permitted for a moment to say that the point about that line was not the question of the right side or the left side, the starboard hand or the port hand of the line that went up and down the channel. It was the islands up at the eastern end; and that is shown by the subsequent discussion. Unfortunately the clever men who framed that treaty thought they did understand what the channel meant. It turned out they did not and accordingly the United States claimed a great many more islands than Great Britain thought they were entitled to. The Emperor of Germany made an award, laying down that line, the result of which was that the islands on the right hand looking up passed to the United States, and the islands on the left hand passed to Great Britain.

Senator MORGAN.—You remember that the proviso in Article 1 of that Treaty does not reserve the right of fishing.

Sir RICHARD WEBSTER.—What if it does or not? I am not sufficiently acquainted with the facts to say if the inference you draw is correct but I do say there is nothing in it which militates against my argument.

Senator MORGAN.—Perhaps not. I wanted to bring it forward as a division between two nations who claimed the soil on both sides of the Strait.

Sir RICHARD WEBSTER.—I do not happen to have before me what you said with regard to the existence of this Treaty, but I desire to point out this, that if the United States were claiming that the 1867 Treaty was to be regarded as being a division between the United States and Russia of the waters of Behring Sea in the same sense you were contending, it is possible there might be some analogy on the ground that those two nations meant to make it territorial waters; but unless the meaning is to be imputed to that word "ownership" on page 70 which the United States Case seems to indicate it would not be a parallel case.

Senator MORGAN.—I only cite it with the view of showing that this assumed doctrine of the 3 mile territorial limit said to be laid down and established by the law of nations is a doctrine which has been buffeted and kicked about by all the nations of this world according to their convenience.

Sir RICHARD WEBSTER.—Well, Sir, I do not know whether that argument finds favour with my learned friends, but I respectfully submit to you that the fact that a Treaty has been made varying the 3 mile limit as between themselves is neither a "buffet" nor a "kick" nor a "pouring of contempt or scorn" upon it; on the contrary, it is a recognition of there being a rule of that kind for the variation of it is to be by Treaty, and, so far from it affording an argument against me, it is an argument in my favour, because it was necessary that there should be a contractual arrangement between Great Britain and the United States to get rid of the disputed doctrine.

I hope I have not done wrong in calling attention to that matter because it seems to me to afford if anything an argument in our favour and not in favour of my learned friends.

Senator MORGAN.—Personally I feel very much obliged to you for your suggestion.

Sir RICHARD WEBSTER.—I am glad to be able to say except with regard to one or two general considerations affecting these first four questions, I believe I have substantially finished what I have to say about the first four questions, and I shall be able to devote myself soon after the commencement of the proceedings to-morrow to the consideration of the fifth question.

[The Tribunal then adjourned till to-morrow at 11.30.]

THIRTY-SECOND DAY, JUNE 2ND, 1893.

Sir RICHARD WEBSTER.—Mr. President, when we broke up yesterday, I was dealing with the Juan de Fuca Treaty; and I find that I made a mistake against myself of an important character, which I had better put right at once. I spoke of the entrance to those Straits as being 30 or 40 miles wide. I had not the chart before me; the only copy I had, I had lent to the Tribunal and I find I was inaccurate because the width is rather over 10 miles,—10½ miles wide—where the light is; and that extends for no less than 50 miles wide into the country. It is not for me to suggest what the Tribunal might decide; but all I can say is, having regard to decisions which are well known to me, I submit to you that there is no doubt those would be regarded as being enclosed and interior waters, as to which, quite apart from convention, many nations might consider they had rights of dominion.

I will merely mention one or two instances which have come under my notice in the course of reading this case. One set of instances has been mentioned by one of the Members of the Tribunal with regard to Norway. There are fiords in Norway, of varying widths at the mouth, which run up for 100 miles or so into the country. The question depends on the configuration of the country, the land enclosing them on both sides; and for many purposes, if not for all, those would be regarded as interior waters.

Then, the question arose in Great Britain as to the Bristol Channel at a point where it was 17 or 18 miles wide, which formed the discussion in a Criminal Court whether the crime of murder committed on board a vessel in the Bristol Channel was within the jurisdiction of the Assize Courts, which have only jurisdiction in the body of the county. There the Court of Crown Cases Reserved, which is the highest Court that we have in England in regard to criminal matters, decided that that space was within the body of the country, Lord Chief Justice Cockburn, I remember, delivering the judgment in the matter.

The PRESIDENT.—Was that before your law about territorial waters?

Sir RICHARD WEBSTER.—Yes, that was before the territorial waters law, and it marks the distinction that when the question of territorial waters arose in the *Queen v. Keyn* they were dealing with a three mile belt in the English Channel. I happen to know from having been engaged in the litigation between the "Franconia" and the "Strathclyde", that the "Franconia" was a German ship of which Keyn was the captain, and when passing through the Channel she came into collision with the "Strathclyde" within the three mile limit. A question arose on a charge of manslaughter brought against the Captain on the ground of the death of a passenger, there having been negligent navigation of the "Franconia," the negligent navigation not being disputed; it was decided for the purpose of that criminal jurisdiction that the three mile belt did not give the court jurisdiction, and in consequence of that the Territorial Waters Act was passed.

The PRESIDENT.—That was a matter of domestic legislation.

Sir RICHARD WEBSTER.—Entirely; but before that Act with reference to what I call the embayed and enclosed waters of the Bristol Channel, the question would depend upon the common law principle, and the principle of international law, that enclosed and embayed waters may become part of the dominion of the particular country; and I say with great respect to any argument that may be addressed on the other side, I do not think that my learned friends will find any authority to suggest that the waters in such a place as that shown on the chart, between ten and eleven miles wide at the mouth, extending 50 miles into the country, would not be regarded as otherwise than inland, embayed or enclosed waters. And the fact that they widen out to 35 miles among the islands would not remove that presumption. Of course, I do not withdraw the argument that I addressed to the Tribunal yesterday on the Treaty. The real object of that line was to determine to which nation the particular islands belonged on the one side and the other of the line laid down.

I was going to mention that a similar question arose with regard to Passamaquoddy Bay in the Bay of Fundy, and there are three or four cases where similar views have been adopted where the question turned upon the configuration of the land, the degree to which the sea was enclosed, and exactly the same considerations, Mr. President, as M. de Poletica had in his mind when, in that passage to which you called my attention yesterday he thought fit to say, erroneously it must now be admitted, the whole Pacific Ocean down to latitude 51° on the coast of the United States and of America, and latitude 47°, on the coast of Asia, had all the characteristics of shut seas and *mers fermées*.

The PRESIDENT.—Before you leave that subject, Sir Richard, I think it is my duty as the President of an International Tribunal, as this is, to remind you of the suggested distinction which you made and which you must keep to, between jurisdiction as it is fixed by internal law and international law—what may be and ought to be considered as international law. I perfectly admit that in such instances as this strait of Juan de Fuca and also in the case of the Norwegian fiords, that any nation, as far as it concerns its own nationals, has a right to fix the limits of her jurisdiction. That, I believe, everyone who has studied international law and every lawyer who is competent on the question, will admit. As to the international validity of such a pretension, that is another question, and I believe that we must stick to the point that it is a question in each particular case how far the general assent of particular seafaring nations may go. That is an open question, and may be solved differently, not only in different cases, but in different times. It may account for the ancient pretensions put forward by Great Britain in the time of Selden, which the Russians seem to have put forward as regards the Behring Sea in the time of M. de Poletica. It may account also for your explanation of the Treaty, which is also an explanation of Mr. Senator Morgan, between the United States and Great Britain as concerns the straits of Juan de Fuca. I myself will ask you not to accept any definite opinion about it, and I put my own reservation forward, inasmuch as I do not know how far this necessary regard of other nations may go. I will say, with all due respect for my very learned colleague Mr. Gram, that I would give it as an answer concerning the fiords of Norway. I find nothing incompatible with the extension of a three-mile limit principle to a larger extent, if and when the assent of other nations is secured. That is a question of fact; that is a question of tradition; that is a question open to examination. Under those reservations, I will ask you to proceed.

Sir RICHARD WEBSTER.—May I remind you, Sir, that what you have indicated is exactly in accordance with the view I ventured to present yesterday, and which the Attorney General presented, that the arrangement made by treaty between these two nations, the United States and Great Britain, in this case, would not in any way preclude other nations from contending that the terms of the agreement were not binding on other nations; but that other nations could contend they were waters of the high sea, and it would be a question, as far as other nations being bound, either of acquiescence and assent, or of the configuration of the land round the waters being such as, applying to the argument the principles of international law, they are to be regarded as being inland sea.

Senator MORGAN.—In order that another authority or citation of an instance may be examined by counsel on both sides, I desire to call attention to the action of Great Britain, the United States, the Netherlands, and France, in 1862 or 1863, in going to war with Japan and compelling her to admit merchant-ships to pass through the Straits of Shimonoseki. There, one of the feudal Princes, Prince of Negato, had fortified a pass through the Straits of Shimonoseki, which was not more than a mile and a half wide, and stationed three ships-of-war there, and the United States Government, leading off in one year, the British Government followed it the next, they succeeded in bringing Japan to terms, and compelling her to admit that that was part of the open sea. Four great nations were concerned in forcing her to admit that that strait, a mile and a half wide, was open sea.

Sir RICHARD WEBSTER.—I will gladly examine into that matter; but I would answer at once that the reply seems obvious. It is clear, whatever may have been the question of legal rights, the nations thought fit to enforce their claims by power, and not by the exercise of any legal rights. And I rather think it will be found the cause of the war, so far as Great Britain was concerned, was an actual attack on some of her vessels.

Senator MORGAN.—Yes. She claimed the ancient right to pass through as part of the high seas. That is all.

Sir RICHARD WEBSTER.—Now, I should like to pass from the subject if I may by reminding you that in a very celebrated case of Conception Bay, which formed the subject of discussion in the Privy Council, and is reported in our Law Reports, (in the 2nd volume of Appeal Cases, at page 420), the ground of the judgment as to the right to regard these waters and this bay as interior waters was put upon the acquiescence by other nations, and, therefore, that has been, as you most properly pointed out, one of the principal things to be considered in connection with any extension of territorial rights either in a particular locality or in the question of the general marginal belt which is to be regarded as being territorial waters, near to the shores of a country.

The PRESIDENT.—I am very happy to think that this question of the definition of "territorial waters" does not altogether lie before us. I know that it has given a great deal of trouble some 60 years ago in the case of the Plate River which was also a difficult instance to know where the open sea ends and the interior water begins. There are many difficult instances of that sort; but I believe the general principle is the general assent of seafaring nations.

Sir RICHARD WEBSTER.—Mr. President, as I said yesterday, in substance I had concluded all I desired to say on the four questions first enumerated in Article VI because you will remember my criticism or my argument upon them in connection with the Juan de Fuca Treaty,

arose out of the passage in the Counter Case and the Case to which I called attention, where the Treaty of 1867 was dealt with; and, practically speaking, I am almost in a position to pass to question 5.

One topic only I wish to notice before doing so. It is suggested more than once, in the United States Case and Counter Case, that whatever may have been the rights on the legal position with regard to these first four questions, the United States in purchasing Alaska had the seal industry in view, had the Pribilof Islands in view, and that induced them to give the sum of seven million dollars for that territory.

Sir, I desire to make a perfectly frank admission—that from the point of view of the legal rights of the United States, it makes no difference at all whether they knew of the Pribilof Islands, or did not; whether they knew of the fur-industry, or did not; and I admit their rights are as great and as large—that it strengthens my argument in no respect to show that they were ignorant either of the Pribilof Islands, the value of the fur-industry, or anything else. But it is at any rate right that I should, in a very few sentences, point out to this Tribunal, that the allegations contained in the United States Case, and the Counter Case, are not well founded, because it then removes from the claim of the United States what I may call some cause of equitable complaint, which otherwise might be supposed to be allowed to be invoked in their favor. The first of the two passages to which I refer will be found on page 74 of the Case of the United States speaking of the Pribiloff Islands and the fur trade, in these words:

Their value was well known to the American negotiators of the Treaty of 1867, and while it must be admitted that political considerations entered into the negotiations to a certain extent, yet so far as revenue to the Government and immediate profits to its people were concerned, it will appear from a careful study of the incidents attending the transfer of sovereignty that it was the fur industry more than all other considerations which decided the United States to pay the sum of seven million two hundred thousand dollars required by Russia for the cession and transfer of her sovereign rights and property.

Well, Sir, whoever is responsible for the framing of this Case—I must not, of course, speculate—all I can say is, it would have been more satisfactory to the Tribunal—perhaps, a little fairer to those who had to argue on the other side—if the incidents attending the transfer (the careful study of which will show that it was the value of the fur-industry that induced the United States to pay this price) had been stated. As far as we can gather from the evidence before the Tribunal the incidents are all the other way. I will in a moment call attention to what the evidence is, but in the Counter Case when the whole matter had been discussed by Great Britain in their Case (as I shall show directly) they repeat the allegation in these words.

It is to be found at page 30 of the Counter Case of the United States:

First. That soon after the discovery by Russia of the Alaskan regions, and at a very early period in her occupancy thereof, she established a fur-seal industry on the Pribilof Islands and annually killed a portion of the herd frequenting those islands for her own profit and for the purposes of commerce with the world; that she carried on, cherished, and protected this industry by all necessary means, whether on land or at sea, throughout the whole period of her occupancy and down to the cession to the United States in 1867; and that the acquisition of it was one of the principal motives which animated the United States in making the purchase of Alaska.

Mr. President, for a few moments, and for a few moments only, I will show you upon the evidence that neither of those allegations is well founded, and from the point of view of equitable claim to have the so-called industry protected on the ground of their having considered it in the price, the evidence does not support the contention of the

United States. Of course, one obvious comment arises at once, and that is this: it is a remarkable thing, if they had this knowledge, that for a year and a half if not for two years, they permitted the wholesale slaughter which, according to their own statement, and perfectly fair statement, to-day, was extremely detrimental to the United States. But I am not going to rely upon negative matters at all. I am going to rely upon positive and affirmative testimony with regard to this matter. I will call attention first, Mr President, to page 70 of the British Counter Case. The United States without mentioning any date had referred at pages 75 and 76 of their Case to a Congressional Committee which sat in the year 1888. They do not mention the date, but it is the fact that it sat in the year 1888.

Mr. Justice HARLAN.—1888?

Sir RICHARD WEBSTER.—1888; and that Committee is referred to as if it was of a much earlier date, but I have no doubt that was by inadvertence. The report of that Committee will be found on page 86.

General FOSTER.—It states the date. There is no inadvertence about it.

Sir RICHARD WEBSTER.—With deference, it does not.

General FOSTER.—At the bottom of page 77, it says it was the 50th Congress.

Sir RICHARD WEBSTER.—I beg General Foster's pardon. I have not such an intimate acquaintance as General Foster with these dates, and I do not suppose many members of the Tribunal have.

The PRESIDENT.—What date would that be?

Sir RICHARD WEBSTER.—1888, but I merely make the observation in passing, that to anybody reading the Case there is nothing to show that the transition at the bottom of page 75 from the period of 1867, refers to as late a date as 1888. On page 75 they refer to it in this way, after referring to Mr. Sumner's speech in 1867.

The Congressional Committee, after making various quotations from official and other sources, further states: It seems to the committee to have been taken for granted that by the purchase of Alaska—

The Tribunal will kindly note this.

the United States would acquire exclusive ownership of and jurisdiction over Behring Sea, including its products.

If that is anything, that is *mare clausum*. Then it goes on:

The fur-seal, sea-otter, walrus, whale, codfish, salmon, and other fisheries; for it is on account of these valuable products that the appropriation of the purchase money was urged.

Will you kindly note that the Congressional Committee so far even, from its report in 1888, supporting the statement that it was principally the fur-seals, say that it was:

Exclusive ownership of and jurisdiction over Behring Sea, including its products—the fur-seal, sea otter, walrus, whale, codfish, salmon, and other fisheries.

Then it goes on:

The extracts above quoted in reference to these products are emphasized by the fact that the fur-seal fisheries alone have already yielded to the Government a return greater than the entire cost of the territory.

It seems clear to the committee that if the waters of Behring Sea were the "high seas" these products were as free to our fishermen and seal hunters as the Russians, and there was, therefore, no reason on that account for the purchase. But it was well understood that Russia controlled these waters; that her ships of war patrolled them, and seized and confiscated foreign vessels which violated the regulations she had prescribed concerning them; and the argument in favor of the purchase was that by the transfer of the mainland, islands, and waters of Alaska we would acquire these valuable products and the right to protect them.

Again I note the evidence upon which the Congressional Committee was led to the belief that Russia had controlled the waters, and seized and confiscated vessels, and that they were going to get the ownership and jurisdiction over Behring Sea, does not appear. But having called attention to the Report of the Committee of 1888, of course at a time when the case was jurisdiction over Behring Sea and nothing else—when this idea of defensive regulations had not occurred to the fertile imagination of anybody—that report of the Committee having been referred to at page 70 of the Counter Case to which I was directing your attention, you will find what the contemporary evidence is. I read now from page 70:

No reference is made in the United States Case to the report of any previous Committee of Congress. Such reports, however, exist, and are of a directly opposite tendency.

Now I read from the Report of the Foreign Affairs Committee in 1876. That, Mr. President, as you will remember, is one year after the purchase.

Senator MORGAN.—Which House was that?

Sir RICHARD WEBSTER.—It does not say, Sir, but I will get it from the history of Alaska. At page 70 of the British Counter Case, you will find this:

The motives which led the United States Government to purchase them [Russia's American possessions] are thus stated in a report of the committee on foreign affairs published 18th May, 1868: "They were, first, the laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays, and rivers of the Western World; the refusal of Russia to renew the Charter of the Russia-American Fur Company in 1866; the friendship of Russia for the United States; the necessity of preventing the transfer, by any possible chance, of the north-west coast of America to an unfriendly Power."

I wonder whether that Committee thought that North-west coast meant from 60° down to 54°! It goes on:

The creation of new industrial interests on the Pacific necessary to the supremacy of our empire on the sea and land; and finally, to facilitate and secure the advantages of an unlimited American commerce with the friendly Powers of Japan and China.

I pass the reference here to Mr. Elliott. I shall have to refer to that later on and show that he was absolutely right; but I pass from that for the moment, as I do not want to argue on any contested matter. I am taking the reports from the official sources of the United States which are not suggested in any shape or way to be otherwise than worthy of credit. I call attention to the report of the evidence of Mr. Williams before that Committee of Congress to which reference has been made. It is quoted on page 72. He said:

I do not think, when the Government made the purchase from Russia, that any one outside of a dozen people, perhaps, who had been acquainted with sealing heretofore, had the slightest knowledge of there being any value in those islands, or that the Government was going to get anything of value outside the mainland of Alaska.

And, then, Mr. President, upon the suggestion that the value to the Government enhanced the price they were willing to pay, let me read an extract from the evidence of Dr. Dall, a gentleman who (as I shall shew at another stage of this case), has been more than once referred to by the United States, and whose evidence is used on other points; but I will read, merely for this purpose, the extract set out at page 73:

I said that in 1866 (not "in the early days of the industry") I purchased first-class fur-seal skins at 12 1/2 cents a-piece, that being the price at which they were sold by the Russians. The point of this observation lies in its application to the oft-repeated

statement that, as Mr. Palmer says, 'little stress was laid upon the fact that fur-seals were found in abundance' at the time of the purchase of the Territory by the United States. No stress could reasonably have been laid upon it, since 100,000 seals would at that time have been worth only some 12,500 dollars, which would hardly have paid for the trouble of taking them. Of course, almost immediately afterwards this was no longer true.

Now, Sir, I said yesterday, and I venture to repeat the observation to-day, this is a Tribunal in which, although the rules of evidence are properly extremely free, liberal and lax, yet still the assertion of Counsel, the assertion of Agents in the case, go for nothing unless there is evidence to support them; and I submit to this Tribunal that it is not in any way proved,—not only is it not proved, but I have shown evidence before this Tribunal which, speaking of contemporary utterances,—speaking of contemporary documents,—shows that the United States did not in any way regard either the Pribilof Islands or the fur-industry as bearing upon the question of price which they were willing to pay.

The PRESIDENT.—Perhaps, in reference to this last quotation from Dr. Dall, do you not think that perhaps the low price paid for fur-seal skins would have been owing to the circumstance that fur-seals were not yet hunted in that time, and that sea-otters were more likely to have been hunted?

Sir RICHARD WEBSTER.—I think that is highly probable.

The PRESIDENT.—And those had but a small value.

Sir RICHARD WEBSTER.—It strengthens my remark. I am not on the question of what the *cause* was; I am on the question of fact, that the allegation that the United States were being hardly dealt with because they paid for this a high price, is unfounded on the facts of history, and upon the facts which are before the Court. Now, let me pass from that.

Mr. Justice HARLAN.—Did not Mr. Sumner in his speech refer to the immense number of fur-seals?

Sir RICHARD WEBSTER.—I should like to be allowed to answer that. I did not mean to refer to it because it would certainly, to an extent, trespass upon what I may call contentious matter,—certainly not in the sense of enhancing the value of the purchase; but, as I am challenged, I will read the passage.

Mr. Justice HARLAN.—I do not mean to challenge you, Sir Richard.

Sir RICHARD WEBSTER.—I beg Judge Harlan's pardon; I did not mean in that sense.

Mr. Justice HARLAN.—I think the passage has been read once; and it is not worth while to read it again, unless you want it.

Sir RICHARD WEBSTER.—The passage to which I was going to refer has not been read. I really should not have troubled about it, but that you were good enough to indicate to me that perhaps my statement might be a little too wide. I do not think it is at all.

The summary of the advantages which is referred to in the citation of Mr. Elliott which I did not read (at page 70 of the British Counter Case), is to be found at page 88 of volume 1 of the Appendix to the British Case; and it really does rather point the strength of my observation, although I can assure the learned Judge I did not mean to refer to it again. I had quite sufficient else to say, and I should not have referred to it, but for his calling my attention to it. Mr Sumner had given a very long and elaborate description of all the various industries. He had referred among others (as the learned Judge has reminded me), to the capture of seals, of sea-otter, and of other fur-

bearing animals; and then the summary to which Mr. Elliott's referred in his passage,—and which it was suggested by the United States Counter Case to be an inaccurate reference,—is in these words.

Mr. President, I now conclude this examination. From a review of the origin of the Treaty, and the general considerations with regard to it, we have passed to an examination of the possessions under different heads, in order to arrive at a knowledge of their character and value; and here we have noticed the existing Government which was found to be nothing but a Fur Company, whose only object is trade; then the population, where a very few Russians and creoles are a scanty fringe to the aboriginal races; then the climate, a ruling influence, with its thermal current of ocean and its eccentric isothermal line, by which the rigours of that coast are tempered to a mildness unknown in the same latitude on the Atlantic side; then the vegetable products, so far as known chief among which are forests of pine and fir waiting for the axe; then the mineral products among which are coal and copper, if not iron, silver, lead, and gold, besides the two great products of New England "granite and ice"; then the furs including precious skins of the black fox and sea-otter, which originally tempted the settlement, and have remained to this day the exclusive object of pursuit; and lastly, the fisheries, which, in waters superabundant with animal life beyond any of the globe, seem to promise a new commerce to the country. All these I have presented plainly and impartially exhibiting my authorities as I proceeded. I have done little more than hold the scales. If these have inclined on either side it is because reason or testimony on that side was the weightier.

I ask for no stronger testimony in refutation of the allegation that the principal thing that influenced the United States in paying the 7,000,000 of dollars was the fur industry, than that passage from Mr. Sumner, who was advocating the purchase before Congress; and to any impartial mind—I lay stress on the observation and I ask criticism upon it—is it not clear that Mr Sumner was expatiating upon the fisheries, upon the mineral products, upon timber, upon trade and commerce and, if you like, upon trade in sea-otter and the other animals mentioned, the black fox, and things of that kind? No candid statesman, as Mr. Sumner was, if he meant to say "You are to pay \$7,000,000, because the seals from these little dots of Pribiloff Islands are worth it all"—if that had been the main inducement, would have left it out. I was only induced to follow this up, because of the somewhat extravagant allegations in the Case and Counter Case of the United States. I say, let the United States have the benefit of it, only do not let them parade before the Tribunal that they are being deprived of anything for which they paid so many dollars.

Mr. Justice HARLAN.—On page 79 of that document you will see Mr. Sumner goes into details of all the other kinds of animals, stating, among other things: "That from 1787 to 1817 for only a part of which time the Company existed, this Unalaska district yielded upwards of 2,500,000 seal skins". Near the top of page 81, you see he does refer to the seals.

Sir RICHARD WEBSTER.—I never said the contrary.

Mr. Justice HARLAN.—I know.

Sir RICHARD WEBSTER.—My point is that neither the value to Russia, nor the value to the United States of that trade or industry, is suggested or referred to. The fact of that strengthens my point. If I might be permitted simply to argue what seems to me to be the fair result of what you have been good enough to put to me, it strengthens my point; it shows that the knowledge of the capture of those seals was in the mind of Mr. Sumner, whatever extent it was, but that as an element of value to the United States it is not enumerated when he is speaking in a summary of what the objects of value were. I might say that the Foreign Committee about which Senator Morgan asked, seems to have been the Foreign Committee of the House of Representatives in 1876.

Senator MORGAN.—I am asking this question for information—does the evidence anywhere show that, at the time, a fishery of any description—either a whale fishery or what we call a fur-seal fishery had been established in Behring Sea—a cod fishery or halibut fishery?

Sir RICHARD WEBSTER.—According to my recollection of the evidence I do not think fisheries had been established, but large quantities of cod and halibut had been caught.

Senator MORGAN.—In Behring Sea?

Sir RICHARD WEBSTER.—In Behring Sea, but not a fishery established in that sense that I know of—vessels going there to fish.

I know of persons catching in Behring Sea large quantities of cod and large quantities of cod close to the Pribilof Islands—that is a matter which I will call attention to when I come to address the Tribunal on the matter of Regulations, but it is nothing to do with my particular point. I believe, Senator as far as my present knowledge goes—I speak subject to correction—there is no evidence of the establishment of what I may call regular trading fisheries of either cod or halibut, in the waters in question.

The PRESIDENT.—You are not aware of any fishermen having claimed against the existence of these fish-devouring animals, the seals?

Sir RICHARD WEBSTER.—I do not think, beyond the objection made by the Board of Trade of the town, and the important town to which we directed and were happy enough to be enabled to direct the attention of Mr. Phelps,—beyond that particular reference to the town of Port Townsend—

Mr. PHELPS.—Port Townsend.

Sir RICHARD WEBSTER.—Port Townsend—I will not attempt to follow it up, because Mr. Justice Harlan did not want in any way to do otherwise than to see that my argument was not stated in too strong language, but certainly the reference to furs in page 77 speaks of them as having, “at times vied with minerals in value, although the supply is more limited and less permanent”. I cannot help thinking it was a very doubtful element of value—certainly it was not represented an element of value in any document that I am aware of.

Now Mr. President, I cannot forbear reminding you, once more, of the position that the committee took up in the year 1888 following out the line which was then the case of the United States, namely, that it was taken for granted that by the purchase of Alaska the United States would acquire exclusive ownership and jurisdiction over Behring Sea. Had they any warrant for saying that was taken for granted? Would the Tribunal kindly oblige me by looking at page 100 of the British Case where, at the very first inception of this matter, before we knew anything that the United States would say except what appeared in the diplomatic correspondence, we pointed out the impossibility of contending that the waters of the Behring Sea were *mare clausum*; and strangely enough to a certain extent, although not directly, it answers Senator Morgan. Mr. Sumner referring to whale fishery said:

The narwhale with his two long tusks of ivory, out of which was made the famous throne of the early Danish kings, belongs to the Frozen Ocean; but he, too, strays into the straits below. As no sea is now *mare clausum*, all these may be pursued by a ship under any flag, except directly on the coast and within its territorial limit. And yet it seems as if the possession of this coast as a commercial base necessarily give to its people peculiar advantages in this pursuit.

Perfectly true, Mr. President, as was pointed out in connection with the subject by my learned leader, the Attorney General, when he was pointing out that it was because the possession of the coast in prox-

imity to the fishing with facilities of going and returning, in obtaining food, drying fish and a variety of other things, enables the inhabitants to exercise to a greater extent the privilege that all others enjoyed—that, as Mr. Sumner put it with prudence and judgement—

The possession of this coast as a commercial base must necessarily give to its people peculiar advantages in this dispute.

Then Mr. Washburn, of Wisconsin, spoke in this debate—this is the evidence upon which it is supposed to be taken for granted that it was *mare clausum*—Mr. Washburn said:

But, Sir, there has never been a day since Vitus Behring sighted that coast until the present when the people of all nations have not been allowed to fish there, and to cure fish so far as they can be cured in a country where they have only from forty-five to sixty pleasant days in the whole year.

Then Mr. Ferris, speaking in 1868, said:

That extensive fishing banks exist in these northern seas is quite certain; but what exclusive title do we get to them? They are said to be far out at sea, and nowhere within 3 marine leagues of the islands or main shore.

Then Mr. Peters refers to this and says:

I believe that all the evidence upon the subject proves the proposition of Alaska's worthlessness to be true. Of course, I would not deny that her cod fisheries, if she has them, would be somewhat valuable; but it seems doubtful if fish can find sun enough to be cured on her shores, and if even that is so, my friend from Wisconsin (Mr. Washburn) shows pretty conclusively that in existing treaties we had that right already.

Then occurs a long reference to Mr. Williams which I do not desire to read, because it is only on the same point. But perhaps I had better read the first passage. It is this:

Or is it the larger tenants of the ocean, the more gigantic game, from the whale, and seal, and walrus, down to the halibut and cod, of which it is intended to open the pursuit to the adventurous fishermen of the Atlantic coast, who are there already in a domain that is free to all?

Here, Mr. President, was the time when, if it were true that the motive to be urged upon a reluctant House of Representatives to vote the money was the value of the fur-seal fisheries, and the closed nature of the waters, we should have found the counter-reply. We have nothing of the kind; and I leave this branch of the case with the submission to this Tribunal that neither in law, nor in equity, nor in justice in the higher sense of the word, have the United States people ever acquired from Russia any rights which they are entitled to exercise now, to the exclusion of Great Britain, France, Japan, Russia, and all other countries that choose to send a ship there hunting and fishing for seals upon the high seas; and that the same law with regard to those animals on the high seas, in so far as we are dealing with the first four questions, applies equally in the case of whales, seals, walruses, cod, and numbers of other fish, well-known to my friends, which can be caught, and probably will be caught, in increasing numbers in these waters as the demands of population and the increase of civilization by that cause creates a market for them, and facilities increase for transit of the products when they once have been taken from the deep itself.

I ask the Tribunal now to permit me, at some little length I am afraid, to deal with the contentions of my learned friends Mr. Carter and Mr. Phelps, supplemented by that of Mr. Coudert, on the question of property.

Mr. Justice HARLAN.—Before you go to that new point, Sir Richard, let me make an enquiry about some documents. You are so familiar

with them, that I know you can readily answer me. You remember the two drafts that passed between Great Britain and Russia in respect of the Treaty of 1825?

SIR RICHARD WEBSTER.—You mean the *projet* and the *contre-projet*?

MR. JUSTICE HARLAN.—Yes. It appears from the letter on page 72 (vol. II. Appendix to Brit. Case), of December the 8th, 1824, from Mr. George Canning that, he sent to Mr. Stratford Canning an amended *projet*; that is one showing such additions and alterations as he would consent to for the guidance of the British Minister at St. Petersburg.

SIR RICHARD WEBSTER.—You meant, that Mr. George Canning sent it to Mr. Stratford Canning?

MR. JUSTICE HARLAN.—Yes; and he had that third *projet* of the British Government in his hands when he concluded the Treaty. I want to enquire if that document appears in the case?

SIR RICHARD WEBSTER.—Well, I do not think he had it in his hands when he concluded the Treaty, though of course he had it. It is clear the first two Articles were taken from the American Treaty, as I mentioned to you yesterday.

MR. JUSTICE HARLAN.—On page 79, Mr. Stratford Canning writes to Mr. George Canning showing that he had presented this new *projet* to the Russian Minister, and some discussion arose about it.

SIR RICHARD WEBSTER.—I have never seen it, and I do not think that that third document, as you very properly called it, being a modification of the Russian *projet*, appears in the papers. We have no means of access to anything else except what is here.

GENERAL FOSTER.—I would like to suggest that my attention was not brought to that reference till it was too late, under the Treaty, to make an application for it.

SIR RICHARD WEBSTER.—If General Foster desires the document, and it is in our possession, he shall have it. We have never raised any question of time; and I may be allowed to say that General Foster has never asked for the document, or expressed a wish to have it, though there are other documents that he has had quite independently of any question of time. Of course, I make no grievance about it; but if General Foster says he would like it looked for, it shall be looked for. My answer to the Judge was that I did not think it was in the papers. I have never seen it; and, more than that, my attention has not been called to it till this moment.

MR. JUSTICE HARLAN.—I followed your argument yesterday very closely, and I took these papers home last night, and studied them carefully, and my attention was called to it then for the first time. That was the reason I asked the question.

GENERAL FOSTER.—I now express a most earnest desire to see it.

SIR RICHARD WEBSTER.—If General Foster had given us the slightest indication, we should have endeavoured to get it.

MR. TUPPER informs me that a search was made, and it could not be found. As far as I am concerned, I should be only too glad to have it, because I know nothing more than what appears in the papers now.

THE PRESIDENT.—It may be in the Foreign Office in London or in St. Petersburg.

SIR RICHARD WEBSTER.—I will make a further enquiry about it. As far as I know, it can only support the contention I urge before you. Mr. Tupper had better state to the Tribunal himself what he knows about it.

THE PRESIDENT.—Certainly.

Mr. TUPPER.—I may say, Mr. President, that that document seemed to me to be of importance; and, during the preparation of the Case, I made enquiries at the Foreign Office in London. A search was made there, and, if my memory serves me right, and my memory is confirmed for the moment by Mr. Maxwell of the British Staff here, an enquiry was also made at St. Petersburg for the same document; but our efforts were unsuccessful.

Sir RICHARD WEBSTER.—We have conducted this case hitherto on perfectly friendly terms; and I hope the Tribunal will understand that the interruption by General Foster, which is quite fair enough, that he would like to see this document was the first intimation, as far as we know, of his having a wish on the matter. We should, of course, if we had had it, have had the document with our papers.

Mr. Justice HARLAN.—Then, on page 41 of the same volume, referring to the settlement of Sitka before the Treaty, Sir Charles Bagot says it,

is not laid down very precisely in the map published in 1802 in the Quartermaster-General's Department here, or laid down at all in that of Arrowsmith, which has been furnished to me from the Foreign Office.

I find, among the maps, a copy of this map of 1802, and I wanted to enquire if a copy of the map of Arrowsmith is in the case anywhere? I see from your list, there was one of Arrowsmith.

Sir RICHARD WEBSTER.—I referred to it yesterday.

Mr. Justice HARLAN.—It was published in 1822 with additions to 1823. That is the map numbered 98; and I wanted to know if a copy of it was in the case. It is referred to on page 100 of the British Counter Case, Volume 1, map N^o 98.

Sir RICHARD WEBSTER.—If you would look at page 96, you will find Arrowsmith's Chart of the Pacific Ocean, originally published in 1798 with corrections to 1810. That I know we have; I should think it was the same map.

Mr. Justice HARLAN.—That was published in 1810.

Sir RICHARD WEBSTER.—Originally published in 1798.

Mr. Justice HARLAN.—But I suppose, from the language of Sir Charles Bagot, the map he refers to is the one of 1822 with additions to 1823.

Sir RICHARD WEBSTER.—Where does Sir Charles Bagot refer to it, Sir? On page 41, he refers to the one of 1802.

Mr. Justice HARLAN.—That is the Quartermaster-General's map that you furnished.

It is not laid down there (that is, the map published in 1802) in the Quartermaster-General's Department here, or laid down at all in that of Arrowsmith, which has been furnished to me from the Foreign Office.

I suppose that is the British Foreign Office?

Sir RICHARD WEBSTER.—I should think so.

Mr. Justice HARLAN.—And the map in your list nearest to that date is one of 1822 with additions to 1823. It is N^o 98.

Sir RICHARD WEBSTER.—I should have doubted if that was it. It was a map of America. I should have thought it was more likely to be the map of the Pacific Ocean.

Mr. Justice HARLAN.—There are a large number of maps,—there is one of Arrowsmith in 1802; one in 1804, and one in 1809, and one in 1811,—reading from your list.

Sir RICHARD WEBSTER.—You see this map was sent by the Foreign Office to Sir Charles Bagot at St. Petersburg. We have not been

able to find it at the Foreign Office; and it by no means follows that it would have come back. We should only have such papers as he sent back.

Mr. Justice HARLAN.—Would it be in the British Museum?

Mr. TUPPER.—No, this was not. We were unable to identify it.

Mr. Justice HARLAN.—From what source was that memorandum obtained on page 100, N^o 98? You give there a list of maps.

Sir RICHARD WEBSTER.—That I have no doubt can be obtained.

Mr. Justice HARLAN.—That is the one I am enquiring about.

Sir RICHARD WEBSTER.—But there is nothing to identify it with the map referred to in Sir Charles Bagot's letter.

Mr. Justice HARLAN.—No; but it is the one in your list nearest to the date of his letter; that is all. There is one there of 1818; and those maps together might be of some value.

Sir RICHARD WEBSTER.—It seems to me, but it is entirely for you to say, there are many other Arrowsmith's maps that would quite as nearly correspond. The coincidence of the date is a very small matter indeed; because the one you referred to of 1773 has additions up to 1823. This letter was written in August, 1823, and it by no means follows that the publication was before this date. I only submit it for your judgment. After all, it is very untrustworthy. It is corrected up to 1823, but that may be the end of 1823.

Mr. Justice HARLAN.—And it may be the map of 1818 of Asia by Arrowsmith.

Sir RICHARD WEBSTER.—Or the large Chart of the Pacific Ocean, N^o 40, published in 1810. You know that when these corrections come home, they have to be plotted out and printed, and it by no means follows that corrections to 1823 would be published in that year; more probably, it would not be so.

Mr. Justice HARLAN.—You may be right about that.

Sir RICHARD WEBSTER.—Anyhow, I am not able to give you further assistance.

The PRESIDENT.—If that map of 1822 was used, would it not be in your favour?

Sir RICHARD WEBSTER.—I was not considering the effect of my answer one way or the other; I was endeavouring to give the Judge the information he wanted. I do not think my argument depends on any particular map; but I trust I made clear to the Tribunal yesterday that between the Contracting Parties there was no doubt about what they meant either by reference to "Pacific Ocean" or "North-west coast."

When Mr. Justice Harlan was good enough to put those questions to me, I was passing on the 5th question in the Treaty, and I will indicate to the Tribunal the course I propose to adopt. I propose to examine Mr. Carter's and Mr. Phelps's argument with reference to the question of the right of property. I propose to examine Mr. Phelps's argument as to the right of protection, for he has more pointedly dealt with that matter—though it is quite fair to Mr. Carter to say that he has used arguments in his able speech incorporating the main features of Mr. Phelps's argument; and therefore I do not consider that there is any distinction between Mr. Carter and Mr. Phelps in that respect. Then I should propose to say a word or two on a suggestion which fell from Senator Morgan, and which has arisen incidentally more than once in the course of this discussion as to what the function of this Tribunal is in answering Question 5.

There are minor differences between Mr. Phelps and Mr. Carter as to whether the United States have got the right to kill all the seals on

the islands to which I am not going to refer further. I leave that very interesting subject of discussion for the next occasion when Mr. Phelps or Mr. Carter in the United States or in England, as I hope, meet on some platform where political economy and the abstract question as to the rights of property are being discussed: and I shall relegate to that occasion the question whether property is robbery, and whether the rights of the United States and of Great Britain to dispossess natives of their territory and to possess themselves of it, is the exercise of a legal right, or is a development of that principle which, years ago would have been called the force of arms. My learned friend Mr. Carter has kindly taken under his wing and protection all the various acts, not altogether justifiable, which have been done by Great Britain and by the United States in the past and reduced them all to a philosophic basis. It seems to me, if I were to endeavour to follow him, I should soon get out of my depth, and I am certain that I should not assist this Tribunal. Therefore, I will confine myself to the legal aspect of these questions.

Sir, my learned friend Mr. Carter, turned from the four questions, after a considerable discussion upon them, with a sense of relief, and he said, on page 364 of the report of his speech,—

I approach with satisfaction a stage of this debate where I have an opportunity for the first time of putting the claims of the United States upon a basis which I feel to be impregnable. I mean the basis of a property interest. Now the United States asserted a property interest connected with these seals in two forms which, although they approach each other quite closely, and to a very considerable extent depend on the same evidence and the same consideration, are yet so far distinct and separate as to deserve a separate treatment.

And then he discussed the question of property in the seals and property in a seal "herd".

Mr. President, the traditions of my profession prevent me from being able to say that any answer which I can give to this proposition places Great Britain in an impregnable position, but I hope, as I said yesterday, that my arguments will not receive less attention or less consideration from this Tribunal if I abstain from endorsing them by personal opinions; I may in the heat of the moment be misled into using expressions which would look as though I was referring to my personal opinion, one cannot avoid doing so particularly in answer to questions put by the Tribunal, but I hope they will understand that I submit my argument to their judgment without craving any additional weight from the fact that I may be of opinion that my position is impregnable or the reverse. I mention that because otherwise those who may be good enough to read my argument may think that because I do not express personal opinions or personal belief in the merits of my case, therefore the case is entitled to less consideration, or my argument to less respect.

Now the proposition has been stated by my learned friend Mr. Carter many times over and pretty much in the same language; and it is only necessary for me to give one citation for the purpose of reminding you of that to which I am about to address myself. He said (the particular reference is at page 464 of the report before you):

Wherever an animal although commonly designated as wild, voluntarily subjects itself to human power to such an extent as to enable a particular man or a particular nation to deal with that animal so as to take its annual increase and, at the same time, to preserve the stock, it is the subject of property.

You will remember, Mr. President, that in an argument extending over a very considerable time, my learned friend the Attorney General dealt with that argument—and I could not with advantage supplement what he said by any detailed examination of the main principles on

which it is based. He pointed out that in the sense of subjection by the seals to the control of man, in the sense of the same voluntary subjection which takes place when the tame horse or tame pig or any other animal of that kind which may have been originally wild comes, and with dumb language, if I may use such an expression, asks to be fed or to be let into its stable—he pointed out that in that sense there was no subjection by the seal to the control of man and he pointed out further that this doctrine that property depended upon a particular individual being able to take the annual increase must be ill-founded, for otherwise it would have given a claim to property in many cases, if not in every case, in which the law of all civilized countries has rejected it. I do not propose to follow my learned friend, the Attorney General, in detail into those arguments.

He further struck, I submit with effect and successfully, at that which my learned friends Mr. Phelps and Mr. Carter have assumed to be so clear, that no argument was desired to support it and any comprehension could retain it: namely that a property in the seal "herd", as distinct from a property in each individual seal, was clear and intelligible, so that no demonstration or proof were necessary in support of such a contention. I may be permitted only in a single sentence to say that I have been—it may be the fault of my intelligence—unable to understand how, if there is no property in the individual seal, there can be a property in the aggregate of individual seals which forms the "herd". Upon none of these points, though they occupy a very important portion of my learned friend Mr. Carter's argument, and of the Attorney General's reply, do I feel it necessary to trouble this Tribunal with a lengthened argument. I have indicated sufficiently, my concurrence in the view which the Attorney General presented to the Tribunal. But I now come to that which in my submission is the vice which lies at the root of the argument written and oral, on behalf of the United States, a vice, I humbly submit, which, the moment it is recognised and appreciated, destroys to a large extent the value of the contention in respect of property. That vice is this, that the United States are unable, so far as their argument discloses it to us, to see any difference between the right which a man has to kill wild animals when they happen to come upon his land, and the right of property in the animal whether it is on the man's land or not. Over and over again in the course of the interesting argument of my learned friend Mr. Coudert, relieved as it was, as you Mr. President pointed out, by brightness in many points, he stated this proposition, and said it was so self-evident and so convincing by its mere enunciation that he would wait till the other side were heard; in fact, he treated it as an admission by us. I could refer to many passages; for instance at the very beginning of his speech—I refer to page 554—he said:

Now to start from a point that is certain, to reach one that may be certain, have we any rights of property at all as to the seals? Here, fortunately, we all concede that we have, and it is said that upon the islands these are as much our property as though they were sheep or calves.

Sir CHARLES RUSSELL.—Certainly not.

Mr. COUDERT.—Certainly not?

Sir CHARLES RUSSELL.—Certainly not.

Mr. COUDERT.—Well, I gave you credit, and I will take it back. I supposed that when we held the seal in our hand—I supposed when we slit its ear—I supposed that when we could put a brand upon it, that it was our own, as much as it was if it were a sheep or ewe. Where it comes in I am absolutely incompetent to say. I have read the argument on the other side with interest, and I supposed that it was conceded that upon our land, in our hands, under our flag, in our waters, they were as absolutely our property, as *that* book is mine.

He was holding up the book from which he was conducting his argument. Sir, it is not saying too much to point out that this proposition, stated over and over again by Mr. Coudert, stated also, though not so positively I admit, by Mr. Carter; because Mr. Carter did refer to the distinction between the right of killing *ratione soli*, and the right of property—I say that that proposition, stated over and over again by my learned friend Mr. Coudert as being so plain as not to require argument, is radically unsound.

My learned friend, Mr. Phelps, in his written argument at page 132 states it, I admit, not quite so distinctly as Mr. Coudert, but still in all probability meaning to maintain the same proposition. This passage occurs—in his Argument having the same meaning, at page 132:

The complete right of property in the Government, while the animals are upon the shore or within the cannon-shot range which marks the limit of territorial waters cannot be denied.

Of course, if my learned friend, Mr. Phelps was then putting compendiously that which other writers have put, that the exclusive right of killing wild animals upon your own land gives you a qualified right of property *ratione soli*, meaning thereby an exclusive right to kill—if that is all Mr. Phelps meant, there is no necessity to discuss it any more; but if the proposition is of any value at all it means this, that the wild animals, so long as they happen to be on the Pribilof Islands or in territorial waters are the property of the United States; and they cannot draw any distinction between the United States and the lessees, and therefore for this purpose they mean to allege that they are the property of the lessees, that they have the right of killing them, and they alone can exercise this right of killing, hunting, or shooting, or whatever it may be.

Senator MORGAN.—As to the lessees, they cannot have a property in any of the seals except such as they kill.

Sir RICHARD WEBSTER.—I contend that.

Senator MORGAN.—The United States possess the right to all the seals, and that gives them the privilege of killing some.

Sir RICHARD WEBSTER.—I must be permitted to reserve my statement, because I could not assent to that statement or allow it to pass as being supposed that I agree the United States have the right of property in these seals, because I contend most distinctly they have not.

Senator MORGAN.—I meant to characterize it as the assertion of the other side. It is not even an expression of my own opinion.

Sir RICHARD WEBSTER.—Yes, but as I read the legislation of the United States, it does not claim the property in these wild animals. I agree with an observation which fell from Lord Hannen. He was desiring to keep us close to the point when he asked Sir Charles Russell, whether it would make any difference for the purpose of this discussion, if the United States Statute purported to give right of property in these seals. It would make no difference; and I will not argue any false point, but I must not be understood by my learned friend as conceding that in construing those Statutes of the United States as between the Government and the lessees, or as between the Government and a trespasser, they would have been able to lay the property (to use a technical expression) in the United States. In two sentences I will state my view. By the earliest legislation, the United States created the Islands a Government reserve, not unknown in other parts of America, not unknown in Canada: they reserved the Islands, and that enabled the United States to grant licenses and to prevent other people going to utilize those islands, or dealing with them in any way, except

with the permission of the Government of the United States. And as to wild animals, as the King; according to English law in years gone by, in certain royal forests and royal parks could restrain people from killing game, so the United States could restrain the citizens of the United States from killing or catching anything or even from working any minerals upon the Pribilof Islands, as they were a Government reserve.

But the lawyers who framed those Statutes had too much knowledge of law to endeavour to claim, even for the Government, property in seals. If they have the property in seals they have the property in birds, they have the property in fish which live in the waters, they have the property in cod which come into the territorial waters. It is not a question of seals only; the United States by its legislation, written in the English language, as far as we can understand that legislation, does not even purport to claim the property in the wild animal.

Mr. Justice HARLAN.—What in your judgment could the United States have done by statute which would have been regarded by you as an assertion of right and property.

Sir RICHARD WEBSTER.—They could have said that, as between themselves and their citizens, the property in all the game, and in all the seals if you like in the Pribilof Islands, should be vested in a public official or should be vested in the State. If they had said that, the result would be, if the seals were killed, proceedings might be taken by the United States for the value of the body, and a penalty might be inflicted.

Lord HANNEN.—Some people have asked that the property in game should be given to the land owner.

Sir RICHARD WEBSTER.—Yes, and I would point out according to our game laws, as they have now existed for centuries there is no ground for the suggestion that the property in game is in the Crown—whatever may have been the origin of the Game laws, there has not been for years any foundation for that suggestion.

But, Mr. President, having made my respectful protest, let me say to the members of the Tribunal, while I am supposed to concede that even as between a citizen of the United States and the Government of the United States the property of the seals may be in the Government, I equally admit that from the point in view that we are considering it is absolutely immaterial, because we are dealing with the right to capture and take these animals and the property in these animals when they are upon the high seas.

I go back to the point which I was considering when the question was put to me and I repeat that so far as I know, the law of no civilized nation has given the property in wild animals to the owner of the soil on the ground that those wild animals are temporarily upon the soil, being found here to-day and there to-morrow. I have examined with care the law of the United States. I have examined with care the law of Great Britain, and refreshed my memory upon it, in so far as I may have forgotten points which I ought to know. I have examined as thoroughly and exhaustively as I could the French law; and I have placed at the disposal of my learned friend Mr. Phelps the full text of the report upon the French law by a gentleman of great learning and eminence, Maître Clunet, obtained in case my own research in these matters should not be sufficient, I say—speaking subject to correction by the President,—that there is not the shadow of a pretence of saying that by the law of France the property in wild animals is given to the owner of the soil simply because they happen to be there; that in the

French law as in the law of all other civilized countries that I know of, it is merely a right to kill, and the right to property in them never arises until possession is taken by killing. Sir, I must not speak with too great confidence of the laws of other countries; but of course it is only for the purpose of analogy that they are of service or of interest to this Tribunal. But perhaps I may be allowed to say that I am not aware of the law of any country, in which the law has been reduced either to a code or is in such an advanced condition that it can be summarized by text writers, or be referred to or appear in reported cases, that gives at the present time the property in wild animals simply by virtue of the possession of the soil on which they happen to be found. And I cannot help thinking that it was a little bold of my learned friend Mr. Condert to start with the suggestion that he gave us credit for the admission that we should concede that seals upon the Pribilof Islands, in the territorial waters of the Pribilof Islands, and under the flag of the United States, whatever that may mean—that on the territory and in those waters we should concede that they were the property of the United States just as much as the book which he held in his hand was his property.

Sir, there is no distinction for this purpose, for the purpose of the principles that we are applying, between nations and individuals. I ought perhaps to say that my learned friends Mr. Carter and Mr. Phelps, and I think Mr. Coudert too, did not suggest that there was any distinction. They say actually in writing, at page 44 of the United States Argument, that the principles of municipal law may be invoked for the purpose of considering this right of property, and Mr. Carter said, that from the point of view in which he was considering this question of property, it was the same between nations as between individuals. It could scarcely be contradicted, because the Government of the United States must be taken to be an individual for this purpose. If the property were allowed in the Government, the nation would be itself an aggregation of individuals. So in the same way the various subjects of Great Britain would be able to claim property upon this principle as between one another. It is put very pointedly indeed at page 44 in the following passage.

And the municipal jurisprudence of all nations proceeding upon the law of nature, is everywhere in substantial accord upon the question what things are the subject of property.

Therefore it is not in anyway misrepresenting the position of my learned friend Mr. Phelps if I indicate that they do not base their case upon any different principles, as applicable to nations, from those which they would apply in the case of individuals.

Now, Mr. President, what is the law as between individuals? Is it the law that the presence on a piece of land of a wild animal gives the property to the owner of the land while it is there? Sir Charles Russell read from the United States authorities; and I am in this position, that unless my learned friend Mr. Phelps was right in saying that one American Judge (I think he was Mr. Justice Nelson) in one case where he was dealing with bees, thought that the presence of the bees in the tree—not *hived*, but in the tree—would give the owner of the tree the property in the bees: unless that Judge did in fact express that opinion, there is not a single authority for my learned friend's contention—not a single one. I suggested at the time to my learned friend the Attorney General,—and Mr. Carter for the moment expressed accord with the view that we were suggesting—that the learned Judge did

not mean to decide anything of the kind, and that that point was not before him; and when the whole of his judgment was examined, we submit it is plain that that learned Judge was laying down no different rule at all, but was simply referring to the doctrine of property *ratione soli*, i. e. the power to take that which was upon certain territory or land for the time being.

Therefore, Mr. President, what is our position to-day in regard to this matter? The question is the same between Great Britain and the United States as it might be between two owners of the Pribilof Islands, as it might be between the owner of the island of St. Paul and the owner of the island of St. George. It is a pure accident, for the purpose of the matter we are considering, that both those islands happen to belong to the United States. They might have been on one side or the other of that imaginary line which is drawn through the sea in order to divide the territory of Russia from that of the United States; and so far as any knowledge in the minds of the United States negotiators at that time was concerned, there might have been seal islands as close to each other as St. Paul and St. George on either side of the line, or those two islands themselves might have been on either side of that imaginary line. Let us, just for a moment, and only for a moment, test the case in that position. The St. Paul islander might say that the seals bred upon his island came back to his island, and that while they were on his island he could prevent anybody from killing them, he could prevent anybody from coming and hunting them; and the same would apply to the waters within which he was supposed to have exclusive dominion. I am in this position, Sir:—That so far as the main fallacy which I submit underlies the written and oral arguments of my learned friends is concerned, there is not an authority or a vestige of authority, (beyond that to which I have made passing reference and, which has been, I submit, misunderstood,) which has laid down a different proposition. There is not a vestige of authority with which I have to contend. On the contrary they are all in my favor. But my learned friends, knowing the extreme difficulty of their position, adduce in their aid a doctrine which is well recognized as giving what is called, not an absolute property, but a qualified property: and may I be permitted to say, Sir, a doctrine which, if mere presence upon the islands had been sufficient to give the absolute title, would have been wholly unnecessary; because I agree in the view presented by some members of the Tribunal that if there be absolute property in a thing, that property follows the thing where it goes, and does not depend upon geographical bounds at all. My learned friends being pressed by the difficulties of their position, invoke what is called *animus revertendi*.

The PRESIDENT.—Sir Richard, I beg to observe that, even admitting the statute law of the United States was to attribute property, as Lord Hannen justly observed, some people attribute to it, in the game or the fish or the birds, in any definite part of the territory of the United States, it would not be implied that other nations would acknowledge that property anywhere.

Sir RICHARD WEBSTER.—That, of course, Mr. President, is *a fortiori* an instance of what I was saying, and we must assume, and we must do gross injustice to the lawyers of the United States if we assume, that in disregard of this consideration they have framed their statutes as claiming property in these wild animals, not only while they are on land and in territorial waters, but when they are to be found in any part of the high sea. I do not wish to go back upon that, because I do not think it is fair or just to impute such a meaning to the framers

of those statutes when it is not to be gathered from the statutes themselves. But, Sir, it is sufficient for my purpose to point out with reference to the observation you have made that when we refer to the principles upon which the law of property in the United States, Great Britain, and other civilized nations is based, we do not find any authority for the suggestion that the presence of the animal upon the land or within territorial waters gives anything more than a greater right and opportunity of killing, because you can keep other people from coming there. It does not increase your property in the animal one iota. It is equally so whether the animal has an *animus revertendi* or whether it has not. If you can catch it there, you can take possession of it, and when you have taken possession of it, it is your property, and not till then, and only as long as you can keep it in your possession and no longer.

Now, Sir, when you were good enough to indicate that you were following what I ventured to put before you, by making that observation, I was pointing out that, feeling their position, they claimed to have this property by what they are pleased to call an application of the doctrine of *animus revertendi*.

Senator MORGAN.—Do you contend that the United States Government, Sir Richard, have not forbidden its citizens to acquire the private ownership of fur-seals on the islands?

Sir RICHARD WEBSTER.—I think the United States has permitted its citizens to acquire private ownership with their license.

Senator MORGAN.—The lessees you mean?

Sir RICHARD WEBSTER.—The lessees; yes, Sir.

Senator MORGAN.—I am speaking of private citizens that are not lessees.

Sir RICHARD WEBSTER.—Only because they have not got the right to go there. That is all.

Senator MORGAN.—I am speaking of private citizens who have the right to go there?

Sir RICHARD WEBSTER.—Certainly. Only because the Government had said that: "None of our citizens shall kill seals on the Pribilof Islands except with our leave."

They have not altered the law of property at all. The lessee has no property in those seals until he has killed them. Mr. Senator, I address you as a lawyer upon this matter, and I ask you to consider my argument simply and solely in that position; and I submit to you that the lessee has no property in anyone of those seals until he has killed it, and that the law of the United States has not given that lessee any property in the seal until it is killed.

Senator MORGAN.—I should suppose he would have property in the seal from the time he commenced driving it to the shambles to be killed.

Sir RICHARD WEBSTER.—I beg your pardon. He has no property until he has succeeded in capturing it. I admit that he would have evinced the intention of taking possession of it, just in the same way as when I point my gun at a wild pheasant or a wild duck I evince my intention of shooting it if I can, and of taking possession of it and making it my own; but I may miss with the gun, and the man may not succeed in driving the seal to the place where he can knock it upon the head. It is not the intention to drive that seal that gives property.

Senator MORGAN.—What becomes, then, of the part of the statutes that prohibits hunting by citizens of the United States.

Sir RICHARD WEBSTER.—That has the effect of saying that nobody else may go there and try to take possession.

Senator MORGAN.—I mean outside the three mile limit, anywhere in Behring Sea?

Sir RICHARD WEBSTER.—That is simply and solely that the United States has said that in the interest of its revenue it will prevent its citizens from killing seals—I mean assuming that to be the construction; of course I do not want to argue again that was not the original construction—but assume that there was a statute that no person should kill any seal in Behring Sea east of that line in distinct terms, in so many words: the result of that would be not that the United States would claim any property, not that the United States statute would give any property, but that in the interest of itself, of its lessees, of any person who desired ultimately to kill seals on the islands and reduce them into possession, the United States thought fit to make that game law.

Senator MORGAN.—But would it not be entirely clear that the person who should kill seals in Behring Sea outside the three mile limit, he being a citizen of the United States, could not acquire any property in that animal?

Sir RICHARD WEBSTER.—It would not be so at all, Senator. That would be entirely dependent upon whether or not by the United States law the property in game killed by a person unlawfully did or did not remain in him—a perfectly academic question, from the point of view we are considering. I really do not know, I never have inquired, whether by the United States law—if a man goes on to the land of a third person and unlawfully kills game, when that game is killed it belongs to the owner of the land upon which it falls or whether it belongs to the trespasser; but from the point of view which I am considering, it makes no difference, because no property is acquired by anybody until the thing is shot.

Mr. Justice HARLAN.—Game killed under those circumstances belongs to the owner of the land, I think, by our law.

Sir RICHARD WEBSTER.—That is the law of England, but I did not know whether any statute of the United States altered the law on that subject.

Mr. Justice HARLAN.—There is no statute on that subject.

Sir RICHARD WEBSTER.—I am much obliged, Sir. My answer to the Senator, and the answer upon which I am prepared to stand, is that there would be no property in anybody at all until that game was shot.

Senator MORGAN.—And that nobody in the United States had any property in them?

Sir RICHARD WEBSTER.—No; not in these seals.

Senator MORGAN.—Then how could anybody acquire property under such circumstances *ratione soli*?

Sir RICHARD WEBSTER.—It depends upon what you mean by *ratione soli*. *Ratione soli* is the privilege to kill. I will put the case to you, Sir. There was nothing to prevent the United States Government from saying: We will by law prohibit every one of our citizens from killing seals unless they take a license from the Government.

There is nothing to prevent it. That practice exists in England today. I cannot kill a partridge or I cannot kill certain wild birds on my own land even without the license of my Government. I presume—I do not really know—that the game laws of the United States are similar. I do not care for the purposes of my argument whether they are or not; but nobody has ever pretended that that license to kill gives a property in the game.

Senator MORGAN.—But it would prevent the property from being vested in you if you shot the game contrary to law.

Sir RICHARD WEBSTER.—I really do not know that; and for my purpose it is perfectly immaterial, because I do not care whether, when the animal is killed, it belongs to the United States, or belongs to a public officer, or belongs to me. My point, respectfully, Sir, is that until it is killed there is no property in anybody at all. It is absolutely immaterial to my argument whether when the animal is killed and taken possession of the property in the body is in the person who has killed it or in the person upon whose land it falls, or, if you like, in the Government. The whole point we are discussing to-day is,—Is there any property in the live animal before possession has been taken of it; and I do not perceive that any light is thrown upon that point by considering what technical rule applies as to the property in the animal when killed.

Senator MORGAN.—Then, as I understand you, the only way of acquiring property in the fur-seal is to kill it?

Sir RICHARD WEBSTER.—Unquestionably the only way of acquiring property in the fur-seal is to kill it.

Senator MORGAN.—That is what I meant.

Sir RICHARD WEBSTER.—I am not referring, Sir, if you please, to property in the islands that enables you to exclude other people.

The PRESIDENT.—You can take possession of a living fur-seal, I suppose.

Sir RICHARD WEBSTER.—Of course. I ought I suppose to have included that; but from the question of Senator Morgan I did not think he meant that.

Senator MORGAN.—I did not mean that.

Sir RICHARD WEBSTER.—Let me give the answer. Of course if you have a pond staked out on the shores of the Pribilof Islands and you drive the seals into that water and keep them there and feed them every day, as you would animals in a zoological garden, then they become *coarctatus*. They become restrained, and so long as you keep them there you can take them out and shoot them and catch them. You have reduced those seals into possession. You can possess a living seal as well as a dead one. But I was dealing with the case of a seal which was found at large, swimming, and I was answering the Senator with reference to the point he was putting to me, that of a free swimming seal in the high seas. Nobody can, according to the law as it stands to-day, obtain the property in that seal except by taking possession of the animal. That is my contention, and if I have not answered your question sufficiently to explain my meaning, I know you will indicate it to me.

Senator MORGAN.—That answers the question entirely, I think. You say there is no way of taking possession of the seal except by killing it.

Sir RICHARD WEBSTER.—It is always important, Mr. President, to be careful that a statement of that kind is exhaustive, and therefore I thank you for putting the question to me. I was excluding zoological gardens from my mind for the moment. Of course I admit that if you retain animals in the sense of keeping them inclosed in a pen, that is another method of obtaining possession of them and keeping them alive.

The PRESIDENT.—Yes; and not only one but several of them in a herd, I suppose?

Sir RICHARD WEBSTER.—Oh certainly; there is not the slightest difference.

The Tribunal thereupon adjourned for a short time.

The PRESIDENT.—Sir Richard, we are ready to hear you.

Sir RICHARD WEBSTER.—Mr. President, by an accident, and a very fortunate accident, I am able to answer, before I resume my argument Senator Morgan's question. Mr. Piggott (who was legal adviser to the Japanese Cabinet), happens to be here, and he happens to be able to give me, from his own knowledge, the references to the document that we happen to have in Hertslet, here, with reference to the action that Senator Morgan called attention to, in the year 1855. I am referring to Hertslet, Vol. X, p. 468. The actual convention is not set out—it is in an earlier volume—but in the year 1855 a convention was made between Great Britain and the Emperor of Japan which gave Great Britain the right to navigate a certain internal or inland sea—the one referred to by Senator Morgan, which I believe was, at one place, only a mile and three quarters or two miles wide—or something of that sort.

Senator MORGAN.—It is not a Sea—it is the Straits of Shimonoseki.

Sir RICHARD WEBSTER.—I merely used the expression "inland sea", because it will be found to be used in the original convention; but it makes no difference.

Lord HANNEN.—It is a passage from one large ocean to another.

Sir RICHARD WEBSTER.—Yes. The Japanese name is "Inland Sea".

The PRESIDENT.—Was that confined, to England, or did it include France and the United States?

Sir RICHARD WEBSTER.—I think, if I remember rightly, the United States subsequently joined in it.

Senator MORGAN.—You mean in the Treaty?

Sir RICHARD WEBSTER.—There are fourteen powers.

Senator MORGAN.—We had no part in the Treaty.

Sir RICHARD WEBSTER.—I will not say in the Treaty—I think it will turn out that the United States got (either by Treaty or by some other arrangement), the benefit of it; but for the purpose that I am dealing with it at the present moment, it makes no difference.

The PRESIDENT.—In 1865 was it?

Sir RICHARD WEBSTER.—1855.

The PRESIDENT.—That was the date of the Crimean war, and very likely concerned the English and French fleets.

Sir RICHARD WEBSTER.—Mr. Piggott tells me there were fifteen or sixteen Powers that had the same rights, and I thought that probably the United States were among them.

The PRESIDENT.—The same rights by Convention, of course?

Sir RICHARD WEBSTER.—Do not let that be taken from me, if the Senator says the United States had not.

Senator MORGAN.—I do not think they had—not to my recollection.

Sir RICHARD WEBSTER.—If the Senator says they had not, I will look it up; but from the point of view he was putting to me, it makes no difference.

Senator MORGAN.—Not at all.

Sir RICHARD WEBSTER.—Certain Powers, among others Great Britain, had got these rights by Treaty. In 1864 a Prince of the name of Choshu—(I am referring now to the 12th volume of Hertslet p. 1145)—appears to have rebelled against the then Government of Japan and objected to this right of passage being exercised by foreigners, and, I believe, actually interfered with British ships in the course of their navigation, whereupon Great Britain, in conjunction with the United States, and with some other Powers, made an arrangement for coercive measures which they should take to restrain the rebellious

action of Choshiu which the Government of Japan was not able to restrain; and the action referred to by the learned Senator this morning, was the action taken by Great Britain to enforce their Treaty rights which existed by the convention of 1855. If the learned Senator tells me that the United States had not got similar Treaty rights, of course the argument would not apply; but I rather think it will be found, when the history is looked up, that they also had Treaty right.

Senator MORGAN.—We only had the privileges, I think, of the most favored nations.

Sir RICHARD WEBSTER.—That would answer it at once. One knows what the expression "favored nation", means,—that would give them, at once the same rights. But at this page 1145 the history of it is referred to. It will be found that the action was taken in 1864, pursuant to a Memorandum which I will read.

Memorandum delivered by the representatives of Great Britain, France, the United States, and the Netherlands, in Japan relative to the coercive measures to be adopted against the Prince of Chioshiu in the Straits of Shimonoseki, and elsewhere.

So that the state of things is this—not that Great Britain was in any way assuming to take any action against what I may call the *de facto* and proper Government of Japan, but that they found that their Treaty rights were being infringed by the action of a prince who was practically rebelling against the Government of Japan, and, thereupon they said to the Government of Japan: If you cannot put down this rebellious chief, we will help you to do it.

And the recitals which I have in the memorandum before me are distinct. The first paragraph is this:

When the Treaty Powers in 1862 consented, on the representations of the Tycoon's Envoys, to certain important modifications in the treaties; the spirit, the motives and the extent of these concessions were clearly set forth.

In consenting to the deferred opening of the ports, mentioned in the memorandum signed at the time, the Treaty Powers were careful to establish the fact that this postponement, far from signifying a virtual abandonment of their rights, was, on the contrary, to be taken as indicating their firm resolution to maintain them, by furnishing the Tycoon with the means which he declared to be necessary for securing them in a more effectual manner.

In a word, the Japanese Government by the very tenor of those representations, pledged itself to remove, in exchange for these temporary concessions, all the difficulties of the time, and the obstacles which might oppose the development of our relations.

But what have been the results of these promises and concessions?

The undersigned summed them up, when, last year in the month of July, they addressed to the Tycoon an identical note describing the restrictions placed upon commerce, the murderous assaults committed upon foreigners, the closing of the Inland Sea, and the attacks made upon foreign vessels by a Daimio:

That was the Prince of Choshiu, who was one of the Daimios, who had been attacking foreign vessels. The memorandum then proceeds.

The Tycoon, by treating with foreigners on a footing of equality, has hurt the national pride of the Daimios, while he has damaged their interests by reserving to himself the monopoly of the new commercial relations.

It then sets out the statement that a certain number of these Daimios had rebelled against the authority of the Government of Japan, taking, as the cause of their complaint, these Treaty arrangements which had been made by the Government with the various Powers which were thought to be inconsistent with the national dignity. I now read from page 1147:

The political situation of Japan might therefore be summed up as follows:

Weakness of the Tycoon and increasing powerlessness of that Prince to resist the violent pressure of a hostile majority.

Existence of a party favorable to continued relations with foreigners, but at this moment incapable of giving effect to its opinions.

Finally, armaments of every kind, prepared with the loudly avowed intention of expelling all foreigners from the country.

The position made for the Representative of Foreign Powers is the natural consequence of the situation and the tendencies which they have just pointed out.

The residence in the capital is virtually interdicted.

The passage through the Inland Sea is forbidden to their vessels, by means of batteries erected with that object.

Then there is a further reference to other restrictions under which foreigners were placed, and the memorandum proceeds in this way:

The recent decision of the Governments to which the demands on the part of the Japanese Mission now in Europe has given rise, enable the undersigned clearly to define their obligations. The foreign Powers not only reject in categorical terms the propositions regarding the abandonment of Yokohama, but also refuse, by anticipation, to listen to any overture for the modification of existing Treaties or curtailment of the rights they confer.

The instructions transmitted to the undersigned are identical. All are directed to maintain Treaty rights intact, and to insist on their complete observance.

Then follows a reference of how the Treaty rights had been exercised, most fairly, in the interests of the residents as well as of the foreigners; and then the memorandum says:

Whereas a more energetic attitude would, on the contrary, have undoubtedly, for immediate result, the dissipation of the idea now entertained by the daimios, that patience has only been dictated by weakness or fear.

A vigorous demonstration will disarrange schemes scarcely yet formed, and it is calculated to give support to the party favorable to the maintenance of Treaties before its opponents will have time to crush it. It will moreover give a salutary lesson to those semi-independent feudal chiefs who scoff at the obligations of Treaties, the validity of which they repudiate, and who for the justification of their continuous acts of violence appeal to a decree still in existence which makes foreigners outlaws.

In a word, this decided attitude may furnish to the Tycoon an occasion to regain an influence which is slipping from his weak hands, although he is far from willing to abdicate or renounce his governing powers. At all events it may compel this Prince [that was Choshiu] to abandon the system of duplicity and half-measures which he now follows, and openly declare whether he wishes to respect the Treaties, or sides with those who wish to tear them up.

Then the memorandum further states the unanimous agreement of the undersigned to the course that is going to be suggested, and then it proceeds:

How and where the first blow must be struck is easily determined by an examination of the present state of things.

While the majority of the party hostile to the Treaties has limited itself to menaces, the Prince of Choshu has resolutely taken the initiative of attack, by prohibiting to foreign vessels all access to the Inland Sea, and by stopping the supplies of produce for the Nagasaki market carried on by native junks as has been shown by the successive reports received from the Consular Agents at that port; such a continued violation of the Law of Nations and formal negation of Treaty rights has been encouraged by the impunity which those perpetrating the acts have been allowed to enjoy.

THE PRESIDENT.—I believe the point is very clearly made out.

SIR RICHARD WEBSTER.—That memorandum was signed by all the Powers I have mentioned—the United States among them—relying and insisting upon their rights under that Treaty.

SENATOR MORGAN.—With deference, I do not believe that the point has been clearly made out, and I beg to state the reasons, in deference to the judgment of the learned President.

THE PRESIDENT.—I mean with reference to what Sir Richard told us.

SENATOR MORGAN.—My reason for saying that is this: The Tycoon of Japan was a military officer who undertook to put himself at the head of the Government, and retire the Mikado on his ecclesiastical authority simply.

SIR RICHARD WEBSTER.—That was Choshiu?

Senator MORGAN.—No, the Mikado—on his ecclesiastical authority simply, and to cut him out from any participation in the civil Government. The Tycoon while thus established, was denied by the Japanese the powers of the Government to make that Treaty with Great Britain. I have never been informed that the United States was a party to it or the Netherlands, or France. That matter went on until a strife, a revolution, occurred in Japan, by which the feudal chiefs (of whom the Prince of Choshiu was one, Prince Negato) undertook to affirm and re-establish the authority of the Mikado. The British Government undertook to sustain the Tycoon and claimed the authority of the Treaty it had made with the Tycoon, and in doing so it of course continued to send its ships through these narrow straits of Shimonoseki. The Netherlands did the same and the United States did the same. When the United States ship was attacked, Admiral Macdougall went down with the “Wyoming”, attacked the batteries of Prince of Choshiu, and beat them; also three ships of war that were stationed in this very narrow pass. The Tycoon was overthrown; the Mikado was reinstated in his power, and no new treaty arrangement has been made which gives to any of these countries a higher power than they had before. So that I beg leave to say, I suppose that that was an assertion on the part of Great Britain, France, the Netherlands and the United States, that that was a part of the high seas—a part of the open sea—through which the ships of all countries had the right to pass, and that was at the bottom of their contention.

SIR RICHARD WEBSTER.—I only say, Senator, with great respect, that from your own recital of it I should have thought that the contrary conclusion must have been drawn. That the rights were originally given by Treaty, as far as Great Britain was concerned, there is no doubt; and the fact that there has been no fresh Treaty since then, seems to me to point to the irresistible inference that on the rebellion of Choshiu against the lawful authority being put down, the old Treaty rights revived, and that we have continued to navigate the inland waters under the Treaty.

Senator MORGAN.—There was just the contrary contention by the United States, and upon that we paid back the indemnity money to Japan that she had paid us on that occasion.

SIR RICHARD WEBSTER.—I am only dealing with the information I have before me; but certainly, so far as I have been able to obtain information from the original documents at my disposal during the interval of the adjournment, they appear at present to support the view of this transaction that I have ventured to put before you. Of course if there be other official documents which show I am wrong, I shall at once admit it; but I cannot admit it in the face of the documents which are the only ones to which I have access up to the present time.

The PRESIDENT.—Mr. Senator, your opinion would be that the United States did not acknowledge the liberty of passing through these straits?

Senator MORGAN.—It demanded the liberty of passing through.

SIR RICHARD WEBSTER.—I cannot help thinking it will turn out that they claimed it under the “favored nation” clause, which was the idea that passed through Senator Morgan’s mind—I cannot help thinking it will turn out that there was a favored nation agreement between Japan and the United States under which the United States claimed the same privileges which Great Britain had.

Senator MORGAN.—If so, there must have been, at the same time, some other justification.

Sir RICHARD WEBSTER.—Following the actual documents, I cannot but assume that when Great Powers put forward Treaties, that real *bona fide* straightforward action was taken by the Great Powers.

The PRESIDENT.—At any rate, one fact is clear—that the Straits are less than three miles wide.

Senator MORGAN.—They are about a mile and a half wide.

The PRESIDENT.—Then it would seem they were territorial waters unless Japan was brought to surrender what they considered as inland waters.

Sir RICHARD WEBSTER.—The first right, as far as Great Britain is concerned, was by Treaty.

Senator MORGAN.—They had been open to the nations of the world—for a great many years prior to the action on the part of Great Britain in making the Treaty.

Sir RICHARD WEBSTER.—The original right of Great Britain to go through was by Treaty.

Lord HANNEN.—Great Britain preferred to take it by Treaty rather than to assert it as an international right.

Sir RICHARD WEBSTER.—It does not seem to me that it is very close to the point I was arguing; but, of course, the Senator was good enough to say that he desired it examined by the Counsel of both parties; and I believe (I speak with authority on this matter as my learned friend Mr. Piggott is present), I have given an accurate account of the transaction as far as Great Britain is concerned unless documents are produced to show that I am wrong in that matter.

You will remember, Sir, at the adjournment of the Tribunal, I had pressed most strongly that, in the case of all wild animals, in order to acquire property, possession must be taken; and, in reply to the questions put by the Senator before the adjournment, my contention is that no property at all could be acquired in a seal inside or outside territorial waters till possession had been taken, and the only way in which property could be acquired is by taking possession; and, with reference to the point he put to me as to what would happen if a United States subject killed a seal in the waters of Behring Sea, I would reply to him that prior to the year 1889, when President Harrison came into Office and the law was extended over the waters of Behring Sea up to the eastern line, there was no prohibition against the killing of male seals at all outside what may be called the territorial waters of Alaska. That is, to say, outside the proper limit of territorial waters, there was no prohibition against a United States subject shooting a male seal, and he would have acquired the right of property in that male seal by shooting it, or killing it, or by capturing it, and by no other operation.

Now, I desire to supplement what I said in regard to this matter by referring to two authorities only bearing on the question you were good enough to put to me with reference to keeping the animals alive in a pen or in an enclosure. It is a question entirely of whether the enclosure in which they are held is such that you can, at any time, take possession of them and capture them. That is referred to at page 31 of the British Argument; and three authorities are given, one taken from a book, which I think Mr. Justice Harlan has been recently looking through, Pollock and Wright's book on "Possession in the Common Law", and I read from page 31 of our Argument:

Trespass or theft cannot at common law be committed of living animals *feræ naturæ* unless they are tame or confined. They may be in the park or pond of a person who has the exclusive right to take them, but they are not in his possession unless they are either so confined, or so powerless by reason of immaturity that they can be taken at pleasure with certainty.

And then two instances of that are given, both of which are authorities in our Courts,—*Young v. Hitchens*, where fish only partly in a seine-net were held not to be in possession; that is to say, they were not sufficiently captured: and *Regina v. Revu Pothadu*, where fish in irrigation tanks in India (that is to say, large tanks not like ordinary ponds or stews, where fish are kept when in possession) were held not to be in possession.

Mr. Justice HARLAN.—I should like to say that you must read the sentence succeeding the one you read, in order to get at the full meaning of the author.

Sir RICHARD WEBSTER.—The succeeding sentence, as the learned Judge asks me to read it, is this:

An animal, once tamed or reclaimed, may continue in a man's possession, although it fly or run abroad at its will, if it is in the habit of returning regularly to a place where it is under his complete control; such habit is commonly called "*animus revertendi*."

The learned Judge must pardon me for pointing out, with great deference, this does not bear on the question of *what is sufficient possession*. I am not on the question of *animus revertendi* now, or, I am sure unintentionally, he would not have diverted the mind of the Court from the question of what is sufficient possession. I am not on the question of how that possession is continued, but what is sufficient possession; and the test of sufficiency is that they can be taken at pleasure with certainty; and, in the same way, I shall show you that animals which, in the proper sense of the word, have the *animus revertendi* can be so taken without exception.

It is to be noted that the taking of an animal *feræ naturæ* found at large, though in fact having an *animus revertendi*, will not be theft if the taker had not the means of knowing that it was reclaimed; not because there is no trespass, but because an essential ingredient of *animus furandi* is excluded by his ignorance that there was an owner. In some cases, also, theft is excluded by reason that the taking is constituted a lesser offence by Statute.

Mr. Justice HARLAN.—I only referred to it because it was used there in the argument to demonstrate the right to take them, and the right of possession was gone when they left the enclosure. I only meant to suggest that that sentence, taken in connection with the one you read, would perhaps give the whole mind of the Author.

Sir RICHARD WEBSTER.—If that impression is conveyed by that passage in the argument, it is not what the persons who framed the argument meant. What the persons who framed the argument meant was what is the question of what is sufficient possession, and that that can be retained by *animus revertendi*, not only do we not dispute, but in the subsequent passage that is pointed out. I do not think with great deference a lawyer would have stated it differently, though doubtless he would have been careful to point out, that possession is preserved by what the law calls *animus revertendi* because you have to differentiate the case of animals of which possession has been taken.

The PRESIDENT.—Do you understand the last phrase you read from Pollock and Wright as meaning, that when there is no *animus furandi*, when one takes this reclaimed game out of premises where it is generally kept, he would legally get possession of it?

Sir RICHARD WEBSTER.—I think that is not the sentence to which the learned Judge referred. The distinction would affect the question of its being a crime, but would not touch the question of property.

The PRESIDENT.—You do not think the other alludes to the question of property.

Sir RICHARD WEBSTER.—I think the question of property ended at the words "Such habit is called an *animus revertendi*."

Those are the two sentences to which Mr. Justice Harlan called my attention. I only read further in case I should have omitted anything.

The PRESIDENT.—Still, it was interesting.

Lord HANNEN.—The Authors go on to point out that even if the animal has been tamed and reclaimed, yet, if it is at large so that the taker has no means of knowing it was private property, it negatives the idea of his having the *animus furandi*.

The PRESIDENT.—Yes; but what as to the question of property?

Lord HANNEN.—It does not touch the question of property in the man who has reclaimed, but only deals with the guilt of the person who took it.

The PRESIDENT.—You would consider the man who reclaimed remains legal owner.

Sir RICHARD WEBSTER.—As my Lord Hannen put, if the animal was his on the ground of having been tamed and reclaimed, and it was going to return to his dominion or place, it would still remain his.

The PRESIDENT.—So that the man that intercepted it would not be punished for theft, but it would not alter the property.

Sir RICHARD WEBSTER.—Yes. Take the case of a tame stray horse; I doubt very much if a man could be punished for theft if he simply caught the horse, and did not know whose it was, and kept it. He would have no defence to an action for not bringing it back; but he could not be charged with theft, because he would say:—It was a stray horse, and I took it because no one was there with it.

I will not overlook this question of *animus revertendi*, and I assure Mr. Justice Harlan that I had not the slightest idea of suggesting that property might not be continued by means of *animus revertendi* but it was the second branch of that which I was about to address myself to.

Mr. Justice HARLAN.—You must excuse me, I did so, because in printed Argument of Great Britain it is introduced in the discussion of the question of property.

Sir RICHARD WEBSTER.—I think quite rightly, but you must look at the argument as a whole.

Mr. Justice HARLAN.—I understand and I only meant that that sentence should be taken with the one quoted in the brief to get the full mind of the author.

Sir RICHARD WEBSTER.—Yes, I think the answer is to consider whether the person who framed it was considering the whole subject or part of it and I understand they were only dealing with possession as distinguished from how that possession would be continued.

Sir, I cannot state this question of what is sufficient possession better than in the language of Savigny which is cited in the United States Argument page 108:

Wild animals are only possessed so long as some special disposition (*custodia*) exists which enables us actually to get them into our power. It is not every *custodia*, therefore which is sufficient; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend upon his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment. Thirdly, wild beasts tamed artificially are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them (*donec animum, i. e. consuetudinem, revertendi habet*).

Now I resume the thread which I dropped just before the adjournment. Pressed with the difficulty of contending successfully that the

presence of the wild animals on land or in territorial waters was sufficient, the advisers of the United States have endeavoured to supplement their case by saying that the property that the United States or the owners of lands have depends on *animus revertendi*. In that they are guilty of two fallacies. One I have endeavoured to expose; the other I am about to expose. The two fallacies are, first, that the suggestion that mere presence of the wild animals upon the islands gives property at all in the animal; and, second, that that property whatever it was is retained by what they are pleased to call *animus revertendi*.

I address myself as closely as I can to the second branch of the argument. I must put my proposition somewhat boldly, but I am open to refutation and answer if I make a mistake therein—I assert there is no instance in the books where the doctrine of *animus revertendi* has been applied, where possession had not been already previously taken. I say the doctrine of *animus revertendi* only applies where possession has been taken, so that, in fact, the person has had at some time or other the power of taking and actually capturing and possessing the animals. I care not which animal be chosen, I will take only one of the four or five instances there are in the books to which attention may be called; but I should like to take two, one of which certainly appeared very, very often in the argument of my learned friend, Mr. Carter, because I could not help thinking that like the bee that returns to the flower from time to time to get honey from it, whenever my learned friend, Mr. Carter, was a little exhausted, he returned to the bees themselves as his stock instance; and I do not think I shall be wrong in saying those highly-favoured bees appeared half-a-dozen times in my learned friend, Mr. Carter's argument, not too often for my purpose, because they are a very effective illustration of what I mean; I will take the case of the bees. There is never any property in the bees whatever till they have been hived. Every authority agrees on that—Roman, English, American, French. There is no property in the bees whatever till they have been hived. What does hiving mean? Hiving means that in a house prepared for the reception of the bees, moveable if it is considered desirable they should be moved—a skip either made of straw or a structure of wood capable of being closed, so that the bees can be carried away when in the hive, if you desire to take them to another place in that hive; when they have been so hived and by their habits continue to return home to that hive, then so long and so long only is there a property in the swarm or the herd, if my learned friend likes it, or the hive of bees. Take pigeons in a dovecot. The dovecot is provided and is repeatedly closed at night, but whether closed at night or not, it could be if necessary. In both cases there is food supplied where it is desirable that the animal should have food.

The PRESIDENT.—You do not speak of a tame dove now.

SIR RICHARD WEBSTER.—I speak of a dove or pigeon in respect of which this *animus revertendi* is supposed to continue the possession—pigeons in a dovecot or pigeon-house. It depends on what you call tame, because there is no case in the books of the wild pigeon that nests in your trees or the rocks, which come back every day or every night, having fed in the fields of the adjoining farmers, being your property. On the contrary, it is specifically put with respect to the pigeons that are housed in the dovecote.

Lord HANNEN.—Homed.

SIR RICHARD WEBSTER.—Yes, their home is in the dovecote or pigeon-house. Whether they are tame birds in the sense of feeding out of your hand is a question of degree.

The PRESIDENT.—You mean pigeons not fed by the hand of man.

Sir RICHARD WEBSTER.—Well there are and there are not—a matter of fact speaking of these pigeons if they cannot get food in very hard times in the fields they would be fed in the dove-cot, and indeed the way they are induced to come to the dove-cot in the first instance is that food is scattered and they are attracted to it by the art of man. But my point is, and I challenge my learned friend to contradict it, that there is no case of the doctrine of *animus revertendi* being applied, except where the animal has previous to its departure been in some place in which possession has been or could be in fact taken. I have all the authorities under my hand and you will remember them—the geese that fed out of the man's hand and were driven away by the Defendant's dog which had twice been brought back and said to be so tame they fed out of the man's hand: the bees in their hive: the pigeons, as I have already said, in their dove-cot or house: the deer which have been made so tame that they will go into an enclosure or stable where they could be kept if it was desired to keep them, and have been so accustomed to it by the hand of man that they come back intending, as Savigny puts it, and I cannot put it better than it is put in page 108. "To return to the spot where their possessor keeps them."

Now what is the case made to day? The case made to-day is that migratory instinct is equivalent to *animus revertendi*, that is to say the fact that the animal, the seal, in the spring of the year, comes to the land—either the male from sexual instincts, or the female to be delivered of its young—that it is the habit of coming to and fro to the land for a limited portion of the year and then returning to the sea—it is said that that migratory instinct is equivalent to an *animus revertendi*.

Now I appeal, Mr. President, to you and to every member of this Tribunal, as a lawyer, and I appeal to their impartial judgment that they can not only find no authority, but not even a vestige of an authority for the suggestion that migratory instincts are sufficient to give a property in animals on the ground that that is an *animus revertendi*. Sir, if that be the case there are literally speaking in England (I do not know enough about the United States to speak of them) hundreds of kinds birds that in their migration come back to the same identical spot—to the same tree and year after year make their nests in the same place or repair the old nests and occupy the same place, and those birds may go away at other times of the year from equally natural instincts either climate or from some other cause—because the food does not suit them—and yet not only is there no trace of such a doctrine, but whenever the matter has come up it has been pointed out that migratory instincts are not sufficient. Every authority that my learned friend has cited supports my contention. I remember one—though I could go through all, but they were exhaustively examined by the Attorney General—*Hammond v. Mockett* where the crows, or rooks as they ought to be called, built regularly in a man's trees, came regularly there and were in the habit of frequenting those trees in his property. It was held on the same principle we have been discussing, though there was not only the strongest *animus revertendi* but an indisputable *animus revertendi*, that there was no property in them.

Mr. Justice HARLAN.—Was not that mainly on the ground that the Court said it was an animal that was not useful but a nuisance?

Sir RICHARD WEBSTER.—No, certainly not. I say the whole of the earlier part of the judgment proceeds entirely upon the question of property. There being no property in the animal at all as being an

animal *feræ naturæ*, they do, in the other part of their judgment, refer to the fact that rooks are not *usually* of an article of food. If you will be good enough to look at the full report of that case, you will find some five or six out of the eight pages of the Judgment proceed entirely on the ground I have been mentioning to you, that there is no property in a wild animal simply because it returns and lives in my trees or my ground; and not being an article of food comes in entirely at the end of the Judgment, and is not made the subject of the Judgment.

Senator MORGAN.—It might not do to assume, accepting your distinction to be correct between migratory instincts and *animus revertendi*, that the seals that occupy Behring Sea periodically are drawn to those Islands by simply migratory instincts. For instance, a nursing-mother, that goes out to find food in order to nourish herself to be able to feed her young could not be said to return under a migratory instinct, but an *animus revertendi*.

Sir RICHARD WEBSTER.—I was not attempting to deal with any specific difference which may be drawn between particular seals or classes of seals.

Senator MORGAN.—But the principle, unless it applies clearly all through, does not apply at all.

Sir RICHARD WEBSTER.—If you say so and give judgment, then I must bow.

Senator MORGAN.—No, I do not say so, and I do not give judgment; I make a suggestion for you to argue.

Sir RICHARD WEBSTER.—I can scarcely conceive, Senator, if persons were in a position to establish ownership in any particular animal, that that would carry with it those animals to which none of those principles applied.

Senator MORGAN.—It might not.

Sir RICHARD WEBSTER.—But your assumption was that, if the principle applied, it applied all through.

Senator MORGAN.—No; I make no assumption, I simply put a question. If it is applied at all, should it not be applied throughout? And I think that is a fair question for you to answer.

Sir RICHARD WEBSTER.—I agree; and I do not shrink from it; you have to see what the principle is; and it is this, not that the animal is property during a given month, or during a certain number of weeks, but always property, and this property for which my learned friend contended is property in the seals when they are thousands of miles away at all times of the year. It has been put by Mr. Carter and Mr. Coudert orally, and in writing by Mr. Phelps, that that property follows the animal wherever it is; and it might be impossible to justify a claim upon the limited view or application of the principle which I am referring to. But, if I might again respectfully put my point, I will then pass from it, that there is no greater property in the pup than there is in the mother, or in the two combined; and I say, with great respect, that, until possession has been taken, the true doctrine of *animus revertendi* does not apply. If you will remember, I was protesting against the idea that migratory instincts, speaking of the herd as a whole, can be turned into *animus revertendi*, but my main proposition, which I enunciated a few moments ago, is, that, until possession has been taken in the sense that that animal has been in such circumstances that the man has actually captured it, the doctrine of *animus revertendi* has no application of any sort or kind.

The wild deer that is in the park, and that never has been tamed or reclaimed at all equally has the *animus revertendi* to return to feed, per-

haps to the same pastures as the tame one. The hind that drops the calf has the same *animus revertendi* to return and feed the calf wherever it may be; but until possession has been taken, neither in one case nor in the other is there any property.

But it may be said to me—You are not stating the law as to the strongest case that can be put against you sufficiently fairly.

Before I come to that however, I would ask Mr. Justice Harlan's attention in justification of what I have said, that so far from the doctrine of the rooks not being fit for food, being the *ratione decitendi* or the basis of the judgment in *Hannam v. Mockett*, in a passage which unfortunately is by an inadvertence not set out in the United States Case, immediately following where they do stop, and within a few lines of it, this passage occurs:

And even with respect to animals *feræ naturæ*, though they be fit for food, such as rabbits, a man has no right of property in them. In Bolston's Case, it was adjudged that if a man makes coney burroughs in his own land which increase in so great number that they destroy his neighbour's land . . . he has no property in them.

Of course you know, Mr. President, that "conies" are rabbits. It is the word that is used in this case to describe rabbits.

Mr. Justice HARLAN.—That means that he has no property in the wild animals simply because they are wild.

Sir RICHARD WEBSTER.—No, sir; simply because they are coming back; they are supposed to have gone off; I agree that they are rabbits supposed to have gone off the land of the man who made the coney burroughs on to another man's land.

Mr. Justice HARLAN.—On what land are they killed?

Sir RICHARD WEBSTER.—They are killed on the land of the stranger. There are two adjoining proprietors, A and B. A makes coney burroughs, or in other word a house for the conies, feeds them, if you like, puts down turnips in hard weather in order that the conies may not eat his trees. The rabbits run out of their holes and run on to the land of the adjoining owner B; B shoots them. They are B's rabbits when he has shot them, and A has no claim against him, in other words although he made the coney burroughs, A has no property in them. I think, Sir, that as to the distinction which you have put to me, tending, to remove the force of my argument based on *Hannam v. Mockett*, I have satisfied you that it is impossible on a fair examination of this judgment to come to the conclusion that the fact that the rooks were not ordinarily fit for food had anything to do with the judgment at all.

Senator MORGAN.—If C shoots the conies on the land of B, they belong to B *ratione soli*?

Sir RICHARD WEBSTER.—If C reduces into possession, by killing, the wild animals on the land of B, the dead animal it belongs to B. That is a fiction of the law.—

Senator MORGAN.—Ah!

Sir RICHARD WEBSTER.—Well, Senator, I am not unwilling to grapple with the point.

Senator MORGAN.—I beg your pardon; I did not think it was a fiction of the law, I thought it was a provision of the law, a decision.

Sir RICHARD WEBSTER.—Really I used that expression, but I did not mean fiction in that sense. I merely meant the dead animal being a thing which, as was said in the House of Lords, is in somebody's possession, it is given by our law, contrary to the civil law, contrary to the Roman law—

The PRESIDENT.—And to the French law also.

SIR RICHARD WEBSTER.—Yes. The possession is given to the man on whose land it falls and not to the trespasser.

Senator MORGAN.—Suppose that C when he kills the coney is on the public highway and kills it there. Whose property is it then?

SIR RICHARD WEBSTER.—I believe it would be the property of the killer.

Lord HANNEN.—Other questions may arise in that case. If it is only a right of way, the property may belong to another person.

SIR RICHARD WEBSTER.—Yes; you have to consider what kind of a road the highway is.

Senator MORGAN.—The King's highway where everybody has a right to go, and nobody has a right to trespass upon the property of his neighbour?

SIR RICHARD WEBSTER.—I, Mr. President, have been accustomed now by long training, if I can, to go straight to the real point; and the real point is that there is no property in any of these animals until they are captured alive or dead, and therefore it makes no difference to my purpose in whom the property is after they are captured, after they are dead. If I am well founded—and I am quite willing to stake my case upon it—that there is no property in wild animals until possession has been taken of them, and that the only effect of the *animus revertendi* is to preserve the property acquired by the taking of possession as long as the animal is coming back and intends to come back to the premises of the person who has reclaimed or tamed it, the whole question of whose property it is after it is dead is absolutely academic. It throws no light whatever upon the matter. According to the French law, as you have said, and as I have found out myself by research, the animal killed on the property of another man belongs to the man who shot it. According to the English law and the doctrine that a man shall not take advantage of his own wrong the animal belongs to the man on whose land it lies when it is dead.

The PRESIDENT.—That is a special provision of the law.

SIR RICHARD WEBSTER.—It is a special provision, and it does not advance us on the road one single step.

The PRESIDENT.—It seems contrary to the principle?

SIR RICHARD WEBSTER.—I do not really know whether it is contrary to the principle or not. It seems to me entirely—I will not use that word fiction again—a rule one way or the other. It makes no difference to the point we are considering, and it seems to afford no light or assistance.

The PRESIDENT.—You are aware that under the French law a man who has a wood in which are conies is responsible for the damage which the conies do to a neighbour; but that does not alter, I believe, the question of property.

SIR RICHARD WEBSTER.—But also by the French law, Mr. President, if the conies run out on the other man's land that other man may shoot them.

The PRESIDENT.—Yes.

SIR RICHARD WEBSTER.—And therefore, as a conclusive answer, as far as property is concerned, the man out of whose wood they have run has no property in those conies. And they might equally be said to be the property of the man on whose property they have run.

Mr. President, may I point my argument in one sentence, showing you the bearing of the two limbs of the argument. I assume I have made my ground good, and to avoid repetition I assume that I have satisfied you that there is no property in a wild animal going on to a

man's land simply by virtue of its going there; that he has only got a right of killing it and capturing it and treating it as his keeping other persons off his land.

That animal runs away, swims away, or flies away from the man's land. How can the fact that the animal intends by natural instincts to return to that same piece of land give the man a greater property than he has when the animal is on the land. If I have not made my point clear though I hope I have, let me repeat myself. The animal comes on to my land. I assume for the purpose of my argument that I have shown you that according to the law of all civilized nations I have no property in that wild animal. The animal leaves the land, meaning to come back the next year, if it has any intention at all by natural instinct to come back to the land. When it is off the land in the sea how can the *animus revertendi* in that sense, the instinct to return, give me when the animal is off my land, a greater property than I had when the animal was on it. Sir, I submit to this Tribunal that the more this question of property is examined the more impossible—I will not use any word which my friends may think not sufficiently respectful to their position—the more impossible their position becomes. It may be said that I have not correctly stated the law as to these cases where the *animus revertendi* continues property—not gives it, please. It never does anything but continue property. The *animus revertendi* only continues the property which has been created by some previous act.

The PRESIDENT.—I do not believe the contrary was argued, Sir Richard.

Sir RICHARD WEBSTER.—I do not know that, Sir. I have no right to assume it.

The PRESIDENT.—I believe the question was about possession.

Sir RICHARD WEBSTER.—Would you be good enough to look, Mr. President, at page 109 of the United States Argument, where in a book of the highest authority, cited by everybody with approval, cited by my learned friends as supporting their proposition—I mean the second book of Bracton—the language is:

In the first place, through the first taking of those things which belong to no person, and which now belong to the King by civil right, and are not common as of olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air; wherever they may be captured and wherever they shall have been captured, they begin to be mine because they are coerced under my keeping, and by the same reason, if they escape from my keeping, and recover their natural liberty they cease to be mine, and again belong to the first taker.

Can anybody have the hardihood to suggest that the seals do not recover their natural liberty?

The PRESIDENT.—I thought you argued that they had never lost it.

Sir RICHARD WEBSTER.—Certainly.

Senator MORGAN.—The first question is, what is their natural liberty? Is natural liberty feeding in the sea or existing and being born upon the land.

Sir RICHARD WEBSTER.—Senator, with very great deference, it does not touch my point the least in the world. I care not what view you take, whether they are upon the land and get all their food upon it and do not go out into the sea at all. My position is, you do not get any property, according to the law of all civilized nations, until possession has been taken.

Senator MORGAN.—That is, provided they are animals *feræ naturæ*?

Sir RICHARD WEBSTER.—Certainly; but we must not have the question shifted every moment.

Senator MORGAN.—No; I do not shift it at all. I supposed you meant subject to that qualification.

Sir RICHARD WEBSTER.—I hope so. The seals have never lost their liberty. The seals that are driven and killed possibly have not much liberty left. The seals that are not driven and go away have never lost their liberty at all. If a man has tried to drive them if he let them go he does not restrain their liberty.

The PRESIDENT.—I believe that is agreed between both parties, what you have just stated.

Sir RICHARD WEBSTER.—It may be, Mr. President. Of course it is not possible to argue every point at the same moment; and that is why I reminded the learned Senator that the introduction of the suggestion which he was good enough to make to me did not bear upon the argument which I was proceeding upon. I was proceeding upon the theory that originally the seal was an animal *fera natura*; that it never has lost its liberty; and that never having lost its liberty no possession has been taken of it; that no possession or occupation having been taken, the doctrine of *animus revertendi* has no application at all. I was met with the case of the bees; and accordingly I desire to say that the strongest case they can put, namely, that of those bees, fails them altogether.

Now Bracton puts it on their originally having lost their liberty:

But they recover their natural liberty then, when they have either escaped from my sight in the free air, and are no longer in my keeping, or when they are within my sight under such circumstances that it is impossible for me to overtake them.

Occupation also comprises fishing, hunting, and capturing.

Now then, here is the point the Senator put to me about wishing to drive them:

Pursuit alone does not make a thing mine, for although I have wounded a wild beast so that it may be captured, nevertheless it is not mine unless I capture it. On the contrary it will belong to him who first takes it, for many things usually happen to prevent the capturing it. Likewise, if a wild boar falls into a net which I have spread for hunting, and I have carried it off, having with much exertion extracted it from the net, it will be mine, if it shall have come into my power, unless custom or privilege rules to the contrary.

There were certain privileges about wild boars that prevented people from catching them at one time, and that was what Bracton was referring to.

The PRESIDENT.—Was that under the feudal law or in general?

Sir RICHARD WEBSTER.—I think they were under the feudal laws.

Occupation also includes shutting up, as in the case of bees, which are wild by nature.

I do not know whether the American Judge referred to meant to contradict this or not.

For if they should have settled on my tree they would not be any the more mine, until I have shut them up in a hive, than birds which have made a nest in my tree, and therefore if another person shall shut them up, he will have the dominion over them. A swarm, also, which has flown away out of my hive—

That is to say, which has already been reduced to possession in the hive:

is so long understood to be mine as long as it is in my sight, and the overtaking of it is not impossible, otherwise they belong to the first taker; but if a person shall capture them, he does not make them his own if he shall know that they are another's, but he commits a theft unless he has the intention to restore them. And these things are true, unless sometimes from custom in some parts the practice is otherwise.

Now, I should ask the Senator kindly to let me read this great authority upon the question which he introduced a moment ago into my argument, as to whether seals are domestic or not.

What has been said above applies to animals which have remained at all times wild; and if wild animals have been tamed—

Is there any living being who suggests that these seals have been tamed? Could any reasonable man suggest it for a moment.

if wild animals have been tamed, and they by habit go out and return, fly away—

That means with a tamed habit,

such as deer, swans, sea-fowls, and doves, and such like, another rule has been approved that they are so long considered as ours as long as they have the disposition to return; for if they have no disposition to return they cease to be ours. But they seem to cease to have the disposition to return when they have abandoned the habit of returning; and the same is said of fowls and geese which have become wild after being tamed.

Mr. President, there is not, I submit, the shadow of a doubt that this habit of returning means the habit of returning after they have been tamed, not the habit of returning while they are in a wild condition.

The PRESIDENT.—You made your case perhaps easier in saying that the seals had been stated to be tame. They were not precisely argued to be tame. They were argued to be the object of what Mr. Carter called a husbandry.

Sir RICHARD WEBSTER.—With great deference, Mr. President, there is no case in which what my friend Mr. Carter calls the creation of a husbandry has been supposed to be equivalent either to taming or taking possession of the animal. The sparing and not slaughtering the whole, the abstaining from the right to kill on your land never has been suggested as giving property. I could give you instances without number. Why, in the case of the rabbits, there is not as much husbandry in the seals as there is in the rabbits. It seems to me, Sir, that the mere statement of the case of rabbits is sufficient. The rabbit man, on the hypothesis, may construct the burrows. Nothing of that kind is done for the seal. No house is built for them. The man, if he chooses to do it, can feed the rabbits, to induce them to return.

The PRESIDENT.—You compare the seal to the rabbit, upon which there is no doubt. Suppose we compare them with the bee. The bee is not a tame animal.

Sir RICHARD WEBSTER.—Let me compare it, Sir, with the case of the bee. In the case of the bee, the man builds the hive, builds the house in which the stock is going to be hived. As a matter of fact, as you no doubt know perfectly well, he does in hard weather actually feed the bees, and he does make convenient places in which the bee can store its honey; and modern invention has actually assisted him in the formation of the comb in which the honey will be placed.

Lord HANNEN.—Those are the grounds upon which the French law is based in the case you refer to.

The PRESIDENT.—You know you just objected to calling the pigeons tame. You would not call the bees tame, either. I think the word “tame” is not quite correct.

Sir RICHARD WEBSTER.—I am afraid, Mr. President, I did not make my meaning clear. I did not object to your calling the pigeons tame. I merely suggested I was not dealing with the case of tame animals in that sense, but of animals which had been by the act of man induced to take up a lodging in his dove-cote, to go out and return, and I desired the distinction to be drawn so that you would not think I was referring to

animals that would come and feed out of your hand. The bee is hived, and, as the French law has pointed out, hived by the act of man, and induced to return to that place, as Savigny puts it, where the owner keeps them, where the owner has the means of taking possession of them. He can shut up the door of the hive and carry the whole hive away with him. That is the degree of possession in the case of the bee; and it is quite remarkable when you remember that the mere settling of a swarm of bees upon your tree gives you no property in them.

Senator MORGAN.—Suppose the bees go into the tree and make their hive there without your assistance, do not they become your property?

Sir RICHARD WEBSTER.—Simply and solely because you have got the power of cutting down the tree and taking the honey, and nobody else can do it.

Senator MORGAN.—That is the whole matter. You have got the dominion over it.

Sir RICHARD WEBSTER.—If you say so, that is sufficient. I can say no more.

Senator MORGAN.—I suggest that; I do not assert it.

Marquis VISCONTI-VENOSTA.—So you say that the animal has not the *animus revertendi* unless it returns to the place where man has previously kept it. That is your contention?

Sir RICHARD WEBSTER.—That is my contention; that according to the law of all civilized countries, *animus revertendi* has no operation at all until the man, has had the animal in his keeping. It is not my own language, Mr. President.

Mr. Justice HARLAN.—You mean in his actual manual keeping?

Sir RICHARD WEBSTER.—No.

Mr. Justice HARLAN.—I did not so understand you, but I thought I would ask the question, so that you might bring out the point.

Sir RICHARD WEBSTER.—I do not think it could fairly be put upon me that I meant that. I took the case of deer, that are induced to come into a stable, and which by food being placed there, and by men going among them, can be fed and tamed in the sense which Mr. Carter relies upon as was the case of the deer in the park of Lord Abergavenny. It would not be right to say they were in the manual possession, in the sense of being held, but they were in such a possession that at any moment the man can take possession of the whole of those which are tame, and they have got the intention of returning to the place where the man has had them in possession.

The PRESIDENT.—I beg your pardon; it perhaps is not quite regular, but it might be well to ask Mr. Carter, or one of the other gentlemen to tell us what their view of this matter is. It would make the case more easy for us.

Sir RICHARD WEBSTER.—I am afraid it would be inviting their reply now, Mr. President. That is all.

The PRESIDENT.—Of course if you would prefer to continue your argument.

Sir RICHARD WEBSTER.—I have said all I desire to say.

The PRESIDENT.—I thought there was no difference between you as to *animus revertendi*.

Sir RICHARD WEBSTER.—By all means, Mr. President, if you will put the question, I shall be only too glad to submit to your wishes.

The PRESIDENT.—No; I think it will be answered later; and you might perhaps go on with your argument.

Sir RICHARD WEBSTER.—Mr. President, I will only say, if you will forgive me for repeating it, that in every one of our books of authority, Blackstone, Bracton, Savigny and all the books, the law has been stated

in this way, without deviation. My position is that there is nothing to the contrary. You are asked to invent this law for the benefit of the United States. The learned Senator put to me just a moment ago the question, supposing the wild bees light in your tree, you have got the dominion over that tree and consequently the property in that swarm.

Senator MORGAN.—I mean if they build their nest inside the tree, go inside and make a hive there, if it is a hollow tree, without your assistance.

Sir RICHARD WEBSTER.—“Though a swarm light upon my tree, I have no property in them until I have hived them any more than I have in the birds which make their nests there”.

Senator MORGAN.—That may be true. But suppose they live themselves in that hollow tree without your assistance; then whose property are they?

Sir RICHARD WEBSTER.—They are simply nobody's property at all. My submission is that the man into whose tree they have gone has no property in them whatever, except in the sense that he has a greater right and power of taking them than anybody else. There is no book, and I think no case which, when examined, suggests the contrary for a single moment. I cannot do more, Sir, than answer your question, because I think that will be exhaustive of the matter.

Senator MORGAN.—I had running in my mind an incident that happened to pass under my observation. I suppose you will pardon me for stating it.

Sir RICHARD WEBSTER.—Certainly.

Senator MORGAN.—On the Tennessee River, a few miles below Chattanooga a cave has existed for many years, and has been occupied by bees, which have made many tons of honey there; and I think it has never been doubted that the bees and honey, and everything there belonged to the owner of the soil. He had no agency in them, and no inducements for the bees to return to it. It has been going on there in that way for a great many years.

Sir RICHARD WEBSTER.—There is no case in the books in which any such question has ever been raised and decided; and most unquestionably in the case in which it has been raised, it has been put upon the right, *ratione soli*, of taking possession of the animals that have come there by their natural instinct, and have not come there by any act of man.

I apologise to you, Mr. President, and the other members of the Tribunal, for dealing with a matter which was so fully dealt with by my learned friend, the Attorney-General; but I hope the Tribunal will not think that in endeavouring to make this question of the supposed analogy between bees, seals and pigeons clear, I have unduly occupied the time of the Court; because if there be a lingering doubt in the mind of the Court, I prefer, at any rate, that our case shall be presented, and that no member of the Tribunal shall say that we have endeavored to shrink from any point or to avoid any point which any member of the Tribunal thought it important to make.

The PRESIDENT.—I think your observations were very useful, Sir Richard.

Now I desire, Mr. President, to answer if I can of another of the propositions which we think, as I said, involves a fallacy. I am bound to say that here I can rely a little bit on the difference between Mr. Phelps and Mr. Carter. I will not ask them before the Court to settle their little differences, but Mr. Phelps is of opinion, and I shall submit

rightly of opinion that the United States would be doing no wrong if they killed every seal on these islands, and in law they have the right to kill every seal if they can, and when they have killed all the seals they will have the property in them—my learned friend, Mr. Carter, to support his most ingenious argument says that no possessor of property has an absolute title, but only the usufruct is given him. You will find it in print at page 59.

The title is further limited. These things are not given him, but only the usufruct or increase.

Then my learned friend, Mr. Coudert, sides with Mr. Phelps. Mr. Coudert thinks they might have killed every seal also without breaking any law. I was much interested in this discussion, though not as a lawyer; and I looked through all the authorities so courteously sent me by Mr. Carter, and I find this doctrine of man only having the usufruct, and only being allowed to enjoy the income and not touch the principal—only allowed to take the increase and not diminish the stock, has no place in law whatever. It only finds a place in the writings of political economists who speak of the gain there would be to the community at large by a man only using a portion of his wealth, that is to say not spending every thing he has, but only living out of the fruit of his property.

LORD HANNEN.—But what practical bearing has that, whether they would be entitled to do some thing which they never intended to do?

SIR RICHARD WEBSTER.—Mr. President, I should, perhaps not as crisply as my Lord, have made that comment, and I only point out it is used by my learned friend, Mr. Carter, as ekeing out the claim to property by the United States. It is suggested by Mr. Carter that the property is to be given to them, I suppose on legal principles, because there has been that exemption. Well, perhaps I may be permitted to say I have looked through every law-book I could get, both English and American that we have, to see if there was any foundation for this rule according to the law of any of these countries, and certainly there is not, and it is extremely well dealt with by the French Code by Article 544. It puts it in a way I cannot improve upon.

Property is the right of enjoying and disposing of things in the most absolute manner, provided one does not make a use of them prohibited by laws or regulations.

So that unless, in other words, the law has said, you shall not kill an animal at a certain time of the year, for some reason or other, there is no principle of law that confines the property in any animal to simply enjoying and using the annual produce of it.

Now where is this principle of property to stop if my learned friends are correct in this contention? I have taken some interest in natural history for many years, and I would only remind you of the number of instances which are analogous in which, according to the law of all nations no property is given, and I do not propose a better one than that of migratory birds. If it was a question of natural history discussion, I could give many instances of cases in which particular breeds of birds breed in two or three places which are known. Every member of the families of birds could be destroyed by the owners of these particular places. Their eggs could be taken; their young could be taken, and the race in a very few years exterminated; and I say that it is idle to endeavour to apply this principle to one particular class of animals which have no feature which in law creates any distinction. These Pribilof Islands happen to be a very remarkable instance. On them there are myriads of birds that frequent year by year the islands, come

back every year in regular succession, and breed there and produce their young there; if the principle is worth anything it must be suggested that property in them should be given, because the breasts of those birds could be plucked for the adornment of ladies' hats, or the stuffing of cushions or quilts or making of warm coats for people, out of which a most useful industry has sprung.

The PRESIDENT.—Do they not regularly get the eggs of those birds.

Sir RICHARD WEBSTER.—They do, but I put it higher than the eggs—where the birds were most useful for the benefit of mankind. That is to say that you actually want the animal or the bird itself—it might be the plumage of the Eider duck; but it is not confined to that by any means—there are numbers of other birds whose plumage is of value and much more a blessing to mankind than the seal skins over which my learned friend Mr. Carter shed tears; but I put it to you if this suggested law is worth anything it must apply to persons whose birds breed in his cliffs and on his land, and go out to feed at sea 10 or 15 or 20 miles away, and which have been slaughtered by United States citizens and other persons without let or hindrance all over the world, because there is no property. I entirely deny that there is any distinction between fish and birds: perhaps I may take an opportunity next week of saying a word as to the fallacy which underlies my learned friend Mr. Carter's argument in the matter of fish. But as I have not time to do that to-day, I might tell you some of the instances of fish which would give as great a claim to property. On many of the rivers of the east coast of Scotland the fish of the river are as distinct as they can be. There are two rivers that run into the Moray Firth: the Ness and the Beaully. They are Salmon rivers and they have perfectly distinct Salmon. No Ness salmon are ever seen in the Beaully, and no Beaully Salmon are ever seen in the Ness. They go out and feed in the Ocean and are caught promiscuously there and if the owners of those rivers did not exercise the abstinence that my learned friend talks about they could be killed to such an extent that in a few years no fish would be left.

The PRESIDENT.—Are there not laws relating to that?

Sir RICHARD WEBSTER.—None except a close time, and a provision that the nets shall not be put in more than a certain number of hours a week. There are local laws that in every week nets must be left off for 48 hours, or 24 hours as the case may be, so that the fish can get up and down again, but that is entirely by municipal legislation. So far as actual property is concerned in these fish there is no distinction. They can be identified when caught as to which river they have come from, and they are, as a matter of fact, though I am anticipating, artificially hatched and bred largely to increase the stock in a great number of places: a form of industry which is impossible according to our present knowledge of seals, and yet in this case property in the fish has not been recognized.

The PRESIDENT.—Are they ever fished in the open sea?

Sir RICHARD WEBSTER.—Yes.

The PRESIDENT.—There is no municipal law against that?

Sir RICHARD WEBSTER.—No; there is no municipal law against that, except on some of the foreshores there are certain privileges of setting nets; but that is a privilege given to certain persons under Royal franchise, and has nothing to do with the open sea.

Senator MORGAN.—In your studies of Natural History, Sir Richard, which seem to be very broad and very exact, have you found an animal,

feathered, furred, or scaled (the coating makes no difference) that, by its instinctive characteristics, surrenders itself in regard to its power of escape to the same extent as the fur-seal does on the land?

SIR RICHARD WEBSTER.—That entirely depends on what you mean, Senator Morgan, by “surrenders itself”. When I come to that part of the case, what I am going to suggest to you is, except people get round and frighten it, it never surrenders itself at all. May I tell you an exact case that seems in point? One of the most interesting birds on the coast of Scotland is the Solan Goose, which is a very beautiful bird that breeds, so far as I know, in two or three places only, and one of those places is off the Orkneys, 100 miles out,—there are two Rocks, called the “Stack” and the “Skerries”, out in the Atlantic; and people go to take a certain number of eggs, and the hen-birds, the wildest known, will sit on their nests, so that you can hit them with a stick as you pass by.

I have known people who have done it, they will hiss at you, and these wild birds, while sitting on their nests will allow you to knock them on the head, if you like.

Senator MORGAN.—Then, as to the male bird?

SIR RICHARD WEBSTER.—Well, he would not be much use without the hen.

Senator MORGAN.—So that, if you kill the males and not the hens, there will not be much progress in killing.

SIR RICHARD WEBSTER.—The male bird would fly away; and, if you attempted to drive the bull-seals away, you would not have much progress then.

Senator MORGAN.—But they do not seem to escape at all.

SIR RICHARD WEBSTER.—I cannot tell what is in your mind as to the habits of these seals—I shall have to trouble you some other day with regard to that; but that I should not be thought to have my answer ready, I submit what happens with regard to these seals is, that they are frightened and from fear and fear alone are made and not induced (in the ordinary sense of the word) to travel long distances out of what I shall call their natural element are reduced into a condition where they suffer immensely, and being in that condition from which they cannot escape, they are then killed, and if that is surrendering themselves—supposing that is what you mean by it—I have not a word to say.

Senator MORGAN.—I never heard that seals were so frightened as to haul out of the sea on to the shore.

SIR RICHARD WEBSTER.—No, but you were good enough, as I understand, to put it to me that they surrender themselves so that they could be dealt with by man.

Senator MORGAN.—I do not mean by a voluntary act, but by an instinct from which they cannot escape.

SIR RICHARD WEBSTER.—Of course, you have more knowledge than I have of this, but I do not suppose a three or four year old seal, when he comes out for the first time, knows that he is going to be driven, I venture to think that if a seal comes out upon the island, he has no idea he is going to have boys to shout round and drive him up till he is in the condition to which I will call attention some day or other, and then to receive the final blow.

Senator MORGAN.—And I have no idea that he would have any such expectation, but if he had, I think he would come out any way.

Sir RICHARD WEBSTER.—I do not think the evidence supports your inference, Sir; but that is not a matter we are discussing. You must not take me as saying anything to show that I accede to or acquiesce in your view of the facts.

I entirely deny, you must understand, that that condition of things is at all different from that which exists in the case of many other birds and animals; and I say, submitting or surrendering in that sense is common to many other animals besides the seal. It is as common an incident in the life of the salmon as it is in the life of the seal. It is obvious, at this time of the day I should not be justified in attempting to answer you at greater length than I have in the few words I have addressed to you in reply to your question.

[The Tribunal then adjourned till Tuesday next, June 6th, 1893, at 11.30 o'clock A. M.]

THIRTY-THIRD DAY, JUNE 6TH, 1893.

The PRESIDENT.—Before you begin, Sir Richard, Mr. Gram wishes to say something.

Mr. GRAM.—The Appendix vol. I to the United States Case gives the text of the law and regulations relating to the protection of whales on the coast of Finmarken. It was my intention later on to explain to my colleagues these laws and regulations, by supplying some information about the natural conditions of Norway and Sweden which have necessitated the establishment of special rules concerning the territorial waters, and to state at the same time my opinion as to whether those rules and their subject matter may be considered as having any bearing upon the present case. As, however, in the later sittings reference has repeatedly been made to the Norwegian legislation concerning this matter, I think it might be of some use at the present juncture to give a very brief account of the leading features of those rules.

The peculiarity of the Norwegian law quoted by the Counsel for the United States, consists in its providing for a close season for the whaling. As to its stipulations about inner and territorial waters, such stipulations are simply applications to a special case of general principles laid down in the Norwegian legislation concerning the gulfs and the waters washing the coasts. A glance at the map will be sufficient to show the great number of gulfs or "fiords", and their importance for the inhabitants of Norway. Some of those "fiords" have a considerable development, stretching themselves far into the country and being at their mouth very wide. Nevertheless they have been from time immemorial considered as inner-waters, and this principle has always been maintained, even as against foreign subjects.

More than twenty years ago, a foreign government once complained that a vessel of their nationality had been prevented from fishing in one of the largest fiords of Norway, in the northern part of the country. The fishing is carried on in that neighborhood during the first four months of every year, and is of extraordinary importance to the country, some 30,000 people gathering there from South and North in order to earn their living. A government inspector controls the fishing going on in the waters of the fiord, which is sheltered by a range of islands against the violence of the sea. The appearance in these waters of a foreign vessel pretending to take its share of the fishing, was an unheard of occurrence, and in the ensuing diplomatic correspondence the exclusive right of Norwegian subjects to this industry was energetically insisted upon as founded on immemorial practice.

Besides Sweden and Norway have never recognized the three-mile limit as the confines of their territorial waters. They have neither concluded nor acceded to any treaty consecrating that rule. By their municipal laws the limit has generally been fixed at one geographical mile, or one-fifteenth part of a degree of latitude, or four marine miles; no narrower limit having ever been adopted. In fact, in regard to this question of the fishing rights, so important to both of the united kingdoms, these limits have in many instances been found to be even too

narrow. As to this question and others therewith connected, I beg to refer to the communications presented by the Norwegian and Swedish members in the sittings of the Institut de Droit International in 1891 and 1892. I wish also concerning the subject which I have now very briefly treated, to refer, to the proceedings of the Conference of Hague, in 1892, (Marten's *Nouveau Recueil Général*, 11^{ème} série, volume IX), containing the reasons why Sweden and Norway have not adhered to the Treaty of Hague.

The PRESIDENT.—I would beg the Counsel of both parties to keep in remembrance the observations of Mr. Gram if they are inclined to quote the example of the Norwegian Waters; but I wish to state once more very distinctly that the question of the definition of what are territorial waters is not before us, and it is not the intention of this Tribunal to express any opinion as to the definition of territorial waters.

Sir RICHARD WEBSTER.—It is only necessary, Mr. President, in acknowledging, so far as the Counsel of Great Britain are concerned, our appreciation of the courtesy of Mr. Gram with regard to the Memorandum he has been good enough to read to us which will no doubt appear upon the Notes of the Proceedings, for us to say it is exactly in accordance with the view which I understand the Attorney General to have expressed, and which I expressed a few days ago, in regard to this matter; that, knowing perfectly well the question of territorial waters was not before you, I merely stated, so far as my own reading and information went, the doctrine of territorial waters in Norway and Sweden had to be considered with reference to the special configuration of the coast. And I did not know, one way or the other, whether or not Norway had either adopted the three-mile limit or insisted upon a wider range. It is clear, from the Memorandum that the learned Arbitrator has been good enough to read to us, the view I expressed was in accordance with the contention of Norway; and, further than that, I would point out, for the reasons with which I was not acquainted,—the discussion at Hague,—it is clear that this matter has been treated specially by Norway and Sweden in connection with their claim. If we had been discussing the question of the claim of the United States to a territorial jurisdiction, which is for the purpose of their case disclaimed, similar considerations might have arisen; but they do not arise, as the whole of my learned friend's argument is based on other considerations, to which I shall have to call attention later on.

Before I conclude what I desire to say on the question of property I wish to supplement a few observations on the subject to which I referred, as a little doubt was thrown upon the accuracy of my information by Mr. Senator Morgan when I made my statement with regard to Japan. First he intimated that Shimonoseki Straits had been opened a good many years before; and second he thought I was not correctly informed in my suggestion that the United States relied upon treaty. I have obtained the most accurate information on the matter and in both those matters I may say my information was strictly accurate. The Shimonoseki Straits; and all the waters of Japan, had prior to 1854 been absolutely closed to foreigners for upwards of 250 years, the only persons who had any settlement there were the Dutch who had a small settlement. In 1854 a treaty of navigation and for the opening of certain ports was made by the United States,—and I only surmised this the other day, because I had not had the opportunity of looking it up,—the first treaty was made by the United States in 1854 and it was not till after that treaty that 14 other Powers including Great Britain and France came in in the year 1857 and 1858, and the right to navigate

the Shimonoseki Strait had been claimed by all the powers by virtue of these treaties and by no other claim so far as I have been able to ascertain.

The learned Senator was perfectly accurate in referring to its narrowness but he rather stated it against himself, because it is less than a mile wide in one place, and the opening at the other end, clear of the islands, is less than four miles, so that it would have been difficult unless there had been some immemorial usage or some Treaty, for any nation such as Great Britain or France to have claimed a right of navigating in such waters. The Treaty was in fact concluded with the Shogun, and when the authority of the Emperor was restored it was not considered necessary to ratify again the Treaties. The only alteration was that in the case of Great Britain an Order in Council was issued substituting the name of the Emperor for the name of the Shogun; and when the disturbance by Prince Choshu arose all the Powers combined, as I stated on the last occasion, and expressed their intention in identic memoranda to aid the then Government of Japan in putting down the interference of the rebellious prince Choshu who was purporting to interfere, and in fact interfering, with the rights of navigating under those Treaties. I mention the matter now as I was, of course, anxious to look up any point as to which there was a lingering doubt in the mind of the Tribunal. I have ascertained those facts, and I need not say that all the information in my possession is at the disposal of any of the members of the Tribunal.

Senator MORGAN.—Well Sir Richard, I think it only right to say I have that Treaty of 1854 before me, and the United States have the right, under Article 2 to enter the ports of Simoda and Nagasaki and the port of Hakodadi, which I think is not on the straits of Shimonoseki. Those are the only ports they had the right to enter.

Sir RICHARD WEBSTER.—Is not that the Treaty with the favored nation clause in it?

Senator MORGAN.—You spoke of a Treaty with the United States in 1854, by which this strait was opened to the commerce of the world. I do not find that.

Sir RICHARD WEBSTER.—I think I said supplemented by the other Treaties under which the other Powers came in. It will be found that prior to that Treaty of 1854 those Straits were closed, and they remained open from 1854 till Prince Choshu attempted to close them in 1864 as I mentioned the other day.

Senator MORGAN.—I meant to state the attitude of the United States Government towards that country—they claimed no Treaty right of going through the Straits of Shimonoseki at all. They claimed it on the ground that it was part of the high sea, because it was a strait connecting two great seas—the Sea of Japan on the south, and the Yellow Sea, I think it was, or the Sea of Corea on the north.

Sir RICHARD WEBSTER.—Well, Mr. President, I must not appear to enter into a controversy with the learned Senator, but I looked at the identic notes that were signed in the year referred to, and I can only say I believe it will be found that the United States claim was founded on Treaty. It seems to me sufficient for my purpose to call attention to that, and as I cannot say that my information as to the facts accords with what the learned Senator says, I have performed my duty in calling the attention of the Tribunal to what I understand to be those facts.

Now, Mr. President, I had practically concluded what I desire to say on the question of property at the sitting of the Tribunal on Friday last, but I presume I may be possibly expected to make one or two

observations applicable, so to speak, to this particular tribe of animals, the seals. I do not wish to add anything to the general description of them given by my learned friend, the Attorney General. I confess I was somewhat surprised in reading through the argument of Mr. Coudert, and the passage I refer to will be found at page 594 of the revised print before the Tribunal, when he stated that seals were only amphibious as the result of education. It struck me as a somewhat strained view. We know on the evidence that although young seals would be drowned if they were allowed to remain in the water too long, that is to say, that they cannot sustain themselves in the water during the first years of their birth any more than birds can fly when they are first hatched—

Lord HANNEN.—You used the word “years”. I suppose you would say “months”.

Sir RICHARD WEBSTER.—I ought to have said “days” of their birth any more than birds can fly; but we know that the instinct is there, for there is abundant evidence that pup seals have swum when in the water. I mention this to show that the argument of the United States has gone to very remarkable lengths when it leads my learned friend to suggest that the amphibious nature of the seals is only the result of education.

I wish to say a word on that which both my learned friends, Mr. Carter and Mr. Coudert, regarded as of importance,—the question of intermingling; and certainly, from a most careful view of this evidence, I say he will be a very bold man who would suggest that these seals did not intermingle, whether you take the evidence of the United States alone or whether you take the body of evidence on both sides.

I will remind you in a few moments of one or two matters which bear directly upon that. You will remember that my learned friend, the Attorney General, read to the Tribunal extracts from the evidence of the fur merchants, showing the existence in the Alaska catch of skins which could not be distinguished from the Commander and Copper Island skins, and in the Commander and Copper Island catch of skins which could not be distinguished from the Alaskan. He further read to the Tribunal evidence to show that in the same catches there are also skins in the Alaska and Copper Islands respectively which practically show interbreeding. I desire to supplement that evidence with one or two observations, directing the attention of the Tribunal to two or three matters in the same connection. First, I should like to tell the Tribunal that there are no less than 32 Furriers of independent position, many of them giving evidence for the United States, to many of whom my learned friend, Mr. Coudert, appealed as being witnesses of impartiality and integrity,—there are 32 witnesses, who will be found on pages 238 to 251 of the 2nd volume of the British Counter Case, who speak to the finding of these skins, as I have said, indistinguishable among the Alaskan catch from the Copper and Commander Island catch. Mr. Coudert felt that that would be important evidence, for, on page 618 of the Revised Print, he said:

But upon this you will observe that there is not one single witness who will testify that he ever found a skin which he would call a Copper skin, in a consignment of Alaskan skins.

I do not, of course, want to prove my learned friend to be in the wrong, because it was a matter to which perhaps he had not had his attention sufficiently directed to; but so far from there not being a single

witness, there are that number of witnesses to which I have referred, and many of them (some 15 or 20) state the actual percentage or extent to which they think those skins occur.

Now, Sir, there is another body of testimony to which I desire, for a few moments, to direct the attention of the Tribunal—that is the evidence of no less than 57 witnesses who having sailed across Behring Sea, and having sailed across the Pacific Ocean south of the Aleutian Islands, state they have seen on a variety of voyages, at a variety of latitudes, and a variety of positions, practically continuously scattered seals across the sea. Well, Sir, of course it may be true that this kind of evidence is to be wholly disregarded, but I would ask the Tribunal first to consider for a moment what the probabilities of the matter are. That large masses of seals do go to the Commander Islands, do go to the Pribilof Islands, is of course plain. It is stated in the first instance by the British Commissioners, and recognized by every one who has investigated this matter; but when they are on the sea they must, to a large extent, be influenced by what is the actual position of the shoals of fish upon which they feed.

It is now plain from the evidence of the United States witnesses, as well as ours, that the seals feed largely on herrings cod salmon and on other fish—that it is not a fact that they feed solely upon squid or solely upon those animals or fish which would be found on the surface. Therefore that these shoals of fish do shift, is spoken to by many witnesses, and as one would expect from one's general knowledge of natural history; you have therefore the testimony to be found summarized in pages 23 to 27 of the 2nd volume of the Appendix to the British Counter Case. You will find the evidence of 57 witnesses who, sailing across Behring Sea at all times of the summer—after May—sailing across the North Pacific Ocean, even in months which range over a longer period, have found these seals in thin scattered numbers going one or two at a time, or three or four at a time, practically the whole way over. But Mr. President let us for a moment consider what the United States evidence shows upon this matter, because really looked at fairly, and without an attempt to contradict what may be said in support of this theory, I shall submit to this Tribunal that it disproves altogether the theory of nonintermingling. There is the testimony of a witness at page 215 of the 2nd volume of Appendix to the United States Case. His name is Prokopief, and I will just tell you what he proves. Would it be troubling the Tribunal too much to ask them just to open map n° 1 of the United States—I mean the map of Behring Sea and the North Pacific. Just a little to the south-east of the end of the line of demarcation, you will see the Island of Attu. Just to the right of that, you will see the Island of Semichi, and then, a little further about an inch on the map which represents 150 miles to the right, you will see Amchitka. Now this witness says he has seen seals constantly as far as Amchitka and that he has seen them in batches between Attu and Agattu; that he has seen them 30 miles east of the Semichi Islands; so that, if you took the evidence of this gentleman Prokopief, and assume it to be (as I will assume it to be) perfectly honest, the limit to which he reduces the zone where no scattered seals are to be seen is 140 miles.

The zone or the space between which he says he finds there are seals is 140 miles. Now will the Tribunal consider for a moment what the problem is—and bring to bear their general knowledge on the evidence?

It is admitted that seals have come from the Pribilof Islands down to Amchitka. That will be a distance, roughly, of between 500 or 600 miles. The distance from the nearest of the Pribilof Islands to the Aleutian Islands is 182 miles. It is put by some witnesses as 200 miles; but I will take the smallest distance, 182. From the Pribiloffs to Amchitka you will see, roughly, is a little more than double that distance; that would be between 400 and 500 miles however, the seals are supposed to have come and probably have come. Of course, if the seals have crossed over the 30 miles, so much then of intermingling is proved at once; but the seals are supposed to have come from the Commander Islands down, 30 miles east of Semichi. As far as I can judge by my eye, that again would be about 250 miles, I should say—perhaps rather more, 300. I will show presently that seals have also been found right up into Behring Sea near Behring Straits. We know they have been found all along these Aleutian Islands from time to time, and I will also remind you they have been found spread out across *these* seas. Now I want to ask you upon what reasoning—upon what line of thought is it to be suggested that having gone the 500 miles—having gone the distance which would indicate that they are roving about—they do not pass over the 140 miles? What magic is there in that 140 miles, it being the strongest corroboration of the fact which is sworn to by upwards of 30 independent witnesses, that the skins are, in fact, found identical in the two consignments, and also seem to partake to a great extent of one character and to a great extent of the other. Upon this, let me simply mention a subject which I do not wish to elaborate at length, for reasons which the Tribunal will, I am sure, appreciate.

Mr. PHELPS.—I beg my friend's pardon, for interrupting him, but I think, if he will kindly read the evidence of this witness which he is quoting he will perceive that he has not understood him quite correctly.

General FOSTER.—The first paragraph—that is all.

Sir RICHARD WEBSTER.—I will read the whole of it. He says:

I am a hunter of the sea otter and blue fox and have lived in this vicinity all my life. I hunt about Attu, Semichi Islands. Have never hunted nor killed a fur-seal. Fur seals do not regularly frequent these regions and I have seen none but a few scattering ones in twenty years. Thirty years ago, when the Russians controlled these islands, I used to see a few medium sized fur seals, on in the summer, generally in June, travelling to the north, I think; for the Commander Islands.

Now, observe that: from the Amchitka Island down to the north-west,—that is, going away over the very branch of the sea in question, if his opinion is right,—from that Island down away to the north-west, I think, to the Commander Islands.

Then he goes on to say:

The farthest east I have ever observed them was about 30 miles east of the Semichi Islands; do not think those going to the Commander Islands ever go farther east than that. Those most seen in former times were generally feeding and sleeping about the kelp patches between Attu and Agattu, and the Semichi Islands, where the mackerel abounds.

We know the mackerel are about the most fleeting fish there are. Then he says:

They decreased in numbers constantly, and now are only seen on very rare occasions.

Whether I misrepresented—I am sure my friend does not mean to say I misrepresented—whether I misappreciated that evidence, I will leave the minds of the Tribunal to judge.

General FOSTER.—He does not say that the Pribilof Island seals came to that island.

Sir RICHARD WEBSTER.—I beg my friend's pardon. I see General Foster's point. It is better for me—but I do not want to argue this case on that theory—if those were only Commander Island seals, because he is speaking of the island of Amchitka. I can prove beyond all question, on the evidence, that the Pribilof Islands seals go and are found—in fact that is the United States Case—all along the north of the Aleutian Islands in Behring Sea. I say that to come to the conclusion that seals do not pass across 140 miles of sea, when they have traversed hundreds of miles, as much at least as 500 or 600 miles, and do traverse thousands of miles, is a conclusion which, except upon overwhelming testimony, the Court, I submit, will not adopt; reminding the Court that the seals from both Islands are the same species. There is no distinction between the animals. Any distinction in the furs is due to the climatic conditions, and possibly the curing conditions of the Pribilof Islands and the Commander Islands respectively; and Mr. Senator Morgan, when Mr. Coudert was arguing, stated at page 638, that the feeding grounds shifted—could not be located—and that, therefore, it was not possible to define the exact place where the seals might be one year, as with another.

Senator MORGAN.—I only asked the question.

Sir RICHARD WEBSTER.—I am much obliged, Sir, I understand. But Mr. President, will you look at the evidence of Captain Hooper? It will be found at page 216 of the American Counter Case. Captain Hooper found the seals in large numbers 300 miles west of the islands. It is no question of females—it is the question of finding seals in large numbers 300 miles to the west. He says:

During the run of 400 miles from Lat. $58^{\circ} 22' N.$, Long. $177^{\circ} 42' W.$, to Lat. $55^{\circ} 38' N.$, Long. $174^{\circ} 23' W.$, no seals were observed, although a careful look out for them was kept at all times.

Numerous seals having been found in these latitudes at a distance of 300 miles I infer that the western limit of the range of the Pribilof herd of seals is between two and three hundred miles from the islands and that the herds from the Pribilof and Commander groups of islands do not mingle.

I ask why when numerous seals are found at a distance of 300 miles, it shall from that be inferred that the western limit is between 200 and 300 miles? It is a difficult thing quite to appreciate. I am not unduly or unfairly criticising Captain Hooper's evidence but I point to numbers of seals having been found at a distance of 300 miles from the Pribilof Islands—I am content to show that those animals, speaking of them as scattered animals—not as thick, dense flocks of them round the Pribilof Islands—do travel a considerable distance, and again I say: What argument is there which is conclusive; or which you can say is found in any way sufficiently powerful, to induce you to come to the belief that they do not travel that intermediate 140 miles which is suggested to be the zone of separation between the two herds? I am not now, Mr. President, criticising this matter at length. I shall have to deal with it at length when I touch the question of regulations, and I shall then venture to urge before this Tribunal that the opinion of the British Commissioners is completely justified by the evidence subsequently taken. There is a very convenient summary of the evidence upon this matter at pages 23 and 24 of the Supplementary Report of the British commissioners. I am only using this as a part of my argument in order to show what is the existing state of the evidence with regard to the distances to which the seals approach one another. I will begin to read from the bottom of page 23.

In our previous report, as the existence of a certain amount of intermingling had never been questioned, it was not considered necessary to note in detail the evidence and the observations upon which the general statements made were based, but in conjunction with the information since obtained this becomes more important.

Now this is referring to the information they had when they made their Report stating there was intermingling. It goes on:

This information consisted, in the first place, of statements by pelagic sealers to the effect that, when crossing Behring Sea from the eastern to the western side, fur seals were frequently seen by them in all longitudes; secondly, of our own observations and of enquiries locally made along the Aleutian Chain.

My friends do not, of course, dispute the accuracy of facts actually spoken to by Dr. Dawson and Sir George Baden Powell.

Mr. PHELPS.—We very much dispute the accuracy of facts which are brought into this Supplementary Report that we had never heard of before, and we did not understand the decision of the Tribunal to make them evidence. We should contend they are not.

Mr. Justice HARLAN.—Sir Richard only adopts them as part of his argument, he said.

Sir RICHARD WEBSTER.—I am distinctly in accordance with the decision of the Tribunal.

Mr. PHELPS.—I understood my friend to say he was referring to the subsequent information obtained by these gentlemen.

Sir RICHARD WEBSTER.—My friend, Mr. Phelps, misunderstood me. I was referring to what the gentlemen themselves observed in the year 1891, which they had not previously stated in their report, because they did not understand the matter to be questioned. What has been ascertained since is in evidence in the Counter Case. It goes on:

While running to the westward, north of, but near to, the line of the Aleutian Islands, though the circumstances were often unfavourable for sighting seals, and long distances were passed by night, seals were actually seen by us approximately in the following positions:

August 25th.—North of Amukhta Islands, longitude 170° West.

August 25th.—North of Amlia Island, longitude 173° West.

That is going towards the West, of course: they are west longitude from Greenwich. Then it goes on:

August 28th.—Near Attu Island, longitude 173° East (one seal).

August 30th.—Midway between Attu and Commander Islands, longitude 171° East.

Further to the north, in the vicinity of the 60th parallel of latitude, occasional seals were met with at sea by Her Majesty's ship "Nymphé", and by ourselves in the month of September as far to the westward as 174° 30' West.

We also ascertained from Mr. Grebnitsky, Superintendent of the Commander Islands, that fur seals had been seen in 1880, 1886, and 1887, by Russian cruisers when shaping a course from these islands to Indian Point, as far north as the 60th parallel, and at about the intersection of this parallel with the 180th meridian. The position thus defined is within about 180 miles of that in which we ourselves saw the first seals at sea in approaching the Pribiloff Islands from the northward.

Information gathered on this subject in the Aleutian Islands, in 1891, may be thus summarized.

Mr. PHELPS.—Pardon me, I think myself this question should be determined now. It is a question that we debated at so great a length before the principal hearing commenced—whether these British Commissioners could come in, pending the argument, and, by a new Report, not provided for by the Treaty, and which we have had no opportunity of seeing, much less to answer, add to those facts which are to be considered as evidence before this Tribunal.

We did not understand the decision of this Tribunal—we may have misunderstood it—to be that facts of this character became evidence in the case. We understood the decision to be that the argument of

the British Commissioners in support of their previous conclusions might be adopted by my learned friends as part of their argument, and, to that we had no objection whatever, but here my friend is reading new and additional statements of fact, which are either evidence or else they are utterly totally immaterial. We object to those being considered as a part of the evidence in this case.

Sir RICHARD WEBSTER.—I only desire to say that I propose to read (in strict accordance with the decision of the Tribunal) this summary of the evidence referred to as obtained by them in 1891, and all the evidence in 1892 (which is in the Counter Case) as a part of my argument. I understood that to be distinctly in accordance with the decision of the Tribunal, but I only wish to say—I am not going to argue the matter at greater length—that if the Tribunal give me the slightest indication—

Mr. PHELPS.—Might I ask my friend where this statement of Grebnitsky of what he gathered from the Russian cruisers is to be found except there?

Sir RICHARD WEBSTER.—I think my learned friend, Mr. Phelps, while Mr. Williams was speaking to him, was not paying attention to me. I stated that that was evidence obtained by the British Commissioners in the year 1891, upon which they made their statement. I did not say that that was in the appendix.

Mr. PHELPS.—My question was whether the evidence upon which they base this statement is to be found in this case anywhere, or whether it is supplied in support of a statement which we claim to have disputed.

Sir RICHARD WEBSTER.—It is found in the statement made by the Commissioners themselves.

Lord HANNEN.—Where is it to be found?

Sir RICHARD WEBSTER.—As far as I know it is a statement made by the Commissioners.

Lord HANNEN.—Where is that statement to be found?

Sir RICHARD WEBSTER.—At page 24.

Lord HANNEN.—Of the Supplemental Report?

Sir RICHARD WEBSTER.—Yes.

Mr. CARTER.—And no where else.

Lord HANNEN.—Mr. Phelps was trying to ascertain where it appeared upon the record. You say in the Supplemental Report.

Sir RICHARD WEBSTER.—It did not appear before and the report says so.

Lord HANNEN.—It is the only evidence of the statement.

Sir RICHARD WEBSTER.—The statement appeared that there was intermingling—I will refer to that in a moment.

In the original report the British Commissioners stated that in their opinion the two herds intermingled; they had not stated the evidence and they proceeded to say this:

In our previous report as the existence of a certain amount of intermingling had never been questioned, it was not considered necessary to note in detail the evidence and the observations upon which the general statements made were based.

Lord HANNEN.—Well, you might adopt that into your argument—that that was the reason why they did it. Now what is the next statement?

Sir RICHARD WEBSTER.—The next statement is this—that they now state what was the information that they had obtained in 1891 upon which they drew their conclusion, they having had no reason to state it before, because rightly or wrongly they did not think this matter would

be disputed, and that is, as I understand, (of course I am entirely in the hands of the Tribunal with regard to this matter), a statement by the Commissioners in exactly the same manner as that which was stated in their original report, not of course controlled by rules of evidence any more than the statement of the United States Commissioners, but a statement of evidence they had before them from which they drew their conclusions. The rest of the matter refers to that which is in evidence. What I was reading when Mr. Phelps interposed was the statement by the Commissioners of what they learned from Mr. Grebnitsky.

MR. CARTER.—The position of the learned counsel seems to be this: that if there is any matter of fact in the possession of the British Commissioners at the time they drew their original Report, which matters of fact are not contained in it and which are in the nature of evidence, that they may now introduce that evidence of these matters of fact, and for the reason that they were not then thought to be material. The point is, that it is introducing *new* evidence, and the suggestion that it was omitted by them at the time, because they did not think it to be material, does not detract from the fact that it is still *new* evidence, and that was excluded by this Tribunal, as we understood, when we debated upon the question of the introduction of this report.

SIR JOHN THOMPSON.—It was not excluded.

MR. CARTER.—It was excluded as evidence, and was allowed to be adopted by way of argument.

SIR JOHN THOMPSON.—We reserved our decision as to whether it should be received as evidence.

MR. CARTER.—At all events it was not admitted.

SIR JOHN THOMPSON.—It was not received.

MR. CARTER.—If the question still remains open, we make objection now.

LORD HANNEN.—Were you going to add anything, Sir Richard?

SIR RICHARD WEBSTER.—I was going to say this. As, of course, this matter is of more importance upon the question of Regulations than it is upon this matter—but for the introduction of it by Mr. Coudert I do not know that I should have referred to it—I was going to read the decision of the Tribunal. I am reading now from page 192 of the revised report.

It is ordered that the document entitled a supplementary Report of the British Behring Sea Commissioners, dated January 31st 1893 and signed by George Baden-Powell and George M. Dawson and delivered to the individual Arbitrators by the Agent of Her Britannic Majesty on the 25th day of March 1893, and which contains a criticism of, or argument upon, the evidence in the documents and papers previously delivered to the Arbitrators, be not now received, with liberty, however, to Counsel to adopt such document, dated January 31st 1893, as part of their oral argument; if they deem proper.

The question as to the admissibility of the documents or any of them, constituting the appendices attached to the said document of January 31st 1893, is reserved for further consideration.

I have not referred at present—I am not going to refer to—any appendices, but solely to the statement made by the Commissioners, gentlemen of repute—as to the grounds upon which they made the statement which I referred to in their original report. I do not like to involve myself in matters of discussion and I submit I am within my right. Of course I have other important matters to bring before the Tribunal, and unless the Tribunal wished to adjourn formally to consider it, I would rather postpone this matter for the present.

The PRESIDENT.—We must reconsider the matter at any rate since you intend to use those statements in your arguments on Regulations.
Sir RICHARD WEBSTER.—Certainly.

Mr. Justice HARLAN.—You postpone it until that time, do you?

Sir RICHARD WEBSTER.—Upon the least intimation from the Tribunal, I should do so.

Lord HANNEN.—I am very anxious, Mr. Phelps, so far as I can, always to meet your views. Would it be objectionable if Sir Richard referred to it, you having noted the fact that the evidence was not contained in anything which preceded the supplementary Report? We bearing that in mind, would it inconvenience you that Sir Richard Webster should use it, with the comment made by you upon it?

Mr. PHELPS.—It is not a question of convenience if the Tribunal please, at all—it is a question of right. The objection that we make is: That neither under this Treaty, nor under the procedure of any Tribunal that ever sat under the forms of law, is it allowable for a party after the case is made up, the written argument complete, the oral argument begun, to come in with a statement of new facts and new evidence that is to be regarded by the Tribunal in determining the issues of fact.

Lord HANNEN.—I had that fully in my mind. You have answered by saying you stand on your strict rights, and do not treat it as a matter of convenience.

Mr. PHELPS.—As a matter of course if it is not to be regarded, it need not be read. If it is to be regarded, we are defenceless as far as that is concerned.

The PRESIDENT.—You object to the facts being stated, because you have not had time or the capacity to control them.

Mr. PHELPS.—Certainly.

Sir RICHARD WEBSTER.—Mr. Phelps' observation shows that he really has not apprehended my position in the least. In paragraphs 452 and 456 of the original report the British Commissioners state the fact that in their opinion, (rightly or wrongly) they come to the conclusion that there was intermingling.

Mr. Justice HARLAN.—That there *was*?

Sir RICHARD WEBSTER.—Yes—intermingling. They did not state the information they had obtained with regard to the matter. They did state an amount of other information they had obtained, and the United States Commissioners in their report equally state that. In this supplementary Report all they do is to give to the Tribunal the information they then had upon which they formed the conclusion which the Tribunal can criticise.

Lord HANNEN.—That raises the question of what Mr. Phelps insists upon, whether or not it is not fresh evidence.

Sir RICHARD WEBSTER.—Of course I do not want to argue this again now—this was the whole matter we discussed on the previous occasion. It is not a question of evidence—it is a question of information before the Tribunal with regard to this question, depending partly upon the conclusions people drew from certain facts.

Sir JOHN THOMPSON.—The British contention at that time only was that this was admissible and capable of being used *quoad* Regulations, and you have not come to that stage of your argument yet.

Sir RICHARD WEBSTER.—Really, one only regrets possibly that one is involved in a contention which may be thought to introduce questions of difficulty to a greater extent than it does. I am willing from the point of view of property argument not to refer to this any more; but I must,

in adopting that line, be understood distinctly as reserving my position. I do not pass from it in consequence of what my learned friend, Mr. Phelps, has said in regard to this matter, because he has, with deference, endeavoured to put us in a position that we have never assumed, and which we ought not to be supposed to have taken.

So far as I am concerned, if the Tribunal prefer that the matter should be discussed at a later stage, it does not bear directly on the point I am now arguing. There is abundant evidence without this, before the Tribunal, to enable them to come to the conclusion to which I invite them.

The PRESIDENT.—Then, Sir Richard, you are willing to pass over these facts till you come to Regulations?

Sir RICHARD WEBSTER.—Certainly, Sir.

The PRESIDENT.—Very well.

Sir RICHARD WEBSTER.—Then there is one argument to which, for obvious reasons, the Tribunal will not expect me to refer at any length; and that is, the question of the fertilisation of the female at sea. All I desire to say is that I hope they will be good enough to take a note of pages 33 and 34 of the British Counter Case, Appendix 2, where will be found evidence of between 20 and 30 witnesses. The fact, for what it is worth, is abundantly proved. There is this further matter to which I ask the particular attention of the Tribunal, that, upon the evidence on both sides, the United States and ours, there is no evidence of virgin cows ever having been seen on the Island at all, and it has a remarkable bearing on this branch of the case. But, of course, for obvious reasons, I do not desire to elaborate that matter further now; I may have to call attention to it later on.

Sir, Mr. Coudert told you that the branding of these pups was a matter of perfect ease, could be done without the slightest difficulty, and that that fact was strong evidence of the property rights of the United States. Mr. President, I do not doubt that this Tribunal have read many passages in these affidavits, so that they have a very intimate knowledge of the evidence; and I am willing to put this in the broadest possible way. It has never been done, except in the instance of the hundred seals that had their ears cut in order to see whether they would come back to the same rookeries, with the result, as the Attorney General reminded you, that none came to the same rookery: some were found in different parts of the Island, and some were found on the other Island of St. George. When you remember the evidence as to the timidity of these animals, that, if the rookeries are disturbed, the seals go with such haste (this is on the evidence of both sides) to the sea, that they trample over the young pups and kill them,—when you know that the evidence is that, upon any person alarming them, they immediately take to the water and no longer remain upon the land; when you further find that upon the evidence of Mr. Stanley Brown for the United States and the evidence of Mr. Macoun and other witnesses, to whom later on I shall have to call attention, the pups in 3 or 4 weeks from their birth spread themselves over miles of these Islands, I think the suggestion made to you that a ground for awarding property is that these seals might be branded is somewhat extravagant. I use, and desire to use, no stronger expression than that.

Now, I would point out that if they were marked or branded, it would make no difference on the question of property. If I mark my pheasants, those actually hatched by me, and reared by me, and fed by me, and they fly out to other people's land, they have a perfect right to shoot them. Suppose I should mark every young rabbit that could be caught in the same way. If a rabbit went out on my neighbour's property, he

would have a right to shoot it. The only case, as I endeavoured to point out to the Tribunal on the last occasion, in which property is given in such animals, is when possession is taken; and possession is not taken by marking a wild animal and letting it go.

Sir, some of my learned friends seem to think, from this point of view, there was some analogy between the seals and the cattle on the plains of America. That was fully dealt with by the Attorney General; but perhaps I may be allowed to remind you that the whole principle upon which the legislation (for it is legislation) has proceeded in the United States, has been that the animals could be rounded up at any time and were, in fact, rounded up from year to year; and, as the Attorney General reminded you, particular provisions as to marks were directed by Statute. I cannot better illustrate my meaning than by referring to an argument made by Senator Morgan when I was arguing this question of property the other day. He said you may not like to call it property; as long as the seal is on the Islands, the United States or the lessees have absolute dominion over them. I should not agree that perhaps "dominion" was the strictly accurate word to express the right or privilege of capturing. But I will accept it for the purpose of the argument. Did anyone ever hear of dominion extending beyond a kingdom; or of dominion extending beyond territory; and if it were a correct analogy to describe whatever power and rights the United States have over the seals while on the Islands or in territorial waters as being dominion, one wants no better illustration for showing that that dominion stops when the animal leaves the Island or the territorial waters and goes out on to the high seas? Therefore, I ask the Tribunal to come to the conclusion that from the point of view of any act which is supposed to be an equivalent of taking possession, no possession has ever been taken; and if in the case put to me the other day, that there is an attempt to take possession by driving the seals, with regard to all the seals that are not captured and killed the attempt fails or is abandoned; but nothing equivalent, either in law or in fact, to the taking of possession in any way occurs.

In this connection, I was asked, or my learned friend the Attorney General was asked, also I think by Senator Morgan with regard to the question of whether there was not some ground for the theory that all game belonged to the State—belonged in England to the King: and I presume the Senator would endeavour to draw the analogy that it belonged in the United States to the State. Sir, I am not surprised at that question being put; and, although it is of purely academic interest, perhaps I may be allowed in one or two sentences to give my answer in regard to that matter. Under the old Forest Laws, the King had the exclusive privilege of killing game in royal forests. If the game wandered from the forests, anyone had a right to kill them; and, although there were writers, and among them Sir William Blackstone, who expressed the view that the origin of the Game Laws originally was the property in wild animals being vested in the King, the theory was exposed in a very learned note by a lawyer of the name of Christian,—Christian's edition of Blackstone,—and by perhaps the greatest authority on this question, Mr. Chitty who wrote on the "Prerogatives of the Crown" in the work to which my learned friend the Attorney General called attention; and it is the fact, that there is no case and no decision which in any way limited,—no instance either criminal or civil in which a party has been sued or prosecuted on behalf of the King for taking game unless he took it within some privileged place. On the contrary, it is laid down that no individual can be indicted at Common Law for stealing animals

feræ naturæ unless reclaimed; and the books of authority,—I have investigated this matter, I may say, with as much care as I could bestow upon it,—repeat more than once that there are various authorities showing that, if a man drive a stag out of the forest, then he would be liable for having, interfered with the King's forest; but if the stag comes out of the forest upon his own land or territory, he has a right to kill it.

Again, stating it as I have said more than once, referring to the authority of a case in the 11th Coke's Report, the Case of Monopolies, at page 87, everyone on his own land may use them, that is hunting and hawking, at his pleasure, without any restraint to be made unless by Parliament, as appears by certain Statutes that are there cited. I, therefore in deference to a view expressed by a member of the Tribunal, have to state respectfully before this Tribunal, and in that I shall be corrected by those skilled in English Law whom I address, that for years it has been the recognized law of Great Britain, certainly for a century or more, that the King has no greater property in game other than the royal birds, such as swans, and the royal fish, such as sturgeon, than a subject has in respect of game upon his own land.

Now, Mr. President, I wish to say a word about the theory that, apart from property, the United States have equally a right of interfering to protect their industry. Sir, when my learned friend, the Attorney General was addressing you upon this matter, you pointed out to him that the argument of my learned friend, Mr. Phelps, and the passage from the Argument which he read, was only an argument based upon the assumption that there was no property in the seals. It is to that part of the Case that the observations which I shall now address to the Court are directed. It is extremely important that I should enforce upon the Tribunal this view, namely, that my learned friend, Mr. Carter in his oral argument, Mr. Phelps, in his argument to which he has already told you he adheres, and to which he courteously called our attention, and said that we must deal with it by anticipation, both those learned gentlemen assert that their right to protect—to take the steps which they did take in connexion with the British vessels, is independent of any possession, property, or ownership of the seals themselves. At page 136 of the written argument of my learned friend, Mr. Phelps, you will find this passage which I have no doubt is in your memory, but I will read it again.

The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed, for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of that term. Let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons, in such numbers as to render the fishing there productive.

The question then remains, whether upon that hypothesis, the industry established and maintained by the United States Government on the Pribilof Islands, in the taking of the seals and the commerce that is based upon it, are open to be destroyed at the pleasure of citizens of Canada, by a method of pursuit outside the ordinary line of territorial jurisdiction, which must result in the extermination of the animals.

And at page 484 of Mr. Carter's speech, he in opening his argument on this part of the Case, said:

I come now then to the other branch of the question of property namely, the property which the United States asserted in the industry carried on by them on the Pribilof Islands, irrespective of the question whether they have property in the seals or not.

Therefore, for the purpose of that to which I desire to direct the attention of the Tribunal, I am entitled to assume—nay, I must make the assumption made by my learned friends that no property exists, and

that they have no claim either to the seals or to the herd apart from the industry. May I state, first my submission of the law in regard to this matter, and then deal in detail to whatever extent I think necessary, without trespassing unduly upon the time of the Tribunal, with the arguments of my learned friend, Mr. Phelps, which appear in the written book. Apart, Sir, from a malicious act with the intent of injuring the person who is carrying on an industry, and done by a person who is not doing the act complained of himself for the purpose of his own trade, there is, so far as I know, by the law of no civilized country, no right of interference by the person whose trade is injured. I am putting it as I am sure my learned friends will admit, in the broadest way. I am not endeavouring to obtain any advantage from the fact that what the United States do is entirely done on the Islands and is in territorial waters. I say that whatever industry is carried on, if it be conceded, as for the purpose of this argument it must be conceded, that the animal itself is not the property of the United States; except in the case of what may be called wanton and malicious acts with the intent of injuring the person carrying on the trade, pursuit, or industry, no civilized country recognizes that any wrong is being done by the person who, in the course of carrying on his own business, interferes with or competes with, or, reduces, the profit earned by the person who makes the complaint.

Sir, it can be tested in a moment, and tested, I submit, almost exhaustively by one test. Can the right of the pelagic sealer depend upon the question of whether or not the industry is being carried on on the Islands? Is it not absolutely fatal to the United States contention as to their right of interfering with the particular act done by the pelagic sealer, if they are driven to admit that the pelagic sealer could kill the animal if the United States were not carrying on what they call the industry upon the Islands? Sir, legal rights cannot depend on any such contingencies, and to put only for the purpose of enforcing my argument one of the main positions taken by my learned friend, the Attorney General—suppose the trade did not pay; suppose the price of seal-skins in the market is such that the lessees do not care to renew their lease, and suppose that the United States as a Government do not go in for the catching and dressing of seal-skins, my learned friends cannot claim that the pelagic sealers would then be within their right: and therefore their position is this, that the determination of a particular individual to catch animals on land is in itself sufficient to turn an act at sea otherwise lawful into an unlawful act. Sir, I speak with great deference to any authority that my learned friend, Mr. Phelps, may cite when he comes to reply. If there are any new authorities, we shall, of course, have the privilege of dealing with them, but in his very learned and elaborate argument, and in the most interesting argument of my learned friend, Mr. Carter, there is not a trace of authority for such a proposition as that to which I am now directing attention. It does require authority and does require some principle which one can appreciate in order that it may find favour with such a Tribunal as this.

Now, what is the real ground, so to speak, of my learned friend, Mr. Phelps, contention? You will remember, Mr. President, that the United States in their Case give a long list of legislation by colonies and other countries, by which legislation certain restrictive measures have been taken with a view to the preservation of animals, or with a view to the prevention of the interference with individuals in their rights of taking animals. And you will remember that every one of those instances was examined by my learned friend, the Attorney General. They had been

examined in writing in the Counter Case; and in the Argument, the defect in the United States assumption in their original Case had been pointed out; notwithstanding that, in the exercise of his discretion, my learned friend Mr. Phelps adheres, and told us orally he adhered, to the contention which is put forward in his written Argument, namely, that these authorities show or afford some analogy of the justification of the United States upon the ground that these protective or defensive measures are supposed to be legitimate.

Now, how is that put forward? I desire to read three paragraphs in order that you may thoroughly appreciate the particular part of the argument to which I am going to address myself this afternoon. The first one is at page 130 of the United States Counter Case. This is, of course, after the British Case had been seen, and the Argument of the British Case considered.

The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur-seals in the waters of Behring Sea in violation of the statutes of the United States, and that such seizures were made in accordance with the laws of the United States enacted for the protection of their property interest in the fur-seals which frequent Behring Sea and breed only upon the Pribilof Islands, which Islands are part of the territory of the United States; and that the acts of the crews and owners of these vessels in hunting and catching seals were such as, if permitted, would exterminate the Alaskan seal herd and thereby destroy an article of commerce valuable to all civilized nations.

Sir, to take the Argument of my learned friend, Mr. Phelps, from which I will read a passage in a moment, I certainly should have thought that that meant to assert that the United States Government had got the right of making these laws, so that they would extend over the waters in which the British vessels were actually sealing. But, to be perfectly fair, I think that that would be scarcely just after the very pointed way in which the case is put by my learned friend, Mr. Phelps. If you will be good enough to refer to two passages in the United States Argument, particularly at pages 170 and 171, you will see the way in which my learned friend, Mr. Phelps, proposes to avoid the difficulty which would arise if the language of page 130 which I have just read were taken according to its natural meaning.

An effort is made in the British Counter Case to diminish the force of the various statutes, regulations and decrees above cited, by the suggestions that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of those countries outside the territorial limits of such jurisdiction. In their strictly legal character as statutes, this is true. No authority need have been produced on that point. But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not. Without, they become defensive regulations, which if they are reasonable and necessary for the defence of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the Government at its discretion.

If the words

“will be submitted to by other nations”

meant other nations may assent to them and then they become part of international law so far as those nations are concerned, I could have understood it; but I gathered, and it is really necessary for my learned friend Mr. Phelps' argument, that his contention is that the Statute, though municipal and though operating as a Statute upon the subjects or citizens of the country who owe allegiance to that State, is to be regarded as a defensive Regulation and may be enforced by the Government at its discretion against foreigners.

The same idea, Mr. President, is also expressed at an earlier page of Mr. Phelps' Argument, namely page 149, where he says:

Statutes intended for such protection may, therefore, have effect as statutes within the jurisdiction, and as defensive regulations without it, if the Government choose so to enforce them, provided only that such enforcement is necessary for just defence, and that the regulations are reasonable for that purpose.

Now is there any foundation for this theory. I speak to lawyers; I speak to those members of this Tribunal all of them who of course have a very large experience of the grounds upon which the action of particular nations has been justified from time to time by the representatives of various nations. Now, Mr. President, so far as I know, and certainly so far as the instances given by the United States Government are concerned, there is no instance prior to this case in which it has ever been suggested that the writing down of a law on a municipal Statute-book has any effect outside the dominions of that country so far as foreigners are concerned. The cases in which foreigners have been affected by municipal statutes are, without exception, prior to this case, cases in which foreigners had gone within the dominions and broken the law, or were intending to go within the dominions and break the law.

LORD HANNEN.—So that you must add "or had immediately before broken the law."

SIR RICHARD WEBSTER.—That, of course, my Lord, is a further qualification. I was putting it a little more generally myself. I say that, of the authorities prior to this case, there is no trace of an authority for suggesting that a municipal statute has any operation—in fact I do not want it better admitted than in the language of my learned friend Mr. Phelps himself, to use his expression at page 171: "they have no authority".

My point is that, prior to the contention on behalf of the United States, there was no suggestion by any writer or by any Judge that a municipal Statute had any operation against foreigners, excepting in the case where the foreigner either had entered the country or the territorial waters, and broken the law there, or was intending to enter those waters or that territory and intending to break the law. In principle it would be indeed strange if international law was otherwise. I know not the actual number of nations in the world that legislate for their subjects now in some form of written legislation. If this theory of my learned friend, Mr. Phelps, is correct; by simply writing down in the Statute-book or whatever may be the form—in the Ukase if that be the expression for Russian legislation, at the present time, or whatever may be the name of the particular form of local municipal legislation which takes effect in a particular country—writing it down not in a language known to other nations—because it is a mere accident that in this case the two contending countries speak the same language—if this theory be worth anything, all the Russian municipal laws are defensive regulations to be put in force against foreigners upon the high seas, although they have never been communicated to foreigners and although they speak of course by their Statute-book, or by the statute in which it is expressed, simply and solely to the subjects.

My first broad criticism with regard to this contention is that it is inconsistent altogether with the principles that have affected the relations between nations, that the writing down of an enactment in the laws of the country can have any effect upon foreigners who do not intend to do anything, and do not, in fact, do anything within the territorial limits.

Senator MORGAN.—Sir Richard, before you read your authority, I would like to know what your position is about this.

Sir RICHARD WEBSTER.—Certainly, Sir.

Senator MORGAN.—In the exceptional cases you speak of, where a nation may exercise its authority beyond its territorial limits, is the authority when exercised the authority of the statute of such nation, or is it the authority of the international law?

Sir RICHARD WEBSTER.—It is the authority of the statute of the nation. It is the stretching the long arm of the law. I say, Sir, with great deference to the argument on the other side, that the true ground which has been recognized more than once is that either by express consent, or by acquiescence, as you put it the other day—for it may be by acquiescence—nations, sometimes one, sometimes more, have agreed to the arm of the municipal law being stretched in order to prevent a breach of its municipal law.

Senator MORGAN.—Then the question would be how far a nation may be tolerated in defending what it conceives to be its rights outside of its territorial limits?

Sir RICHARD WEBSTER.—I say a nation may be tolerated—I am only adopting your language for the moment—

Senator MORGAN.—Certainly.

Sir RICHARD WEBSTER.—A nation may be tolerated to any extent, if it chooses to say: I am going to make this a matter of war, and I am going to assert that which I can enforce by power.

But I am now dealing with the legal argument of my learned friend, Mr. Phelps. I am now dealing with the question which is submitted to you under Question five.

What right of protection had the United States at the time this Treaty was entered into, and at the time that the vessels were seized—what right exists by international law?

If Mr. Senator Morgan will let me postpone to the conclusion of my examination of my learned friend's authorities the consideration of the question that he has more than once hinted at, whether this Tribunal might not have some wider or more general jurisdiction, I would prefer to do so. I do not think I could make my meaning clear with regard to that matter until I have submitted, as accurately as I can, to this Tribunal what our contention is with regard to what I may call the express authorities to which Mr. Phelps refers.

Now, Sir, the expression "defensive regulations" occurs very rarely. On page 147 of the United States Argument, quoting from Chancellor Kent, the same edition that I quoted from the other day, pages 30 and 31, this citation is made:

Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of—

What?

maritime jurisdiction.

Well, I think that the meaning appears perfectly plain from that language, taking the extract by itself. Chancellor Kent, dealing with the question, and arguing the question, of the three-mile limit, arguing the question of jurisdiction, properly so called, pointed out that for the purpose of fiscal and what he there calls defensive regulations, there was a fair claim to a liberal extension of maritime jurisdiction. If the passages immediately following that extract, and immediately succeeding it, are read—they amount to some two or three pages—it will be found that in the whole of that extract, in the whole of that discussion,

Chancellor Kent was dealing with the right of a nation to make municipal laws which should have an operation beyond the three miles, and never referred to the executive acts of a nation to be justified upon the principles to which you, Senator Morgan, referred me a moment ago; that he had not in his mind, and was not at that time in any way discussing or considering, those executive acts, the responsibility of which a nation will take upon itself, whether they be right or wrong, according to international law. He was discussing the legal question, and the legal question only, to what extent might a claim be fairly made to an extension of the three mile limit? I am going to point out, sir—I had it in my mind to mention it the other day—that this passage shows that similar ideas as have been expressed this morning by Mr. Gram, were really in the mind of Chancellor Kent when he was referring in the following words to the character of the waters over which such maritime jurisdiction should be extended:

It would not appear unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod and from Nantucket to Montauk Point, and from that Point, to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi.

Now, sir, Mr. Chancellor Kent may have been right or may have been wrong in the views that he was expressing with regard to claims, but the point of my present observation is, that, so far from that citation being any authority for the contention of Mr. Phelps, that the statute might be construed, and was to be construed, as being an executive act, to be put in force at the discretion of the Government, it is the contrary. A contrary inference is to be drawn, a contrary conclusion to be arrived at; because he is referring to the right of a nation to extend its maritime jurisdiction and to make its laws for fiscal and other defensive purposes.

I am led a little, perhaps, out of the line of thought I was pursuing, but still it will not be inconvenient if I at once call the attention of the Tribunal to some cases which lay down this principle distinctly.

Sir, in those authorities of which we have given the Tribunal and my friends prints, there is a judgment of the great Judge, Mr. Justice Story, in the case of the "Apollon", reported in 9th Wheaton, which I crave leave to read to the Tribunal, because it expresses the argument against the contention of Mr. Phelps, that these statutes might be regarded as defensive regulations to be put in force when and as a nation likes upon the high seas or anywhere else. For, be it observed that the necessity of my learned friend's argument compels him to contend that this right would extend to going even into other people's territory, if necessary, as a matter of right.

I do not know whether it would be troubling the Tribunal too much to ask them if they would kindly look at the report of the "Apollon." It is in the printed authorities handed in by the Attorney General. It is the third case, and begins at page five. The paper is headed "Behring Sea:—Authorities on Search, Seizure and Self defence":

The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be,

That is the American municipal laws—

they must always be restricted in construction to places and persons upon whom the Legislature have authority and jurisdiction. In the present case, Spain had an equal authority with the United States over the river St. Mary's. The attempt to

compel an entry of vessels, destined through those waters to Spanish territories, would be an usurpation of exclusive jurisdiction over all the navigation of the river. If our Government had a right to compel the entry at our Custom-house of a French ship in her transit, the same right existed to compel the entry of a Spanish ship. Such a pretension was never asserted; and it would be an unjust interpretation of our laws to give them a meaning so much at variance with the independence and sovereignty of foreign nations.

Then there is a passage that is not material upon this point. I have the report here.

But, even supposing for a moment that our laws had required an entry of the "Apollon" in her transit, does it follow that the power to arrest her was meant to be given after she had passed into the exclusive territory of a foreign nation? We think not. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations. The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said that there is a revenue jurisdiction which is distinct from the ordinary maritime jurisdiction over waters within the range of a cannon-shot from our shores. And the provisions in the Collection Act of 1799, which authorize a visitation of vessels within 4 leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory in the exclusive jurisdiction of another Sovereign? Certainly not; for the very terms of the Act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the Americans.

I need not read the rest of the judgment. It is equally in my favor but not so pointed. May I ask the Tribunal to consider the enunciation of the law there laid down by a Judge second to none in the history of lawyers of the world, Mr. Justice Story.

And it is, Sir, in accordance, so far as my research has enabled me to discover, with every other Judge and writer of authority, namely, that these statutes have only force, and are intended only to operate, against persons who are attempting to break or have broken the municipal law. I do not repeat the qualification which, for the purposes of accuracy, I should have included, which Lord Hannen was good enough to mention a few minutes ago, namely that even in the case of an actual breach of the municipal law, the breach must be recent, the pursuit must be hot. It is sufficient for my purpose to say that the cases in which these municipal statutes have ever been held of any authority at all are cases in which the foreigner is entering or has entered the territorial water with the intention of breaking the law.

Sir, the other correlative proposition may be stated, I believe, with as much clearness and with as much generality. I believe that in the whole history of diplomatic relations, in the whole history of complaints made by States in respect of acts which they thought were contrary to international law, though you will find many justifications on the ground of immediate and pressing danger, on the ground of the sudden emergency in which a nation has been placed, on the ground that they were willing to take the risk, having regard to the pressing danger, on the ground that persons in respect to whom the complaint was made had behaved so immorally and so unjustifiably that their cases ought not to be taken up by the complaining State to which they belonged, there is not a trace of a justification of any one of these acts upon the grounds now put forward by my learned friend Mr. Phelps.

Sir, of course it does not in any way weaken his argument, provided it be in accordance with recognized principles, that it should be for the first time asserted; but when, as I shall have to show you later on, it is in conflict with principles of international law, universally asserted and universally recognized, it is no small argument which my learned friends have to meet, that they are not able to point to a single case in which the action of a State complained of has been justified on the ground that it was carrying out the provisions of municipal statutes which were supposed to speak and intended to speak originally only as regards the nationals over which, of course, they had authority.

Therefore, Sir, though upon an argument based upon the past proceedings of five or six years negotiations between the United States and Great Britain, an argument based upon the fact that in its inception these vessels were seized because they had broken municipal statutes, the men were imprisoned, fined and turned adrift penniless, because they were supposed to be criminals, according to the municipal law of the United States, though in the inception that was the case, it may be said if the right existed, it can now be justified on other grounds. Possibly; but it does form a strong argument for our contention if we are able to point to the fact, that prior to the filing of this written Argument the suggestion that a municipal statute operates against all the world, as an authority which the world is bound to obey upon the ground that the State can enforce it on the high seas at its discretion is an argument which is absolutely new both in point of international law and, so far as I know, according to diplomatic relations.

The Tribunal here adjourned for a short time.

SIR RICHARD WEBSTER.—Mr. President, I mentioned that I had two other cases to which I wished to call attention in this connection, and one is merely to refer to a passage in the United States Argument, page 149, where Mr. Phelps having cited the case of the *Queen v. Keyn* says:

The opinion of Chief Justice Marshall, and the language of Lord Cockburn above cited very clearly illustrate the distinction between a municipal statute and a defensive regulation.

If that is merely an expression of Mr. Phelps's opinion, I have no right to criticise it, but I must be allowed to say that if it is intended to be a statement that Chief Justice Cockburn ever recognized a municipal statute as being equivalent to a defensive regulation, or that he supported the view that the making of a statute was supposed to be an expression by a nation of an intention to do an executive act which the nation would undertake on its own responsibility, I appeal to the judgment in the *Queen v. Keyn*. There is not one word to support that view in the passage read by Mr. Carter, which will be found at page 79 of the report which I think the members of the Tribunal have seen in the pamphlet form—the authorized edition.

Chief Justice Cockburn was referring to legislation and to legislation only, and he says in terms:

Hitherto legislation, so far as relates to foreigners in foreign ships in this part of the sea has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances to cases of collision. In the two first, the legislation is altogether irrespective of the three-mile distance, being founded on a totally different principle, namely the right of a State to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws.

And in that passage, cited more than once by my friend Mr. Carter, and referred to in this passage in Mr. Phelps' argument, it will be found that there is no trace of foundation for the suggestion that the Statute

is to be construed as being otherwise than a Statute, convenient, useful, and intended to operate upon, and affect foreigners in the cases in which foreigners have become subject to municipal laws.

Now, Sir, the only other case I need mention in connection with this, is to repeat a criticism which I interloctorily made with reference to the statement on page 150 of my friend's Argument that the judgment of the Supreme Court of the United States in the case of the "Sayward", supports this position.

My friend Mr. Phelps was good enough to mark for me some five or six pages of the authorized Report from which the Attorney General had read, in which Mr. Phelps said would be found the passages which he suggested indicated the view of the United States Courts upon this matter. The passage began at page 13, and ended at page 22. I have read and re-read that passage most carefully, and, speaking of this judgment as a judgment to which the world might look hereafter in investigating the question, I do not hesitate to say that except the suggestion that possibly a Court might not think itself justified in examining an executive act, there is not any passage that supports the view that a Municipal Statute is to be regarded as a defensive regulation. I felt it my duty to repeat this, because Mr. Phelps was good enough to shew me the passage upon which he relied. When he comes to reply, I ask the Court to judge between us by listening to any passages from the judgment he may read, and see whether there is any foundation for the suggestion that the United States Courts have ever said, directly or indirectly, that a Municipal Statute would be construed, as against foreigners, as a defensive regulation.

Now, Sir, the next group of authorities cited by my friend Mr. Phelps run from pages 152 to 155. They are such cases as the Amelia Island, the "Caroline" and the Appalachicola River, and they are either cases of war, or warlike operations. Again I have to observe—I am aware it is repetition, but it is necessary—that this is the first occasion when it has been contended that according to International law, there is no distinction between times of war and times of peace. We may be only students—some of us only have the right to speak as students—but I submit the merest student in International law is taught the broad distinction what are rights in time of peace and belligerent rights, and there is, so far as I know, no warrant for the argument or premise which lies at the root of my friends Mr. Phelps' argument, when he states that rights which have hitherto been regarded as belonging only to nations when they are in a state of belligerency are to be exercised as defensive regulations, or as executive acts of defence in time of peace. If that were to be the true view of the matter, a great deal of the learning which has been expended in drawing a distinction between rights of belligerents and rights in time of peace has been wasted, and thrown away. But I am obliged to deal, and do deal, with this argument, treating it with all the respect I can, but I am desirous of pointing out that from my reading and from my examination of the instances cited, they were, in every case, instances which a nation justified on the ground that it was either putting down a rebellion, or engaged in war, or that the acts it was performing were acts which it was justified in undertaking on the ground that marauders or robbers, were setting up either in the territory or in close proximity of the territory a hostile or marauding band. I need not do more than remind you that is no analogy to the case which we are discussing, assuming I am right the United States have no property in the seal or in the seal herd, and no right to prevent other persons from shooting, catching, or otherwise capturing the seal on the high seas.

Now I come to a part of the case to which very great importance was attached by my friend Mr. Phelps. I refer to the passages on pages 155 to 157, on the subject of Newfoundland, and if Mr. Phelps' assertions were well founded with reference to Newfoundland he indeed would be able to administer a very serious blow to our contention. He, in effect asserts that Great Britain and Canada have asserted different rights in the Atlantic to those which they are now contending for in the Pacific.

He says on page 157, that

There cannot be one international law for the Atlantic and another for the Pacific. If the seals may be treated like the fish, as only *feræ naturæ* and not property, if the maintenance of the herd in the Pribilof Islands is only a fishery, how then can the case be distinguished from that of the fisheries of Nova Scotia and Newfoundland.

Mr. President, if that argument was worth anything at all it means simply this: that Great Britain (and Canada, representing the rights of Great Britain) have either prevented or claimed to prevent the United States from enjoying the rights of fishing outside the three-mile limit or outside territorial waters in the Atlantic. Sir, I will make good what I am about to say by reference, but I assert that since the year 1783 such a contention has been impossible, and if I choose to go back I say that long before that time the contention had disappeared; but from the year 1783 down to the present time British, French, United States, and for all I know other nationals—but these are sufficient for my purpose—have been fishing side by side on the banks of Newfoundland 50 or 60 miles from shore, or whatever the distance is, without a shadow of a suggestion that the United States people were there either by grant, by sufferance, by treaty, or in any other way than as exercising the common right of all nations. Mr. President, the tribunal will not think that I am attaching undue importance to this incident, when I remind you that at pages 156 and 157, in order to enforce his argument and, if he were well justified, to pour contempt on the position of Great Britain, Mr. Phelps has gone the length of saying:

It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815 to conceive, that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea.

Sir, I do not wonder that this argument, forcible, strong, and very caustic—indeed much more than an *argumentum ad hominem*—extremely powerful against my contention made an impression on the Tribunal, and accordingly I find on page 745 of the unrevised note—I am not able at present to give the revised page because it is not yet printed—Senator Morgan said this to Sir Charles Russell.

You made some reference to the Statesmanship of Mr. Sumner as being superior to the conception, as I understood you, that there could be any purchase and sale of fisheries in the open sea. That opinion has not always prevailed among the statesmen of the United States, I will say for the reason particularly that in our treaty of peace with Great Britain in 1873 we found it necessary to incorporate in the treaty the following:

It is agreed that the people of the United States shall continue to enjoy unmolested right to take fish of every kind on the Grand Bank and all other banks of Newfoundland, the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries propose to fish.

Of course if we had the open natural right of all mankind to fish in the sea that provision was entirely unnecessary in that treaty it was insisted on and put in.

The PRESIDENT.—I believe Senator Morgan it was an allusion to previous treaties with France.

When the real facts are put before the Tribunal it will be seen that, instead of affording as my friend Mr. Phelps thought it would afford,

an argument in favour of the United States contention it is a most conclusive argument in favour of Great Britain. Sir, what happened was this. In the year 1778 the United States had made a Treaty with France that they would not interfere with the French on the banks of Newfoundland. That was at the time when the United States was struggling for its independence. It was a treaty of friendship and amity, and where having been Treaty rights as between Great Britain and France which excluded the French, the United States rebelling against Great Britain was willing to make terms: and what were the terms?

Senator MORGAN.—You mean that Great Britain had made that Treaty—not the United States?

Sir RICHARD WEBSTER.—No, the United States while in the course of its rebellion—not with Great Britain, with France

By Article 10 of the Treaty of 1778 the United States covenanted:

The United States, their citizens and inhabitants, shall never disturb the subjects of the most Christian King in the enjoyment and exercise of the right of fishery on the banks of Newfoundland—

that is to say in the Treaty of friendship the United States had agreed that they would not interfere with the French. In 1775 an attempt had been made by Lord North (and, if I may be permitted to say so in passing, in my mind a most unjust attempt), to restrain and to prevent the inhabitants of New England from fishing on the banks of Newfoundland, they still being, according to the contention of Great Britain, British subjects, and being engaged in rebellion. The war came to an end, and the state of things for consideration was: What should be the claims of the United States? I can scarcely but think that there are many in this room who hear me who are well acquainted with the history of those times, but possibly it may not be out of place if I refer to Lyman's *Diplomacy of the United States*, a work with which many are familiar. In the course of that negotiation in 1783 (which was the Treaty, you remember, recognizing their Independence) the United States people became aware that France was endeavouring to influence Great Britain, to restrict by Treaty rights, the rights of the United States upon these banks. This will point the observation that was made the other day about the elder Adams saying that he would rather cut off his right hand than let the rights of fishing go.

The PRESIDENT.—You mean fishing on the banks in the open sea?

Sir RICHARD WEBSTER.—In the open sea.

The PRESIDENT.—Not on the Coast?

Sir RICHARD WEBSTER.—I was not dealing with the coast. I will make an observation upon that in a moment. I am dealing entirely with rights in the open sea. A letter was intercepted and deciphered coming from the then representatives of France to Great Britain, which put the United States upon the alarm, and they imagined that some attempt might be made by Great Britain actually to insist on a restriction of their natural right to fish upon these banks outside. You will find the reference to that incident in connexion with the negotiations of the Treaty at page 124 of the 1st volume of Lyman's *Diplomacy of the United States*, published, as no doubt the Tribunal know, in the year 1828, and a book from an historical point of view of the highest authority. I might mention only in passing, I shall show it presently, that the fact is that the United States claimed the right of fishing on the Banks as of right as one of the nations. It is a mistake to suppose that she got or claimed those rights by Treaty. The suggestion made a moment or two ago by Senator Morgan that that

was inserted because there was a doubt, is proved not to be the fact. At any rate, from the opinion of Lyman and the perusal of a chapter in his book, he states in the most distinct terms that the United States claimed it as a right, and it was to prevent subsequent interference that that clause was inserted. However, with regard to the incident that led to the first clause, I will just read this passage.

On page 124.

On the side of France, the United States had much more to fear. She was disposed to curtail their fishing rights and privileges, to maintain Spain in her pretensions respecting her boundaries, and to aid England in exacting a compensation for the loyalists.

That means for the people who had been true to the British flag.

A letter written by Mr. de Marbois, secretary of the French legation, from Philadelphia, dated March 13th, 1782, intercepted and deciphered at the time, if it did not give the first intimation of similar designs in the French Court, strengthened at least the suspicions before entertained. Mr. de Marbois advised Mr. de Vergennes to cause it to be intimated to the American Ministers his surprise that Newfoundland fisheries have been included in the additional instructions. That the United States set forth pretensions therein, *without paying regard to the king's (French) rights*, and without considering the impossibility they are under of making conquests and of keeping what belongs to Great Britain. It will be better to have it declared at an early period to the Americans that their pretensions to the fisheries of the great Bank are not founded and that his Majesty does not mean to support them.

Or, in other words, that the French were at that time endeavouring to get, by means of the Treaty between Great Britain and the United States, a restriction or limit put upon the United States rights. That put the United States on the *qui vive*; or, rather, if it did not actually put them on the *qui vive*, it increased the suspicions that were then prevalent as to what the attempt might be; and, accordingly, when the Treaty came to be negotiated, and was negotiated, the first part of the third Article was in these terms.

It is agreed that the people of the United States shall continue to enjoy unmolested the right.

1. To take fish of every kind on the Grand Bank and all the other banks of Newfoundland. 2. Also in the Gulf of St. Lawrence 3. And all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland and as British fishermen shall use (but not to dry or cure the same on that island).

Then it says:

“And also on the coast” etc.—giving them coast rights. You will remember, Sir, that quoting from the language of the counsel of the United States, on page 1113 of the unrevised edition, the Attorney General cited the expression:

That explains the reason why it was that the elder Adams said he would rather cut off his right hand than give up the fisheries at the time the treaty was formed.

You will observe the expression—“give them up”.

Now we come to that which in my submission is most conclusive proof that our contention is right. You will remember that Mr. Phelps said it never had occurred to a Diplomatist,—an American Representative or anybody else,—to suggest they had this of right. I think it will be scarcely disputed, even for the purposes of this argument, that war puts an end to Treaties. I suppose I need not cite instances, (of which there are so many that I might almost call them numberless), of particular privileges existing before a war, being put an end to by the war. I need cite no other than this,—that the special privileges given by Clause 3 of Article III with regard to the coast were put an end to by

the war of 1812; and, when the United States came to negotiate for fresh privileges under the Treaty of 1818, they acted in accordance with the recognized law of nations.

Lord HANNEN.—Was it 1818?

Sir RICHARD WEBSTER.—1818 was the date. The actual Treaty of Peace was in 1815; the Treaty of the fisheries was in 1818. When the United States came to negotiate with regard to fresh liberties within the territorial waters, or in other words to get a substitute for that which they only got by the Treaty of 1783, they insisted on getting it by Treaty and they got it by Treaty; but did they either ask or get any fresh grant of the right to fish upon the Grand Banks of Newfoundland, and on all the other banks of Newfoundland? They did nothing of the kind.

The question was never raised or suggested—I will show it in writing in a moment—after 1783, that the United States had that right as a nation. Why, Sir, there was one case in the year 1818. It is referred to at page 91 also of the 2nd volume of Lyman, where a vessel having been seized about six miles off the coast, the British Government repudiated the act—would not have anything to do with it; and it is the fact that diplomatically, openly, and without the slightest reserve Great Britain after 1783, has recognized the right of the United States to fish on those banks—the right as a nation by without regard to any grant by Great Britain. There cannot be a stronger instance or argument in support of my contention in opposition to that of my learned friend Mr. Phelps than to point out that if it were true that they got the right of fishing on the Grand Bank by the Treaty of 1783, they would have had to get a renewal of that Treaty after the war of 1812, and not only did they not get it, but never even asked for it. Why not? Because it was openly stated that Great Britain recognized that right to fish as being the right of a nation to fish, quite independently of any grant or right by Treaty. In fact, Mr. President, the Treaty of 1783 is an instance by anticipation of what occurred in 1824 and 1825; in 1824 and 1825, Russia having made a claim to interfere with rights of navigation in fishing on the high seas, withdrew those claims and acknowledged they were withdrawn by the first articles of the Treaties of 1824 and 1825. Forty years before, in the year 1783, the United States, fearing that there might be some impediment or claim against their right, got inserted the words in the Treaty that the United States should continue to enjoy unmolested the right. The case is identically parallel.

But now, Sir, I have stated that Great Britain never insisted upon the position that the United States had this right of fishing upon the Banks by virtue of the Treaty of 1783 or otherwise than as a nation. I refer again to the commission which was given to the representatives of Great Britain under date the 28th July 1814 for the purpose of negotiating the Treaty of 1818. It was read by Sir Charles Russell. You will find it at page 1111 of the unrevised Report of the 28th day:

You will observe that the 3rd Article of the Treaty consists of two distinct branches. The first which relates to the open sea fisheries we consider of permanent obligation, being a recognition of the general right which all nations have to frequent and take fish on the high seas. The latter branch is, on the contrary, considered as a mere conventional arrangement between two States, and as such it has been annulled by the war.

But as my learned friend Mr. Phelps says—and he will forgive me, I am sure if for the necessities of my argument I must once more read this extraordinary language:

It never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, either in 1783 or in 1815 that these fisheries were general property.

I do not imagine that those who have prepared the Case of the United States are unacquainted with the book to which I have been making reference. I mean Lyman's *Diplomacy of the United States*, and it is a little remarkable in the face of what I am now going to read to the Tribunal from that book, that such a statement should have appeared.

You will remember, Mr. President, that my learned friend, Sir Charles Russell, read the letter from Lord Bathurst to Mr. Adams also from the United States official Papers, and we have the volume here. He read the letter from Bathurst to Mr. Adams in 1815 in which he (Lord Bathurst) said, as I have been saying, that Great Britain recognized the right of the United States to enjoy that fishery, as one of the nations of the world. When we called attention to that letter my learned friend, Mr. Phelps, was good enough to tell the Tribunal we need not trouble further about the reference because he had the book from which we read, in Court, or in Paris. Sir, that letter from Lord Bathurst to Mr. Adams is set out in this book—*Lyman's Diplomacy of the United States*; and here, at any rate was a diplomatist who knew what was the true state of the matter, and argues, as he is entitled to argue, in this book that the United States always had this fishery as of right, and that the Treaty of 1783 was simply for the purpose of preventing molestation, fearing claims might be set up, and more than that, that subsequently there was no renewal of that right. I will call your attention to two passages in *Lyman's Diplomacy*. It sets out the commission to the United States Commissioners to negotiate the Treaty, and the terms of the Commission are given at page 86 of the second volume. They are set out in terms.

I read not from the actual language at full length, but from the text of Mr. Lyman:

The most important matter, adjusted at this negotiation, was the fisheries. The position assumed at Ghent, that the fishery rights and liberties were not abrogated by war, was again insisted on, and those portions of the *coast* fisheries, relinquished on this occasion, were renounced by express provision, fully implying that the whole right was not considered a new grant. The American commissioners in 1814 were instructed not to bring that subject into discussion, and the proposition ultimately submitted, securing the rights and liberties, as in the Treaty of 1783, arose from a stipulation, offered by the British commission, respecting the Mississippi, a right invested by the American with the same permanent character, as the fisheries themselves. The English, knowing the slight comparative value of the Mississippi, proposed the two parties should resume their respective rights in consideration, respectively, of a full equivalent; but this proposition was not accepted, for, in the opinion of one party, the right remained entire, and lest it should be impaired by implication, the American commission offered to recognize the right of Great Britain to the navigation, and declined the boundary of the parallel of the 49th degree to the north, (since agreed on) not choosing, even, to accept an implied renunciation on the part of Great Britain to that navigation.

The instructions for the Commissioners in 1818 do not agree precisely with the position, assumed at Ghent, respecting the Mississippi.

Then lower down on the same page.

A certain part of the doctrine, as to the effect of war on the treaty of 1783, is undoubtedly sound, but it appears to us, the remark is equally just, that certain portions of the fishing rights or liberties have, from the commencement of the first negotiation with England, been made the subject of Treaty regulation. These remarks, of course, do not apply to the bank, or deep water fisheries, about which all formal stipulations are needless.

That, Sir, was Mr. Lyman's opinion. My learned friends will scarcely deny that he was a diplomatist of eminence, and it will show you, at any rate, that this is no fresh case we are setting up. But, Sir, at page 97 occurs the passage in that letter from Lord Bathurst to Mr.

Adams, which I respectfully submit in a conclusive answer to this contention put forward by my learned friend, Mr. Phelps.

When, therefore, Great Britain, admitting the independence of the United States denies their right to the liberties—

You will remember that the liberties were the inshore rights

it is not that she selects from the treaty articles or parts of articles, and says, at her own will, this stipulation is liable to forfeiture by war, and that it is irrevocable; but the principle of her reasoning is, that such distinctions arise out of the provisions themselves, and are founded on the very nature of the grants. But the rights, acknowledged by the Treaty of 1783, are not only distinguishable from the liberties, conceded by the same Treaty, in the foundation, upon which they stand, but they are carefully distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American minister to the wording of the 1st and 3rd articles, to which he has often referred for the foundation of his arguments. In the first article, Great Britain acknowledges an independence, already expressly recognized by the powers of Europe and by herself in her consent to enter into the provisional articles of November 1782. In the 3rd article Great Britain acknowledges the *right* of the United States to take fish on the Banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent Nation.

That is the language of Lord Bathurst on behalf of Great Britain in the year 1815. It is a little hard that for the purpose of this case, for the purpose of endeavouring to allege inconsistency on the part of the Representatives of Great Britain, that my learned friend should have, perhaps by inadvertence, thought fit to say in his Case that it never occurred to the Representatives of Great Britain to point out that the Fisheries on the Bank of Newfoundland were enjoyed as of right.

In order to point my observation, I read further from the letter:

But they are to have the *liberty* to cure and dry them in certain unsettled places within his Majesty's territory.

And the next passage refers to those liberties being such as those that were put an end to by the war.

It is surely obvious, that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy in virtue of a recognized independence and the word *liberty* to what they were to enjoy as concessions, strictly dependent on the treaty itself.

Sir, I cannot believe that had Mr. Senator Morgan in his mind the facts that my learned friend the Attorney General and I have taken entirely from the official documents, from the language of the American Representatives, from the language of the Representatives of Great Britain at the time these matters were under negotiation, that it would have escaped his attention, that the language of the first clause of Article III of the Treaty of 1783 was inserted for the purpose of preventing molestation in respect to a right which the United States people claimed as of right by virtue of their being recognized as an independent Power,—as one of the nations of the world.

Senator MORGAN.—My difficulty, Sir Richard, in making that suggestion was this; why the American people should have apprehended molestation about a matter that Great Britain made no claim to at all.

Sir RICHARD WEBSTER.—Well, Sir, I have already, I think, answered that; but I may do it again in one summary. It was that they themselves had made a bargain with France,—there had been a claim made by Lord North to exclude them on the ground of being subjects in rebellion, and, therefore, they could be so excluded, and it is a clause inserted against any subsequent interference—in fact just in the same way, Mr. Senator, as I have submitted to you, I hope not unsuccessfully, that under the first Articles of the Treaties of 1824 and 1825 between Russia and the United States, and Russia and Great

Britain respectively, neither the United States nor Great Britain got the grant of anything; they merely got the acknowledgment that claims previously made were to be no longer insisted upon by the Nation that had put them forward.

But, Sir, as a matter of fair play, as a matter of common justice, when this is introduced by a statement is there to be one law for the Atlantic and another for the Pacific? what answer is there to the fact to which I invite the attention of my learned friend, Mr. Phelps, that from 1783 down to the present time (and that is now more than 100 years) the fishing boats of all countries have been fishing upon the Banks of Newfoundland outside the territorial waters without the slightest attempt on the part of the Government of Great Britain to interfere either with France, or with the United States, or with anyone else; and the suggestion is entirely unfounded that we are seeking here to claim from this Tribunal a right in respect to the seals of the Pacific which we have not conceded to the United States in respect to the cod of the Atlantic. Surely, Sir, if there is to be reasonable appreciation, as there must and will be, of the arguments used on the part of Great Britain, it will remain for the United States advocates not to re-assert a statement which at present is unsupported by any authority, but to give me the date, the place and the person when, where, and by whom, the assertion of the right to exclude the United States from the enjoyment of such national rights has been asserted by Great Britain. Certainly, in connection with the very caustic observation inserted at pages 155 and 157, it is for my friends to deal with the facts as I have now placed them before this Tribunal; I have based my statement, as you are aware, not on my imagination but upon documents which stand upon record and have stood upon record for the last 50 or 60 years, nay even a longer period than that.

Sir, the next branch of my learned friend Mr. Phelps' argument is that which we find on page 158. It includes a passing allusion to the law of piracy, which might, I think, have been well left out of the present consideration. But I suppose I must regard this as serious as it was inserted with consideration and is to be adhered to. Calling attention, or arguing, rather, upon the question of the right of self-defence, the sealers are practically compared to pirates,—nay more, piracy is rather held up as being a pursuit to be practised, and to be approved of in comparison with pelagic sealing.

This is no exaggeration, Mr. President. At page 158 occurs this language speaking of piracy: "The reason of this well settled rule is not found in the character of the crime which is but robbery and murder at worst." How much further do they wish to go? "*Robbery and murder at worst!*" I want to know what other crimes there are? "but in the necessity of general defence". This is the first time, Sir, in the history of argument on international law that I ever heard that the right to capture and to string up and to shoot pirates was a necessity of general defence,—if that means the defence of a nation in respect of its rights. Sir, writer after writer, Judge after Judge, has justified the law which applies in the case of pirates, on the ground that they are "*hostis humani generis*", that is to say that they rob persons and outrage all rules of property and morality, and, therefore, quite apart from the defence of a particular nation they are to be punished when caught red-handed by whom caught, or may be taken into any Tribunal of any country and there dealt with. Sir, my learned friends must have been a little bit in a difficulty to find a justification for this application of the law when they said that the reason for this well settled rule is not

found in the character of the crime which is but robbery and murder at worst, meaning thereby I presume that the shooting of seals at sea is worse than robbery and even worse than murder.

But this is not Mr. Phelps alone.

Mr. PHELPS.—It is certainly not me. I said no such thing.

Lord HANNEN.—No.

Sir RICHARD WEBSTER.—I assure you I am only too glad to take any correction but if my learned friend will permit me to call attention to page 214 there it is in black and white signed by the distinguished name of Mr. Carter. This is of the pelagic sealer alone:

To prevent and punish it is as distinctly the duty of all civilized nations as it is to prevent and punish the crime of piracy. The pelagic sealer is *hostis humani generis*, just as the pirate is, though with a less measure of enormity and horror.

Lord HANNEN.—There it is a "less measure".

Sir RICHARD WEBSTER.—Well, I will construe that in the sense that Mr. Carter desired to say there is a less measure; but the principle that Mr. Carter is advocating there is distinct. Surely I am not saying that which is unnecessary when I point out that the argument of the United States drives them into this position, that unless they can establish to your satisfaction that pelagic sealing is to be placed in the category of piracy, half—nay, more than half, practically the whole of their authorities are cut away. Sir, what is the idea of this comparison of piracy? I do not know whether the Tribunal remembers it. Of course, it has a ludicrous side for this Tribunal, but there was nothing ludicrous in the Court of Alaska when those poor captains and sailors were before the Judge and were told that they were pirates and it was said that they were to be treated as pirates.

Lord HANNEN.—They were told that they were to be treated as having violated the municipal law.

Sir RICHARD WEBSTER.—I am speaking of that which was said of them by the Judge. I am not in any way suggesting that the United States would willingly for a moment use language to these men in that respect, but all I mean is, that in order to strengthen this case, the United States people have found it necessary to endeavour to bring pelagic sealing within the category of piracy, and why? My Lord as well as the other members of the Tribunal will remember that over and over again, Lord Stowell, Mr. Justice Story and Chief Justice Marshall have said that the only case in which they knew that in time of peace the right of search of vessels existed, was in the case of piracy.

The one case in which it is admitted that a right, which may be said to be a belligerent right under ordinary circumstances, did exist in time of peace was in case of Piracy. The passage was read by the Attorney General; it was said by Lord Stowell in the case of the "*Le Louis*" reported in the 2d Dodson, and cited in the United States Argument at page 160, and also cited in support of the existence of the right of search, at the bottom of the page.

Upon the same principle has been maintained the right of visitation and search, as against every private vessel on the high seas, by the armed ships of any other nationality. Though this vexatious and injurious claim has been much questioned, it is firmly established in time of war, at least, as against all neutrals. Says Sir William Scott, in the case of *Le Louis* (2 Dodson, page 244): This right (of search) incommodious as its exercise may occasionally be, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence.

Yes; but what, in that Judgment, does he say at pages 244 and 245? He says:

Except against pirates, no right of visitation and search exists on the high seas save on the belligerent claim.

Now, you will see why it was necessary for the argument of Mr. Phelps, and also that of Mr. Carter, to endeavour to get the Tribunal to accept the view that pelagic sealers were to be regarded and treated in the light of pirates by this Tribunal. I accept the correction of Lord Hannen, which is a correction I ought not to overlook; namely, that it is not just to say that they were ever charged in fact in the United States Court with any other offence than that of breaking the municipal Statute; but my observations were directed, not to the formal proceedings, but to the attempt that has been made to colour this act for the purpose of the case now presented to this Tribunal.

Now, the next line of argument adopted by my learned friend Mr. Phelps is based on the laws of quarantine referred to at page 159. I have said that the rules of evidence are lax enough, and all kinds of evidence have been introduced by both sides; I draw no distinction between the two parties in this respect,—hearsay, opinion, and all classes of evidence have been introduced; but, when it is suggested by my learned friend in his Argument that the Quarantine Laws have been used to interfere, or are intended to interfere with vessels upon the high seas, it is not asking too much to say, “Will you be good enough to tell the Tribunal by what nation and at what time any attempt to interfere with vessels, passing through the high seas, under the Quarantine Laws has ever been known or has ever been made?”

Mr. President, what is quarantine? Quarantine is a local municipal regulation; that, when a vessel is coming to your ports and to your harbours from an infected place, she should not be allowed to come into your ports without a clean bill of health. If she has not got a clean bill of health, she has to be put into a certain position and be disinfected for a certain time. Now, where is the quarantine performed? Everybody acquainted with these matters knows that the quarantine is performed in the country where the vessel intends to unload its cargo or disembark its passengers.

The Attorney General, put a case to the Court; and I should wish to enforce it. Take a vessel bound to France, Germany, or Belgium or Russia passing through the English Channel. Has anyone ever heard of an attempt by Great Britain to stop such a vessel and say she is to be subjected to penalties because of the quarantine laws? The mere statement of the case, I submit, is conclusive. When a ship is going or a person is going to visit a territory, it is a part of the prerogative right of the Crown, and I suppose in the United States of the President, but I will not venture on surmise in that matter, but someone has the power, to make laws or lay down rules under which foreigners shall visit the country. We, by our legislation, of course, prescribe the conditions under which foreign ships shall visit our shores, and among them are the Quarantine Acts.

We have told you and I am permitted to say it with the authority of the Public Department for which I have no longer the right to speak, but my learned friend the Attorney General has, that such an instance in Great Britain is unheard of, that no attempt has been made, or could be made; and on principle as I have said, when you remember the process called Quarantine is to be done in the country which the ship is going to visit, it is obvious it can have no application quite apart from the terms of the Municipal Act to vessels merely passing through the high seas. When these Acts were under consideration by the Court of Queen’s Bench in that judgment so often relied upon by my learned friend, Mr. Carter the *Queen v. Keyn* the true ground of the Quarantine Acts was considered. They are put by Lord Chief Justice Cockburn at page 89:

I am further of the opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties unless they have previously complied with the requisitions ordained by the British Parliament; whether those requisitions be, as in former times, certificates of origin, or clearances of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters. Whether the Parliament has so legislated is now the question to be considered.

Therefore, Mr. President, I ask the Tribunal in considering the argument I have addressed to you on this matter, to say there is absolutely no analogy; it falls within the principle I enunciated before the adjournment to day that these laws are intended to operate and to have effect only on vessels coming to our own country and to our own ports and upon our own vessels; those were the words used by Mr. Justice Story in the case of the "Apollon" which will be found reported in the 9th Wheaton.

Then Mr. Phelps at pages 160 to 163 asserts in his argument that Great Britain has claimed the right of search in time of peace. I am going to make but one observation with regard to that matter. We were of course surprised when we found the reference made to the letter of Lord Aberdeen. We sent for that letter and the Tribunal have now before it the original letter of Lord Aberdeen, the contemporaneous letter of Mr. Stevenson who represented the United States speaking of the year 1841, and again we have the debate and diplomatic correspondence in the years 1858 and 1859.

The result of that being that so far from it being true that Great Britain had never abandoned, if she ever claimed, but still insists upon this right of search in time of peace, the very document referred to by my learned friend in his argument contains the most complete and absolute refutation of the argument put into the mouth of Great Britain on behalf of the United States.

Sir, I believe that, without, of course, pretending to say that I have covered the ground in the same way upon this part of the case as my learned friend the Attorney-General did, I believe that I have noted all of the heads of argument on the question of protection which have been cited by Mr. Phelps in support of his view. And I come back to that principle upon which, and by which in my submission to this Tribunal, this case must be determined, so far as this matter is concerned. If the United States have got the right of property in the seals or in the seal herd, that property does not cease when those seals leave the territorial waters of Behring Sea; and I should admit that from the point of view of what may be called defence in that sense—that if the United States, or the representative of the lessees could say to the pelagic sealer a thousand miles south of the Pribilof Islands, or in the Gulf of Alaska, or away to the west of those islands of which I gave the name this morning, "That seal which you are going to shoot is mine, you must not shoot it", he would be allowed to take measures, not to break the peace, but to take measures to prevent the seal being shot, and in a municipal court, if the man who had shot the seal came into the jurisdiction, so that he could be sued, might have the right to bring what we call an action of trover or an action for the value of the seal.

Senator MORGAN.—Or if the ship was brought into the Prize Court, they could proceed against the ship?

Sir RICHARD WEBSTER.—No I have never heard of such a thing as a proceeding in a Prize Court because a piece of property was taken except in time of war. It is foreign to the whole principle of our juris-

diction. There is no relation, forgive me for a moment if I enlarge upon it—there is no relation between the offence and the punishment.

Senator MORGAN.—I do not understand, Sir Richard, that the jurisdiction of a Prize Court depends upon the fact that there is an existing state of war.

Sir RICHARD WEBSTER.—There must be either an existing state of war or an arrangement by treaty between the parties.

Senator MORGAN.—I think not.

Sir RICHARD WEBSTER.—Well Sir, I speak subject to correction. I am aware of the slave trade conventions, whereby vessels were allowed to be taken in and condemned as between two nations.

Lord HANNEN.—The prize court is usually assigned to the admiralty court; but I never heard of a prize court except in relation to war. I never heard of such a thing.

Senator MORGAN.—What becomes of the cases of the violations of the customs laws? smuggling?

Sir RICHARD WEBSTER.—With great deference to Senator Morgan, they would not be enforced in a prize court at all. They would be enforced in a municipal court to which jurisdiction was given by statute.

Senator MORGAN.—Prize jurisdiction.

Sir RICHARD WEBSTER.—I beg your pardon.

Senator MORGAN.—Jurisdiction to condemn a prize by capture and confiscation.

Sir RICHARD WEBSTER.—I beg your pardon, Sir. I say with the greatest respect that there is not a vestige of authority that a prize court would be necessary in order to put into force a breach of municipal statute.

Senator MORGAN.—I do not mean it is necessary; but it occurs to me that it is the subject of such jurisdiction; that the municipal statutes can confer that power upon the prize court.

Lord HANNEN.—Of course a court may have that power, but by the municipal law it would have powers analogous to those which are exercised by a prize court.

Senator MORGAN.—That is exactly the power conferred by Act of Congress upon the courts of the United States.

Lord HANNEN.—That may be; but a prize court is something, so far as my knowledge goes, which has only relation to a state of war.

Sir RICHARD WEBSTER.—By the law of both countries.

Senator MORGAN.—That seems a national view of it; but every State has the right to give to its courts such jurisdiction. A prize court is a municipal court, and depends for its jurisdiction upon municipal law. It derives its jurisdiction under the municipal law.

Sir RICHARD WEBSTER.—It is a confusion of terms.

Senator MORGAN.—I will hear you, with pleasure.

Sir RICHARD WEBSTER.—With great deference, it is a confusion of terms.

Senator MORGAN.—I think not.

Sir RICHARD WEBSTER.—Suppose a statute passed against smuggling,—we will take the case of a law, first, if you please—that brandy shall be subject to a duty of \$5 a gallon. Any person who smuggles brandy shall be liable to a penalty of \$100 and the ship, just the same as, according to our law, the ship can be seized and confiscated.

Senator MORGAN.—The ship commits the offence.

Sir RICHARD WEBSTER.—If you like. It is immaterial to my purpose. The man commits the offence, but his ship is supposed to do it.

Senator MORGAN.—The offence is attributed to the ship.

Sir RICHARD WEBSTER.—The ship comes in: is seized by a custom-house officer: is libelled—which is the expression formerly used in the old courts—is libelled and condemned. That court does not act as a prize court in doing that. I will go further;—there is no foundation for the suggestion that in exercising that jurisdiction the court would be a prize court. It may very likely be that you have said to that court “If a prize case arises you shall have prize jurisdiction.” We were told by Mr. Phelps, and I will take it from him—I do not think the statute has been produced by which these Alaskan courts have prize jurisdiction, so far as the municipal laws can give it. I have not seen the statute, and, I cannot therefore express my own opinion upon it, but that would not make them prize courts when they condemn a ship for smuggling; and no lawyer would say for a moment that when the schooner “San Diego” belonging to San Francisco was condemned in the Port of Alaska for a breach of the revenue laws it was condemned in a prize court. Under this same statute, section 1954 actually applies the laws with regard to customs, commerce and navigation, and gives this court jurisdiction in respect of breaches of those laws.

Sir, but I will ask my learned friends if they are going to say that the Alaskan court, condemning an American schooner for a breach of the revenue laws—the very case you put—for running brandy on the coast of Alaska, was sitting as a prize court, I will ask them for their authority.

Senator MORGAN.—You will find it in the statutes, Sir Richard.

Sir RICHARD WEBSTER.—I should like to see the section of the statute that gives them that jurisdiction as a prize court, it is an offence against municipal law. The municipal law provides a penalty and the forfeiture of the ship.

An American ship having smuggled goods into the port of Alaska, she is libelled; she is sold; the captain is fined. There is not a vestige of an authority for the suggestion that that is the act of a prize court.

Senator MORGAN.—Except that authority which is given by the statutes of the United States, which authorize the courts to proceed as in cases of prize for the condemnation of smugglers.

Sir RICHARD WEBSTER.—I have not yet seen such a statute. It is not in the statute set out in the United States appendix.

Lord HANNEN.—Mr. Phelps, for convenience, could you refer us to that statute conferring what we will call prize jurisdiction upon the local courts of Alaska?

Mr. PHELPS.—I will have it looked up, Sir, and present it to the Court.

Sir RICHARD WEBSTER.—I am much obliged to Lord Hannen for putting that question. I had ventured to say that the statute set out in the Appendix did not contain such authority.

Senator MORGAN.—If you will allow me, I will state my proposition in regard to that.

Sir RICHARD WEBSTER.—All I desire to say is that the United States printed for our information in volume one of the Appendix to the Case, pages 92, 99, the statutes applicable to this case, applicable to the seizure of these vessels, giving the Alaskan Court jurisdiction, and permitting the proceedings to be taken.

Senator MORGAN.—I do not know that I am responsible for the attitude in which this question may have been presented to the slightest degree. The counsel certainly would not like it that I should be held responsible.

Sir RICHARD WEBSTER.—I do not know that, sir. They might do worse.

Senator MORGAN.—But I understand the law to be this in regard to prize courts. They derive their jurisdiction from the municipal law. There is, however, a sort of jurisdiction which comes to them from the very ancient usages under the international law, which, when they are called prize courts, may enlarge the purview of their authority and power; but no nation, as I understand it, can establish a prize court within the bosom of another nation.

Sir RICHARD WEBSTER.—Except by treaty.

Senator MORGAN.—I mean by its own authority.

Sir RICHARD WEBSTER.—Quite right.

Senator MORGAN.—And therefore the power of a nation to organize and to confer authority upon its prize courts must be a municipal power in its authority, in its rules; and whatever is done within it is according to what the usages, customs and decisions of that prize court, subject to the appellate authorities over it, may consider to be proper.

Sir RICHARD WEBSTER.—I believe, Sir, that the true view is that the prize court, constituted by municipal law, has to administer international law. I do not, of course, want to appear to be arguing this matter.

Senator MORGAN.—I have advanced nothing in the nature of advocacy. I have a right to ask your opinion upon any question you are discussing.

Sir RICHARD WEBSTER.—Certainly; but I beg to remind you that you were not responsible for the way in which it was framed by my friends.

Senator MORGAN.—I am not.

Sir RICHARD WEBSTER.—Let me put two or three cases which are perfectly well known to the Tribunal. They know what maritime lien is and a condemnation of a ship *in rem*; a ship comes into port. She is arrested for salvage, or she is arrested for a collision, and she is sold.

Senator MORGAN.—You mean a vessel brought into port.

Sir RICHARD WEBSTER.—No. An American ship comes into the ports of Great Britain. She is libelled in the admiralty court in the case of collision, and the damage is so great that it is more than her value. She is condemned and sold by the Marshal of the court. You would not say, Sir, that that court was sitting as a prize court.

Senator MORGAN.—I would not.

Sir RICHARD WEBSTER.—The fact that there is condemnation and sale, or condemnation of the vessel, does not make it a prize court; and if there is any thing in this point, or rather in the suggestion that you have been good enough to put to me, it would equally apply to the condemnations *in rem* in our courts.

Senator MORGAN.—If you will allow me, in the case you suggest of a collision, there is a private wrong to be redressed by the action of a court of admiralty. In the courts of prize jurisdiction there is a public wrong to be redressed through the agency of what are termed prize courts.

Sir RICHARD WEBSTER.—My next observation would have met that. The most common case for condemnation for revenue is for smuggling. An information is filed in the name of the Attorney-General on behalf of Her Majesty, the Queen. I do not know what the corresponding procedure is in the United States, but I should rather suppose that some public officer has the right of suing for the penalty, or taking proceedings for the penalty, in his own name, against the ship, or against the owner, as the case may be. That vessel is condemned and

sold for a breach of the revenue laws. I say no man who has ever considered that matter would consider that that court was acting as a prize court.

Senator MORGAN.—That depends on the nature of the statute under which the court was acting.

Sir RICHARD WEBSTER.—I am entitled to say, where is the statute which suggests it was a prize jurisdiction? I appeal to Mr. Justice Harlan. It is so foreign to anything that is in these statutes that it is impossible for an English lawyer, at any rate, to understand how such a question could have been raised. The court may have a prize jurisdiction. The court may have an admiralty jurisdiction. For all I know, it might have a small debt jurisdiction. It may have a divorce jurisdiction. It may have a chancery jurisdiction, or any number of jurisdictions. But because it has got the jurisdiction, it does not make it act as a divorce court when it is trying maritime cases, or as a probate court when it is trying divorce cases. And so in the same way, the fact that a ship is condemned under this statute does not make that court a prize court; and to those who advocate this theory, I would place my learned friends Mr. Carter and Mr. Phelps, in this dilemma—

Mr. PHELPS.—What theory do you understand us to argue?

Sir RICHARD WEBSTER.—I was only assuming for the moment that you would argue the theory submitted by the learned Senator. That is all, Mr. Phelps. I will say nothing more than that; and you will not think it wrong, I am sure, to put it in this way.

Mr. PHELPS.—Not at all.

The PRESIDENT.—I hope you will not understand the opinion of an Arbitrator, whoever he may be, and whatever may be his nationality, to be on the side of any of the parties here.

Sir RICHARD WEBSTER.—I think you misunderstood me, Mr. President. I am doing nothing, with great deference, either irregular or improper.

The PRESIDENT.—I do not mean to say you are doing anything improper.

Sir RICHARD WEBSTER.—I am assuming that Mr. Phelps contends that the court of Alaska is to be presumed to act as a prize court in condemning these vessels. I am assuming that my first question would be, if an American ship is condemned because engaged in shooting seals in the waters of Behring Sea, by the Court of Alaska, will my learned friend contend before this Court, and assume the responsibility for the advocacy of this position, that that Court was acting as a prize Court?

Mr. PHELPS.—It may possibly help my learned friend if I say in a word that I conceive that no question whatever in regard to the validity of those seizures, and no question whatever in respect of the right of the United States to seize any vessel hereafter, is submitted under this Treaty to the Tribunal, so far as I am concerned.

Sir RICHARD WEBSTER.—Of course, in one sense, it relieves me, but it is in no sense any assistance to the particular point that was under discussion. To say that my learned friend does not agree that any such matter is submitted to the Tribunal, is one thing. That is not the point. The point is whether the view which was submitted for my consideration by a member of the Court, that the Alaskan tribunal is to be assumed to be acting as a prize court, is correct.

The PRESIDENT.—I believe one of our colleagues put an inquiry to you in order to elucidate the matter, for the advantage and profit of the

Arbitrators, of whatever nationality they be, and not at all to interfere with the pleading of the case, and not to take the point of view of one of the parties.

SIR RICHARD WEBSTER.—I was not suggesting the contrary for a moment. I was merely saying that if it was part of my learned friends' argument to contend that the Alaskan Court sat as a prize Court, I should immediately ask to be told the statute of the United States which makes the killing of a seal in the high seas of Alaska an offence cognizable in a prize court, and to be adjudicated upon by a prize court?

THE PRESIDENT.—You are relieved of that by the answer of Mr. Phelps.

SIR RICHARD WEBSTER.—I should doubt it, Mr. President.

THE PRESIDENT.—But perhaps you wish to put your own case and advocate your own views.

SIR RICHARD WEBSTER.—I have not made my meaning clear to you, Mr. President. Many days ago, when the question arose about these courts having a prize jurisdiction, Mr. Phelps was good enough to interpose and say that the Alaskan courts had got prize jurisdiction by statute, and it was with reference to that that Lord Hannen put the question to him but a few moments ago, could he, without inconvenience, tell us where this statute giving prize jurisdiction was to be found. But I am entitled, Mr. President, to press upon the Court that the only condemnation possible is the condemnation under municipal law, and that if it be condemnation under municipal law, that that will not be cognizable by a prize court, and that if it be an offence under municipal law, then it cannot, for the reasons which I have already given to you this afternoon be extended to the high seas; and further, that on the broadest view of a municipal statute, it can only be put in force against a vessel which either has recently broken the law within the territorial limits, or is intending to go and break the law within territorial limits. Not one of those arguments would apply to the case if we were dealing with a prize court.

SENATOR MORGAN.—I understood you to say, Sir Richard, that a prize court could have no jurisdiction except in a case of belligerency.

SIR RICHARD WEBSTER.—As a prize court.

SENATOR MORGAN.—I am speaking now of the power of a Government to confer upon its courts prize jurisdiction in any other cases than in case of war.

SIR RICHARD WEBSTER.—One must be accurate in one's terms. If you mean confer upon its prize courts jurisdiction to act sometimes as prize courts, sometimes to administer the revenue laws, and sometimes to administer the laws of admiralty and divorce, of course the Government have got the power to do it.

SENATOR MORGAN.—Except as to the question of divorce, that is exactly a description of the jurisdiction of the United States District Court.

SIR RICHARD WEBSTER.—But, Mr. Senator, that does not make the court act as a prize court when it is adjudicating between plaintiff and defendant in a small debt.

SENATOR MORGAN.—If the statute says so, that does make it act in that way.

SIR RICHARD WEBSTER.—That, of course, is an assertion. I must not meet it by counter assertion. I should have thought it extremely doubtful that in that case as against another nation it could make it a prize court. I should be very glad indeed, now that this case has assumed sufficient importance to be put to me by a member of the Tri-

bunal, if my learned friends would supply me with the statutes which support the view that the court is to sit as a prize court when it is condemning a person for having shot a seal under section 1956, or under section 1954.

If you would kindly look at page 95 of the statutes which have been set out, "the laws of the United States relating to customs, commerce and navigation are extended to and over all the mainland, islands and territory"; and I will assume that among the laws or customs is a prohibition against smuggling, and I will assume that the American ship has been caught smuggling and is condemned, just like a vessel in Great Britain caught smuggling is condemned by the Exchequer Division, it used to be in old days, on the Revenue side of the Court of Exchequer, but now by proceedings upon what is called the Crown side of the High Court of Justice.

Lord HANNEN.—We will assume for a moment that there is such a thing—we shall have proof of it if it exists—a court established and called a prize court, and that it should be said that it should have all the powers of the prize court; and amongst the rest that it should have the power of seizing any vessel which was engaged in the slave trade. Still, it would not be a prize court, in that sense. It would have effect against the subjects of that nation, but not against other nations.

Sir RICHARD WEBSTER.—That is my respectful contention, my Lord, in answer to the learned Senator; but of course, in my point of view, if one can put a case *a fortiori*, the case is so much stronger because the statutes of the United States which are set out, as we have seen, do not purport anything of the kind. The statutes simply purport to give an ordinary municipal court municipal jurisdiction.

Perhaps I might conclude, Mr. President, by giving an instance. Supposing that the law of United States provides that every coasting vessel shall have a certain number of cubic feet of space for the crew to sleep in, or a certain amount of lime juice put on board, or a certain amount of medicine for the crew, with a penalty for not doing it, confiscation, if you like. It would be a strong thing to say that because the court had jurisdiction in prize cases, when it was condemning that ship for a breach of the laws of navigation, it sat as a prize court. The learned Senator will, I am sure, understand that I only desire to grasp his meaning; and desiring to grasp his meaning, I cannot see the slightest ground for coming to the conclusion that there is any justification for saying that when any vessel is taken into a court and condemned by that statute, the court that condemned it was sitting as a prize court.

Sir, I have all but concluded. If you will permit me a short time to-morrow morning, I will try to sum up and deal with the point I said I should deal with, in reference to the jurisdiction of this Tribunal.

The Tribunal thereupon adjourned until Wednesday, June 7, 1893, at 11,30 o'clock A. M.

THIRTY-FOURTH DAY, JUNE 7TH, 1893.

Sir RICHARD WEBSTER.—Mr. President, I shall compress into a very small compass the remaining observations that I desire to address to the Tribunal. There is one matter to which I should not have made further reference, except for an observation of my learned friend Mr. Phelps. If you will kindly look at page 1402 of yesterday's Report, the statement made by Mr. Phelps in the middle of the discussion which I will call the "Prize Court" discussion, which was perhaps not very close to my present purpose, is this:

I conceive that no question whatever in regard to the validity of those seizures, no question whatever in respect to the right of the United States to seize any vessel hereafter is submitted under this Treaty to the Tribunal, so far as I am concerned.

Well, it surprised us all very much at the time, and it led me to look back and search my memory and again to examine my notes with reference to the United States contention: and it does occur to me to say to you, Sir, and to ask your consideration of the question why are we here if that was the real position taken up by the United States? The only way in which they have attempted to exercise jurisdiction in the Behring Sea has been by seizing the sealers' ships and by imprisoning these sealers themselves under the municipal law. But do not let it be put in any words of mine; let it be taken from the Case submitted to this Tribunal after most careful consideration by the United States,—both in the Case and Counter Case; and I shall ask the Tribunal to be good enough to refer to the pages as I read them. At page 301 the United States Case occurs this passage, after dealing with property.

[I should mention they have enumerated on pages 295 to 299 their specific findings, or what they suggest should be the findings with regard to the various questions. I need not go over those, because they are the same points to which I have been referring.]

The United States Government defers argument in support of the propositions above announced until a later stage of these proceedings.

In respect to the jurisdiction conferred by the Treaty, it conceives it to be within the province of this high Tribunal to sanction by its decision any course of executive conduct in respect to the subject in dispute, which either nation, in the judgment of this Tribunal, he deemed justified in adopting, under the circumstances of the case.

And at the bottom of the page:

In conclusion, the United States invoke the judgment of this High Tribunal to the effect.

First, as to the exercise of right by Russia. Second, that Great Britain had not objected. Third, that the body of water now known as Behring Sea was not included in the phrase "Pacific Ocean." Fourth, that all the rights of Russia passed to the United States.

Then I read the actual words.

That the United States have such a property and interest in the Alaskan seal herd as to justify the employment by that nation, upon the high seas, of such means as are reasonably necessary to prevent the destruction of such herd, and to secure the possession and benefit of the same to the United States; and that all the acts and proceedings of the United States done and had for the purpose of protecting such property and interest were justifiable and stand justified.

And upon that the United States invoke the Judgment, as they themselves say, of this High Tribunal.

Now I turn to the Counter Case to see whether that position is in any way abandoned and I will ask the Tribunal to be good enough to look at pages 130 and 135 of the Counter Case.

Reasons why seizures made.

The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur seals in the waters of Behring Sea in violation of the Statutes of the United States and that such seizures were made in accordance with the laws of the United States, enacted for the protection of their property interest in the fur-seals which frequent Behring Sea and breed only upon the Pribiloff Islands which Islands are part of the territory of the United States.

In page 135 just above the signature occur these words.

The Government of United States, in closing its presentation of the matters in controversy by his reply to the printed Case of Great Britain re-asserts the positions taken in its printed Case and all of the propositions and conclusions contained therein, and is prepared to maintain the same by argument before the Tribunal of Arbitration.

And that which I read from page 301 and page 303 of the United States Case are among those very conclusions to which attention is there directed. One scarcely needs to refer to the words of the Treaty for this purpose but when you remember the opening words of the preamble so often referred to by the members of the Arbitration.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States in the waters of Behring's Sea and concerning—

and so on; and, at the beginning of article I the same words occur, and we are to be told to-day that no question arises as to justification, legality, or validity of those acts. I do not understand what is the meaning of the pages and pages of the written argument of my learned friend Mr. Phelps justifying these very acts which he now says he is not concerned to defend either in the past or in the future on the ground that they are what he has called "defensive regulations".

We shall understand more distinctly what Mr. Phelps' meaning is when he argues, but I could not allow that observation to pass without a respectful protest before this Tribunal having regard to the position in which Great Britain is placed, and to the circumstances out of which this Arbitration arose.

I stated the other day that I should say a word or two upon a point suggested by a member of this Tribunal, that this Tribunal was not bound to act upon the principles of either municipal or international law.

The PRESIDENT.—Is that all that you have to say with reference to what Mr. Phelps said yesterday?

Sir RICHARD WEBSTER.—It is.

The PRESIDENT.—Then, Mr. Phelps, you will no doubt be kind enough to note what has been said.

Sir RICHARD WEBSTER.—When Mr. Phelps comes to reply, Sir, I have no doubt he will deal with it.

Now as I said I stated two or three days ago I would not fail to notice a point suggested by one member of the Tribunal that though analogy from municipal law might be of use, I only put my own paraphrase of his meaning—although the analogy of existing, recognized, international law might be of use, this Tribunal was in a sort of position to award the right of property or the right of protection independently of there being by international law, any such right recognized, existing or known. All I can say is this, again respectfully to protest

against such a question being imported into the jurisdiction of this Tribunal, or against it being suggested that when the words: "The questions which have arisen respecting the rights of property, respecting the rights of jurisdiction, of the United States"—when those questions were framed it was contemplated that this Tribunal should decide otherwise than as jurists addressed by lawyers, and applying principles of law. You will remember that the Treaty provides that the Arbitrators selected by the foreign nations shall be jurists of distinguished reputation, in their respective countries.

Mr. PHELPS.—We claim nothing different from that.

Sir RICHARD WEBSTER.—I am extremely obliged to my learned friend, Mr. Phelps, and I thank him for his perfectly courteous observation. I was going to have pointed out that I did not understand my learned friend Mr. Carter's argument in any way to deviate from that position.

Mr. PHELPS.—No.

Sir RICHARD WEBSTER.—I merely mention this because I stated in reference to an observation made that I should deal with it, but there is some little justification in the Tribunal thinking that such a thing was going to be contended from the language of Mr. Coudert, which I only notice in passing to show what I had in my mind. One of the two passages to which I refer is at page 552 of the revised print, and is in these words.

Well in arguing before this High Tribunal the word "right" is most extensive. If there were any Tribunal of lesser dignity that could determine this question we would not have called upon you. The mere calling upon you enlarges the domain of right.

And on page 575 the same idea is repeated by Mr. Coudert in these words.

Because it is law that we want. Law in its best sense, in its highest sense, in its most moral sense; the law that would be expected not from a statutory Tribunal, not the law that would be expected from one nation or the other, confined within narrow limitations which sometimes strangle the right; but from a Tribunal formed for the very purpose of expanding, enlarging and recognizing the beauty and greatness of international law.

Sir, I do not believe that there is any difference between Mr. Carter, Mr. Phelps and myself upon this matter, but, on the other hand, I did not feel it respectful to the Tribunal to abstain from making the observation in answer to a suggestion falling from one of your body. May I remind you, Mr. President, that the original and only cause of this Arbitration was the interference with the pelagic sealers in catching the seals, in shooting the seals in the non-territorial waters of Behring Sea, and the seizure of the British ships and their condemnation by the American Court, and I point once more to the language of this Treaty, both the opening words of article I, and articles VI and VII, making the most marked distinction between Regulations which are only to be considered in the event of the concurrence of Great Britain being necessary, and rights which the United States possess independently of Great Britain at all. That distinction would have been wholly unnecessary and wholly out of place if it was supposed that the only function and jurisdiction of this Tribunal was to deal with joint rights, or joint privileges and joint interests. Those joint rights, joint privileges and joint interests have to be considered under article VII, and have no place whatever under article VI.

Sir, there is but one other independent branch of this case to which I desire for a few moments to direct attention; and that is with reference to that which is the real principle for which Great Britain is con-

tending. In many passages of my learned friend Mr. Carter's speech, he indicated that we were morally wrong in contending for the right of our nationals to shoot seals upon the high seas, and in many of the passages of the written Argument my learned friends have declined to recognize the right of catching, fishing, shooting,—I care not what word be given to it; probably capturing seals is the best word to give,—upon the high seas as being a right at all. Our position is this, Sir; that, apart from Treaty, apart from agreement between nations, the subjects of all cannot be restrained and restricted in the exercise of their natural rights, the right of catching wild animals upon the high seas, be they whales, be they seals, be they sea-otters, be they porpoise, turtles, walrus or fish; for that is one of the natural rights that all nations equally enjoy.

My learned friend the Attorney General cited a few of the leading authorities on this point. Probably it will be sufficient for my purpose if I enumerate them to you. Chancellor Kent, Heffter, Martens, Wheaton, Manning. If my learned friends desire the actual references, or if the Tribunal desire the references, I will give them. It will be perhaps of some little assistance if I do so. In Heffter, the passage which I should desire to direct the attention of the Tribunal to is at page 149.

Mr. Justice HARLAN.—What edition?

Sir RICHARD WEBSTER.—The third edition revised and enlarged by the author. Martens, "*Traité de Droit international*", page 197. There appears to be only one edition, published in Paris in the year 1833. Manning I should cite from the edition of 1875, the one edited by a gentleman no longer living—a most distinguished lawyer—Mr. Sheldon Amos; I cite from page 119 of that edition. Chancellor Kent I cite from the edition of 1878 edited by Mr. Abdy at page 97—Kent's Commentaries on International Law. Chancellor Kent's own words, (not Mr. Abdy's) are these:

The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind and the public. Jurists generally and explicitly deny that the main ocean can ever be appropriated. The subjects of all nations meet there in time of peace on terms of equality and independence.

Those are Chancellor Kent's own words. It must not be thought that I am not reading the other passages because they are not equally pertinent, but it is out of regard to the Tribunal looking to the time I have occupied. I merely read that passage, because I understood the Tribunal desired to know from what particular book of Chancellor Kent's I was reading and whether it was his language.

Mr. Justice HARLAN.—I never saw that book before. I suppose what is in that book is in the first volume.

Sir RICHARD WEBSTER.—This is Kent's Commentaries on International Law, which I believe forms one of the volumes of his Commentaries.

Mr. PHELPS.—It forms part of the first volume.

Sir RICHARD WEBSTER.—That is my recollection exactly. It forms the opening 300 or 400 pages of one of the first volumes of Chancellor Kent's book. Then Sir Travers Twiss' work on "*The Law of Nations in Time of Peace*". I read from the edition of 1884 by Sir Travers Twiss at page 285. Sir, these authorities might have been multiplied to a much larger extent. I do not know among the authorities cited by my learned friend any which in any way conflict with my contention. In fact, my friends put their case on narrower grounds and on different principles; but there is one to which I wish to call attention

because we have been twitted both in the written Counter Case of the United States and orally in argument with having misunderstood those points, and that is the enunciation of the law made on behalf of the United States in the year 1832, when the question of the "Harriet" arose in the Falkland Islands. It is referred to and set out at length in the British Case, and in order to quote nothing as to which there is any dispute, I refer entirely to the documents set out at pages 185 to 191 of the United States Counter Case. Possibly, the Tribunal will be kind enough to take that volume before them. I have also examined the original documents and find nothing conflicting with the position I am now about to submit.

The criticism that is made by the United States when we used the language of the United States in regard to their rights is: At that time there was no question of deep sea fishing involved, and therefore it is not pertinent to the question in respect of which you, the British Government, cite the authority. Well, if it were true in fact it would not be any answer to the argument inasmuch as the United States have enunciated the law in most general terms, but it is not the fact. Buenos Ayres was threatening to interfere not only with the seal fishery but the whale fishery, and it is pointed out in these papers that whales were caught outside the 3 mile limit, and it is in connection with a claim by Buenos Ayres to stop and interfere with vessels doing two things, whaling and sealing; and the seals undoubtedly were caught on the uninhabited shores of certain islands as to which there was a dispute with regard to territory.

I will show from these original documents it is not an answer to the British argument, founded on the enunciation of the law by the United States themselves, to say that the only question there raised was as to killing seals on land, and that no question had arisen as to killing them on the high seas. Will you Mr. President look at page 186.

The undersigned would also call the attention of His Excellency, the Minister of Foreign Affairs, to certain declarations of Don Luis Vernet, important as coming from a high functionary of this Government, the military and civic governor of an extensive region, and if these declarations are to be considered as indicative of the sentiments and views of this Government there would be just cause for apprehending that a project was in contemplation involving the destruction of one of the most important and valuable national interests of the United States, *the whale fishery*.

You will observe that that is italicised.

For he declared to Captain Davison that it was his determination to capture all American vessels, including *whaling ships* as well as those engaged in catching seals, upon the arrival of an armed schooner, for which he had contracted, which was to carry six guns and a complement of fifty men.

The italics are not ours. I should gather from the way in which it is printed those italicised words occur in the original; at any rate I only read from the United States document.

Then on page 187:

But had the Governor, in the exercise of his authority, confined himself merely to the capture of American vessels, and to the institution of processes before the regular tribunals which administer the laws in this country with the sole view of ascertaining whether transgressions against the laws and sovereignty of this Republic had or had not been committed, and had he so done in strict pursuance of his delegated authority, yet in view of the Government of the United States even an exercise of authority thus limited, would have been an essential violation of their maritime rights; and the undersigned is instructed and authorized to say that they utterly deny the existence of any right in this Republic to interrupt, molest, detain, or capture any vessels belonging to citizens of the United States of America or any persons being citizens of those States, engaged in taking seals, or whales, or any species of fish or marine animals in any of the waters, or on any of the shores or lands, of any or either of the Falkland islands, Terra del Fuego, Cape Horn, or any of the adjacent islands in the Atlantic Ocean.

Now after some further negotiations which I have looked through and which are not material for my purpose a further document was sent from the American Chargé d'Affaires to the Buenos-Ayres Minister on the 10th July 1832 and on page 188 there is this discussion about sovereignty.

We were told at one stage of this Argument the whole question in dispute was as to whether the Argentine Republic had the right of sovereignty. At the bottom of page 180 that question is put on one side showing it was not at the root of discussion.

The following is the passage.

But again if the rights of Spain to these Islands were undoubted, and if, again, it be admitted hypothetically that the ancient vice-royalty of the Rio de la Plata, by virtue of the Revolution of the 25th of May, 1810, has succeeded in full sovereignty to those rights would that admission sustain the claim which the province of Buenos-Ayres, or in other words, the Argentine Republic, sets up to sovereignty and jurisdiction.

Then again in page 189.

But again if it be admitted hypothetically that the Argentine Republic did succeed to the entire rights of Spain over these regions and that when she succeeded Spain was possessed of sovereign rights, the question is certainly worth examination whether the right to exclude American vessels and American citizens from the fisheries there is incident to such a succession of sovereignty. The ocean fishery is a natural right, which all nations may enjoy in common.

This would not be necessary if they were discussing the question simply of going on the land.

The ocean fishery is a natural right, which all Nations may enjoy in common.

Every interference with it by a foreign Power is a natural wrong. When it is carried on within the marine league of the coast which has been designated as the extent of natural jurisdiction reason seems to dictate a restriction, if under pretext of carrying on the fishery, an evasion of the revenue laws of the country may reasonably be apprehended, or any other serious injury to the sovereign of the coast, he has a right to prohibit it; but as such prohibition derogates from a natural right, the evil to be apprehended ought to be a real, not an imaginary one. No such evil can be apprehended on a desert and uninhabited coast; therefore such coasts form no exception to the common right of fishing in the seas adjoining them. All the reasoning on this subject applies to the large bays of the ocean, the entrance to which cannot be defended; and this is the doctrine of Vattel, chapter 23 section 291 who expressly cites the Straits of Magellan as an instance for the application of the rule.

I point out in passing Mr. President that you will observe from the point of view of the enunciation of the law if it be right—from the point of view of authority the question of going into the territorial waters becomes immaterial because, as was pointed out, they were only justifying going within the marine league, that is to say going within the distance of territorial waters for certain purposes: their real justification was fishing in the high seas. Now if you will turn over to page 190 I shall be able to conclude what I have to say in this matter.

The treaty concluded between Great Britain and Spain, in 1790 already alluded to, is to be viewed, in reference to this subject; because both nations by restricting themselves from forming settlements evidently intended that the fishery should be left open both in the waters and on the shores of these islands, and perfectly free so that no individual claim for damage, for the use of the shores, should ever arise. That case, however, could scarcely occur, for whales are invariably taken at sea, and generally without the marine league, and seals on rocks and sandy beaches incapable of cultivation. The stipulation in the treaty of 1790 is clearly founded on the right to use the unsettled shores for the purpose of fishery, and to secure its continuance.

I need scarcely point out to this Tribunal, because the perusal of the papers is sufficient, that the whole of this argument as to the whales would have been out of place and altogether unnecessary if it was true as suggested the only question was the right of going on shore.

Now look at the conclusions:

The following conclusions, from the premises laid down are inevitable:

1 That the right of the United States to the ocean fishery and in the bays, arms of the sea, gulfs and other inlets incapable of being fortified, is perfect and entire.

2 That the right of the ocean within a marine league of the shore, where the approach cannot be injurious to the sovereign of the country—as it cannot be on uninhabited regions, or such as are occupied altogether by savages—is equally perfect.

3 That the shores of such regions can be used as freely as the waters: a right arising from the same principle.

That a constant and uninterrupted use of the shores for the purposes of a fishery, would give the right, perfect and entire, although settlements on such shores should be subsequently formed or established.

Mr. President, you expressed an opinion, which I have no right to criticise, some days ago that it must not be taken as recognized international law that this right of landing on unoccupied coasts certainly is recognised at the present day. I need scarcely remind you that I respectfully agreed, as far as an advocate was entitled to agree with that expression of opinion; but I pointed out that at the time of which we were speaking it was a common thing for Nations to contend that there was such a right.

The PRESIDENT.—It was a question of sovereignty.

Sir RICHARD WEBSTER.—But, from the point of view of argument in this case, if General Foster's contention were correct, it would only strengthen my position; because the claim made by the United States, to catch whales, and to visit inhabited coasts, was put simply and solely as a branch of the right of fishing on the high seas.

General FOSTER.—It was that the vessel was seized for taking seals on land.

Sir RICHARD WEBSTER.—With great deference (General Foster will pardon me for saying it) there is no necessity for that interruption, because I refer to what the United States said with regard to the threats of Buenos-Ayres to stop the vessels whaling and as to the question that had arisen independently of a particular ship. You cannot exclude or cut away from the utterances of a Nation in this way. It suits the United States to endeavour to belittle the statements made by their Representatives in 1832, and it has suited them in many other points in this case to endeavour to do away with the effect of utterances previously made by United States Statesmen of great eminence; but my submission in reply to the interlocutory observation of General Foster is, that when you read these documents, whatever claim was asserted was asserted as flowing from the right of all nations to fish upon the high seas; and the only effect of adopting General Foster's criticism would be that that right would be cut down in so far as it did not give Nations the right of touching or of landing upon uninhabited coasts.

Sir, I submit to this Tribunal that so far from the strength of that quotation, which is of equal point whether the Statesman was of the United States, or Russian, or French, or of any other Power,—the strength of that citation is in no way removed by the documents to which I have called attention. On the contrary, they support to the letter and in full the arguments we founded upon them when our Case was framed.

But, Sir, quite apart from authority, quite apart from the utterances of any Statesman in the past, will you consider for a moment what the end of this, and the result of this United States claim, must be?

Feeling pressed by the distinction or by the argument which would be used in connection with such fish as salmon, in connection with such

fish as the knowledge of the world at the present day knows to return to their local habitation for the purpose of breeding, of which the annual increase can be taken and of which the same selection can be made as is purported to be made with seals with this additional incident, that they are actually bred artificially to increase the stock, my learned friend, Mr. Carter, endeavoured to get rid of that difficulty (a difficulty which, we submit, is bound up with and is one of the vices of his argument) by saying the distinction in the case of fish is that they are inexhaustible. Is that the present condition of knowledge either of the United States, or of Great Britain, or of any other Nation? This Tribunal is asked to recognize as a matter of international law a property in wild animals—to recognize a right of protection,—that the animals are to be considered to belong to the United States all over the sea? The argument is weak indeed if my learned friend thinks he can distinguish the case of fish on the ground of the inexhaustibility being a sufficient answer. What has been happening? May I remind you, and I have no doubt you have some knowledge of it (certainly some members of the Tribunal have) the United States, France, Canada, and Great Britain in various parts of the world have had to consider the exhaustion of fisheries and fishing banks, and they are re-stocking them by artificial means, and further it has come out in that examination that practically all of these fish, certainly the principal fish, can be identified as coming from a particular place and are of such a character even that the fish can be identified as having been bred at a particular place and are returning to it.

It would be very interesting to go into this, Mr. President, if it were closer to this case; but I do not know if this Tribunal knows that Mr. Neilsen one of the most experienced inspectors of fisheries in Norway was sent to the other side of the Atlantic to advise the Newfoundland Fisheries in this matter, and Professor Baird—I do not know whether he still lives—probably the most eminent naturalist as to fisheries in the United States had advocated the re-stocking of the deep sea fisheries and had advised that other nations should commence re-stocking and artificially hatching in order to replenish the races of fish then becoming exhausted, and that all these gentlemen from their researches in these matters, Professor Baird among the number, Mr. Neilsen among the number, have found that each of the various species of cod have their own local *habitat* and can be readily and easily distinguished. St. George's fish are known from any other kind of cod caught on the Banks. Cape St. Mary's cod are distinguished from any other kind of cod in Newfoundland; and a Trinity Bay fish is known from a Placentia fish. It would interest this Tribunal upon the question of the principle of law attempted to be pressed upon it; if there is any reason or logic in it, I could show that it would have such a far-reaching effect that the principle applied to this particular case would lead nations to claim that each individual animal or fish that could be identified, or that could be shown to have bred and shown to return to its own breeding home, was to be the property of the particular nation that could prove it came there to breed, and they had there the power of destroying the whole of them at once or allowing a certain number to go free. Perhaps also, Sir, you know, and it may be interesting to the Tribunal I should mention that this has been the subject of a very learned discussion in France with reference to the stocking of exhausted fisheries on the French coasts. Therefore, my learned friends will forgive me for saying that I think it is impossible to draw the distinction they have attempted to draw between seals and fish on the ground, as they suggest, that in one case the animals

are bred in such numbers that they are inexhaustible, because the experience all the world over is that fisheries have become repeatedly depleted; and that further, if identification and habits of returning to the same locality, is to be a sufficient test, and if the power of destroying the whole, or abstaining from destruction is a sufficient claim, this claim must be recognized in respect of various migratory birds and various other animals which are of great use to mankind, probably of much greater use than the seals, the bodies of which are wasted, the oil of which is never reclaimed, and the skin only is used for the ornamentation of the dresses of certain persons who can afford to pay large sums for their apparel.

Mr. President, I have said all that at the present stage I feel it necessary that I should say to this Tribunal. I have endeavoured only to supplement the much wider, abler, and more exhaustive argument of my learned friend, the Attorney General, and it is no part of my duty, Sir, to attempt to apply the arts of oratory or the influence of eloquence to the consideration of the questions submitted to this Tribunal. I have had two objects in view, and two only, that, so far as facts are involved, the true facts, all the facts, and the facts only shall be laid before this Tribunal, that so far as enunciated principles of law are involved those principles of law should be drawn from the best sources that are at our command, and without any attempt either to strain those principles in favour of, or to minimise their effect against, the contentions we are supporting. I am perhaps, more conscious than any one present of the deficiencies in my own argument, but I trust, with its defects, it may still have been of some service to this Tribunal; but, Mr. President, what will remain forever in my mind is the recollection of the unvarying courtesy and patience with which my observations have been received by every member of this Court.

The PRESIDENT.—Sir Richard, we thank you for the very substantial and useful observations with which you have supplemented the argument of Sir Charles Russell. We knew how much we were indebted to you already for the elaborate study you have made of this case on behalf of Great Britain, and I for one have very much admired the unrestricted and friendly co operation of yesterday's Attorney General with to-day's Attorney General. The country is indeed to be envied where party spirit admits of such brotherly association when the national interest is at stake.

FUR-SEAL ARBITRATION.

ORAL ARGUMENT

OF

MR. CHRISTOPHER ROBINSON, Q. C.,

ON BEHALF OF GREAT BRITAIN.



THIRTY-FOURTH DAY, JUNE 7TH, 1893.

Mr. ROBINSON.—I feel very strongly indeed, Mr. President, the position in which I am placed in being called upon to address the Tribunal at this stage of the discussion; but I shall be spared the necessity of further personal allusion if I may ask the Tribunal to be allowed to apply to myself, but with very much added force, the few well chosen observations with which my friend who precedes me has prefaced his argument. To me, I am afraid for a number of years longer than for him, the work of a junior Counsel has also been unaccustomed; but there are two considerations which may reconcile me, at all events to a certain extent, to recurring, for a time, to the labour of earlier years. Many gentlemen of our profession I believe would say that the place even of a junior in a great national controversy of this description, is to be preferred to the work of a senior in the ordinary duties of daily practice; and in the next place, if I may be allowed to make an observation purely personal, may I say that all the surroundings and circumstances of this case in its conduct here, and, much more, all the personal associations connected with it on every side, have been such, whatever the duties may be, important or unimportant, accustomed or unaccustomed, as to make it only a pleasure to discharge them as best one might be able.

If it has been difficult for my learned friend to follow the Attorney General (as I can well understand that it was), I trust it will be remembered how much greater the difficulty must be for me to follow not only the Attorney General, but my learned friend Sir Richard Webster as well. If I may use a simile, Mr. President, not altogether appropriate to our serious work here, it does seem to me that I am called upon to perform a task, which, while it can no doubt be best performed in the place where we are, can seldom be successfully performed by one of my own nationals. I am called upon, I fear, to present to the Tribunal something not altogether distasteful, something which may possibly not be altogether useless, but which must be made up of scraps and of leavings—the scraps and the leavings of very much better artists, and artists I may say, who have found the material so attractive, that even what they have left is not very good of its kind; by which I mean that if there are any points in this case which have not been thoroughly discussed, you will find that they are naturally the points which it is least useful to discuss. At all events I have felt very strongly, that if I could consult only the interest of the case and of valuable time, and follow the dictates only of my own judgment, I should say at once the only thing which I am able to say without doubt or hesitation—that every thing that can be said in the case on our side has been already said, and well said, and that it can serve no useful purpose to attempt to add to it.

But there is one thing, Mr. President, of which I am quite certain: It could not be of any possible assistance to the Tribunal, and therefore it would not be becoming in me, if I were to attempt to follow my learned leaders into any branch of this case in anything approaching to detail. The case has been exhaustively and thoroughly discussed, as it was abso-

lutely necessary that it should be discussed, and for very obvious reasons. I do not think it is too much to say that Arbitrations as a means for the settlement of International disputes may be said to be yet upon their trial. There are very many who believe—all right minded men most earnestly hope—that to an increasing extent they may become the substitute for the only means, so terrible in its consequences, which can be made available in their place: but if they are to do this they must justify themselves by their works. There are many people I believe now watching this Arbitration most anxiously, who know very little of the merits of the case, and who care absolutely nothing for the success or failure of either of the contending parties; but they watch it in the hope that it will show to the World, and the two nations that are engaged in it, that if Nations do not obtain certainly by these means all that they might possibly have obtained by the test of war—by the test of *might*—they are at least certain to secure all that they can shew themselves entitled to by the far preferable and more reasonable test of *right*. It was necessary therefore, and essential, that every principle involved in this case, every consideration which either side might think it worth while to bring to the attention of the Tribunal, should be carefully and anxiously examined—every principle which is thought applicable tested, and traced to its source—and every argument great or small which could have any bearing on the case should be most anxiously weighed. But, while this is the case, there is as it appears to me one feature peculiar to this Arbitration considered in its International aspect. Most International Arbitrations, so far as I am aware, have been concerned with the exercise of belligerent rights, or with the question of territorial or maritime boundaries, which could only be determined by the principles of International law; but it so happens that the most important questions in this case—those upon which in substance it must ultimately turn—might have arisen between individuals, and might have come up for decision in any ordinary Court in either of the countries interested.

It is possible of course to conceive (though I think it very difficult), that the decision as between individuals might be different from that which it should be as between nations. I say this, because I know that is indicated in some portions of the argument on the other side, but still I think this is hardly a possible conception; and what I propose to do, therefore, as the only course which it seems to me can avoid prolixity, and may at the same time be of some possible use, is to assume that this case has come up (as it might come up), by one individual against another, to be determined by the ordinary courts of either of the countries interested, and endeavour to point out what considerations it would then have presented, and upon what grounds the case would have been disposed of.

Suppose for example it had been a claim, as it might well have been if these islands had been owned by a private individual—suppose it had been a claim by one of the owners of these islands against a pelagic sealer, for the destruction of a quantity of seals from the islands—you may say 1,000 dollars worth or 10,000 dollars worth; it is immaterial—and that it had come up for disposition in one of the ordinary courts of either country, in what shape would it have then presented itself to the judge, and in what way, or upon what grounds, would it probably have been disposed of? Now, I apprehend, the first thing that would have struck anyone in such a case would have been the absolute novelty of the claim, which at this stage of the world's history is certainly a consideration entitled to some weight. I think it would occur to any judge before whom it was brought to say:

If there is one principle better established than another, it is the freedom of the seas to all the world—the equality of all nations upon the high seas, and the right of all people to take whatever they may find there in the shape of free swimming fish or animals, as they may be able to secure them. I think it would be asked: how do seals form an exception to the universal rule? And with regard to seals themselves it would be very properly observed: The seals have been swimming the ocean—both the great oceans of the world, the Pacific and the Atlantic—and they have been the subject of pursuit by man, since long before the memory of man. Has there ever been up to this time a claim made by any nation or by any individual to property in those animals? That clearly must have been answered in the negative; and if the question were tested further, I think the explanation would have been asked: have you considered the analogy between all other animals of the same kind and of the same nature—animals *feræ nature*, as we may suppose these seals to be for the moment. I think the case would have been put of pheasants and rabbits and innumerable other wild animals, as to the law of which there is no question whatever, and the Plaintiff's would have been asked to distinguish between the claim made in this case, and a claim *preperes* in seals animals and birds. I question myself whether the case would have gone further. Whether it would have gone further or not, however I venture to submit that the onus would have been on the claimant—that is to say, I think it would have been said to him: You must distinguish this case from the general right as regards the high-seas, and from the universal law prevailing as to animals *feræ nature*. This has been attempted here and I therefore proceed to examine, as shortly as I can, the grounds which are taken here, and which would have been advanced in a case of that description in support of the claim.

Now there is some difficulty—at least I have found some difficulty—in ascertaining exactly on what ground that claim is put; but first it may be well to say a word upon a question which would probably I think, in a contest of that description, either have assumed no place at all, or would at least have assumed a place even more unimportant than it has now been relegated to by the present contention of our friends. I am speaking now of what may be called the derivative title from Russia, and I think that may be put in a very few words indeed, as I should put it, viewing the Case as I am now endeavouring to consider it.

I do not desire to go into the Ukase of 1799, or to treat this question otherwise than in a very cursory manner; but if the question of the derivative rights of Russia and the Ukase of 1821 had come up for consideration, this much at all events would have been plain—that that Ukase was the cause of the Treaties of 1824 and 1825, and those Treaties were the result of that Ukase.

Now the assertion on the part of the United States is, that in those Treaties the phrase “Pacific Ocean” does not include Behring Sea, and that the term “north west coast”—(without going into details, or without speaking of the different meanings given to it) practically means the north-west coast south of the Alaskan Peninsula.

Let us look at the two or three documents upon which this substantially depends.

In the first place, there can be no question as to what the Ukase itself says, or as to its meaning. We should have to ascertain I think—we should have to ask ourselves—upon this question: What was it that the Ukase claimed: What was it that Russia asserted that they

were claiming by the Ukase? What did the United States and England understand them to claim? Against what portion of that claim—if not against all—did they protest; and how was their protest treated by Russia? Did she withdraw the claim, or only a part?

Now we find that the Ukase, to use the words of section I, which I read from the Case of Great Britain, p. 38, says that:

The pursuits of commerce, whaling and fishery, and of all other industry on all islands, ports, and gulfs including the whole of the north west coast of America; beginning from Behring's Straits to the 51° degree of northern latitude, also from the Alentian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz, to the 45° 50' northern latitude, is exclusively granted to Russian subjects.

No one would question what is the meaning of "north-west coast" in those words:

The whole of the north-west coast of America, beginning from Behring's Straits, Going southward.

to the 51° of northern latitude.

There can be no question about that. Therefore the Ukase, at the beginning, puts a perfectly plain and unmistakable meaning on the words, "north-west coast."

Then that was transmitted to Mr. Adams on the 11th of February 1822, and his reception of it is to be found in his letter of the 25th of February 1822, in which he says: British Case p. 47.

I am directed by the President of the United States to inform you that he has seen with surprise, in this Edict, the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on this continent.

I take that to mean extending southward to the 51st degree of north latitude on this continent. He then continues:

And a Regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply.

There, again, it would seem to me, we have Mr. Adams' very clear apprehension that it was a territorial claim of the coast down to the 51st degree of northern latitude, and an interdict of approaching, on the high-seas, within 100 miles of that coast.

Now M. de Poletica answers that in words which have always appeared to me, and I venture to say must appear to anyone, unmistakable and clear. These objections on the part of the United States to the claim of Russia having been called, as I understand, to their attention, M. de Poletica answers in these terms: British Case p. 48.

I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend, on the north-west coast of America, from Behring Straits to the 51st degree of north latitude.

Now is there any possibility of doubt as to what that means? They speak of "Pacific Ocean," and they speak of "the north-west coast." Can anybody contend for a moment that "Pacific Ocean" there did not include Behring Sea, or that the "north-west coast" did not include the coast up to Behring Straits?

It would be impossible to express that meaning in words more plain, more conclusive, or more clear—I do not know how it could be done. The Russian possessions—he asserts—"in the Pacific Ocean extend, on the north-west coast of America" . . . "from Behring Straits to the 51st degree of north latitude". The letter then goes on:

The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (mers fermées).

and so on. I need not read the sentence again.

Then Mr. Adams answers that by saying: P. 49.

With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles.

Now that applies to Behring Sea again, because it is only there that these territories belonging to Russia exist—I mean that the American and Asiatic shores are to be found opposite.

Then on the 22nd July (after some previous correspondence which it is not necessary to refer to), Mr. Adams writes in these terms: P. 50.

From the tenour of the Ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the 45th degree of north latitude, on the Asiatic coast, to the latitude of 51 north on the western coast of the American Continent.

Is there and possibility of doubt as to what Mr. Adams understood to be the claim which was asserted on the part of Russia? He defines it in the words of the Ukase, and puts it in words which can admit of only one meaning, because from the 45th degree of north latitude, on the Asiatic coast, to the latitude of 51 north on the western coast of the American Continent, is practically going round in a semi-circle, so to speak. Then his letter continues:

And they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

The United States can admit no part of these claims.

That will be found at page 50 of the British Case. Is it possible to state the claim more clearly, or to make the denial which followed more explicit, and comprehensive; could you have the assertion on the one hand and the denial on the other, and the issue which is joined between the two parties, more clear and distinct?

There we have the issue thus joined. The negotiations then went on from that time, as you know, for a year in one case—for more than a year in the other: that is to say, the Treaty with the United States was made in 1824, and the Treaty with Great Britain in 1825. Both Treaties are to be found at page 59, worded in almost precisely the same way. The attitude assumed by Russia as the result of all these negotiations is found in the Treaty signed by her. Article I of the Convention between Russia and the United States is as follows:

It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

There was, therefore, a clear renunciation of any exclusive rights in the Pacific Ocean. Now I venture to say that at least this is clear: Unless you can find in the correspondence somewhere some change from the meaning of the words put upon them in the Ukase—put upon them by M. de Poletica in his construction—put upon them by Mr. Adams in his denial of claim, all doubt is at an end. I do not desire to pursue that further, because it has been gone into by the learned Attorney General very much in detail, and carefully.

It has been touched upon also by my learned friend Sir Richard Webster; and all that I venture to say upon that is this; that if there

can be found one syllable in the correspondence following the Ukase—following the claim—following the denial of the claim—which tends to shew that either Great Britain or the United States withdrew any part of their explicit and comprehensive denial, or that Russia reserved to herself any part of the rights she asserted by the Ukase, it has escaped my attention after several very careful readings; and I do not think there can be any object in my pursuing it further, because the Tribunal will have in their minds all the different correspondence which has been called to their attention on both sides. I think there are numerous expressions, and they are all to be found set out in our case, in which, so far from there being any change of the meaning or intention on the part of Russia or on the part of either Great Britain or the United States to be found, there are several letters which show quite plainly that both of those Powers were always adhering to their original denial, and that Great Britain and the United States considered that Russia had relinquished all that she claimed. And again I submit the test which was submitted by the Attorney General: Can anyone, reading that correspondence with care, point to any one time during the negotiations, when, if Russia had said either to the United States or to Great Britain, we will give up all our claim except Behring Sea, her condition would have been even listened to for one moment. If not, then there is an end of that question; and I am content to leave it there.

With regard to the question of maritime claim as distinguished from territorial claim, I think it may be said with truth that to both the United States and to Great Britain the more essential object was the maritime claim; but that perhaps there is some slight difference in this respect—that the United States, as would be natural, possibly attached some little more importance to the territorial claim than Great Britain did, because Great Britain evidently thought nothing whatever about it.

I was struck with one letter, which I do not think has been referred to in the course of this discussion, which impressed itself on my mind, and which is to be found in the second volume of the Appendix to the British Case at page 54. This letter was written in March 1824, and Sir Charles Bagot then represented Great Britain. They were then negotiating about the territorial question, which it was found difficult to settle, and all the negotiations were suspended.

Sir Charles Bagot said to Count Nesselrode that:

If a territorial arrangement perfectly satisfactory to both parties could not now be made it might possibly be thought by my Government that our respective pretensions might still remain without any serious inconvenience in the state in which they had before stood, and that it would only be necessary for the present to confine their attention to the adjustment of the more urgent point of the maritime pretension, a point which would not admit of equal postponement.

In reply to this observation Count Nesselrode stated, to my extreme surprise, that if the territorial arrangement was not completed, he did not see the necessity of making any agreement respecting the maritime question; and I found myself most unexpectedly under the necessity of again explaining very distinctly, both to him and to M. Poletica, that the maritime pretension of Russia was one which, violating as it did the first and most established principles of all public maritime law, admitted neither of explanation nor modification, and that my Government considered themselves possessed of a clear engagement on the part of Russia to retract in some way or other a pretension which could neither be justified nor enforced.

Now that struck me perhaps as the most emphatic piece of evidence pointing out the position taken by Great Britain. The territorial claim may wait; but when it is suggested by Russia, if we cannot settle the territorial claim there is no object in going on with the maritime claim

it can wait too, Great Britain says, not for a moment; that must be utterly withdrawn; it can neither be modified or explained—it admits neither of explanation nor modification; and some where, I cannot myself at this moment remember what the letter is, but there is a letter which Mr. George Canning wrote on the subject in which he says, I take it for granted the maritime claim by Russia will be altogether withdrawn.

On the 8th of December, 1824, in the British Case at page 46, you will find a letter showing also the attitude taken by Great Britain; but that has been referred to before:

It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

The expression of Mr. Canning I have not at this moment before me, but it is of very little importance.

Now, you will not find, I believe, in this correspondence, which has been all gone over, and some of it repeated, anything approaching to a distinction drawn, on the part of Russia, in words, between Behring Sea and the rest of the Pacific Ocean.

Then, as to the claims of Russia by early discovery prior to the issuing of that Ukase and prior to the conclusion of these Treaties; I have only one word to say about that, because I think to some slight extent it has been a little misunderstood. I submit that it will be found, if you examine the papers, so far as it may become of any importance—and probably, in the view of the case I have suggested, it would hardly be worth while to mention it,—that Russia, by 1821, had not established any claim which she could successfully maintain against other nations north of the Alaska Peninsula.

If other nations had pushed their trade north of that Peninsula as they had at that time pushed it to the south, I submit anyone reading this correspondence will say that it would have been extremely difficult for Russia to resist their progress. All that there was at that time was one settlement, which was to be found on Bristol Bay, immediately north of the Alaskan Peninsula, in which (if I recollect rightly) the number of Whites was five; and that was a settlement formed in 1819 by Kossarovski. I find it difficult to reconcile the view taken by Mr. Blaine in one of his despatches of the early title of Russia with that taken by Mr. Adams at the time of these negotiations. At all events, there can be no question as to what the United States then thought of it, and while I say the United States thought comparatively little of the territorial title, though possibly they attached slightly more importance to it than Great Britain, I say that for this reason: if you refer again to our Appendix, Volume II, part 2, page 4, you will find that Mr. Adams there says:

I inclose herewith the *North American Review* for October 1822, No. 37, which contains an article (page 370) written by a person fully master of the subject,

If you will look at the *North American Review*, which is given in our Appendix, volume I, page 33, you will find what is the view taken there, which Mr. Adams affirms to be, as I should understand, the correct view, because he says it is an article written by a person thoroughly master of the subject. What the writer says is:

We readily concede to Russia priority of discovery, first occupation, and are by no means disposed to disturb her "peaceable possession".

that is quoting an expression used by M. de Poletica, in which he states that Russia's title was by occupancy, early discovery and indisputed possession.

We readily concede to Russia priority of discovery, first occupation, and are by no means disposed to disturb her "peaceable possession" of the Aleutian Islands and adjacent coast, including Cook's River, Prince William's Sound, and Behring Bay.

You observe all that is south of the Peninsula, and includes Cook's River, Prince William's Sound and Behring Bay.

We are not remarkably disinterested in making this concession, for, to all practical purposes, we would as soon contend for one of the floating icebergs that are annually detached from the polar masses.

That is the estimate and value which the United States then put upon that Country, and it was a natural estimate, no doubt, to form of it at that time.

In a territorial point of view, it is of little importance whether those distant regions are inhabited by the aboriginal savage or the Siberian convict.

And then they go on to say, as I understand (but I will not detain the Tribunal by referring to it) that the title by which Russia claims that territory, described by them as so worthless, is by no means clear and is subject to doubt.

Now Mr. Adams' view of the Russian title by early discovery and everything else at that time is to be found in the same letter to which I have already referred in our Appendix, vol. 2, part 2, page 4. That is a letter of Mr. Adams, of which we did not give all, and for the rest I am about to refer to the Appendix to the American Case, vol. 1, page 146. That is the letter of July 22nd, the same letter; but I do not find this passage in our version of the letter in our Appendix. My learned friend tells me it is in our Counter Case; but in page 146 of the American Appendix, vol. 1 of the Case of the United States, Mr. Adams there says:

When Mr. Poletica, the late Russian minister here was called upon to set forth the grounds of right conformable to the laws of nations which authorized the issuing of this decree, he answered in his letters of February 28th and April 2, 1822, by alleging first discovery, occupancy, and uninterrupted possession.

It appears upon examination that these claims have no foundation in fact. The right of *discovery* on this continent, claimable by Russia, is reduced to the probability that, in 1741, Captain Tchirikoff saw from the sea the mountain called St. Elias, in about the fifty-ninth degree of north latitude. The Spanish navigators, as early as 1582, had discovered as far north as 57° 30'.

As to occupancy. Captain Cook, in 1779, had the express declaration of Mr. Ismaeloff, the chief of the Russian settlement at Unalaska, that they *knew nothing* of the continent in America.

I will not pursue this subject. I have only cited that to show what Mr. Adams' view was of the claim then advanced by Russia, if they had thought it worth while to contest it or thought the territory of any value. The view which I submit to the Tribunal is simply this: If it had become a question between Russia claiming under the discoveries of Behring and Tchirikoff and England claiming under the discovery of Captain Cook in 1748, it would have been, to say the least of it, doubtful whether England had not a better claim, as Captain Cook had not only discovered the coast, but had landed and taken possession; while Tchirikoff had simply seen the coast at a distance and landed on an island; and Mr. Adams' goes on to say that landing on an island has never been considered to give a claim to the continent adjacent to it. I say that I find it difficult to reconcile his with Mr. Blaine's despatch of 30th June 1890, to be found in the 3rd volume of the Appendix to the British Case at page 498.

Mr. Justice HARLAN.—What you read was no doubt in the letter of the same date from Mr. Adams to Mr. Rush, on page 6 of your volume II, Part. 2. In the British copy that part you read is omitted.

Mr. ROBINSON.—Yes, I had noted between the first and second sentences, that there was this omission I do not know how it happened, but it is supplied in the Appendix to our Counter Case Vol. I at page 56, and, therefore, it is of no consequence. I looked at it before the Counter Case had appeared, and made that note, and had forgotten to take a note of the fact that it was put in in full in the Counter Case.

Mr. TUPPER.—I may be permitted to say that these papers of the United States correspondence were printed from the blue book published by the United States Government in Washington in the year 1888—a collection of all the papers relating to the subject—and they were taken in that way.

Mr. ROBINSON.—As we have it now it is of no great importance how it came to be omitted earlier.

But Mr. Blaine, I observe, writing on the 30th of June, 1890, Vol. III, Appendix to British Case, p. 498 says.

If Mr. Adams literally intended to confine Russian rights to those Islands, all the discoveries of Vitus Behring and other great navigators are brushed away by one sweep of his pen, and a large chapter of history is but a fable.

Then he says at the foot of the page:

Without immoderate presumption, Russia might have challenged the rights of others to assume territorial possessions; but no nation had shadow of cause or right to challenge her title to the vast regions of land and water which, before Mr. Adams was Secretary of State, had become known as the "Russian possessions".

Now you see that at that time the United States having bought from Russia were standing upon that title, and of course, it being their own title, it was only natural that they should make the most of it; but we have to contrast the position, taken by the United States in 1823 with the position taken when they had purchased the title of Russia and were resting upon it. This is what Mr. Blaine says here, which, as I have said, I find some difficulty in reconciling with the position taken by Mr. Adams; and I submit that you will find that the position of Mr. Adams is the right one.

In another place Mr. Blaine asks whether it is likely, if Russia's title had not been good, the United States would have paid the sum of \$7,200,000 for the territory. I have not that passage before me at this moment; but of course the answer to that is very obvious. Whatever Russia's rights might have been, they were conceded and settled to be down to 54-40 by the treaties; and if the United States, forty years after the treaty, desired to acquire that property, it was necessary for them to pay for it whatever they might think it was worth; and I fancy that much as it increased between 1824 and 1867, it has probably increased more since that time.

So much then for those two points, which, in the view which I am endeavoring to take of the case, would have comparatively little bearing, but I think they may be disposed of by simply asking the Tribunal to read the words which I have read from the correspondence, accompanying the words of the Ukase, the words of the protest, and compare with them the words of the Treaty; and as to the other, so far as it is material, to contrast Mr. Adams' view of the title with that taken by Mr. Blaine, and examine, if it is thought worth while, the history of the discoveries up to that time, and see which is the most correct. I venture to think, as it is natural that it should be, that Mr. Adams,

writing near the time, and having studied the question, will be found the more accurate of the two.

Then, if we are now to proceed to discuss in this general way the property claim advanced by the United States, the first thing that one finds some difficulty in—at least, that I have found some difficulty in—is to ascertain exactly what form or what branch of their claim it is to which they attach the most importance, or mainly desire to stand upon, and by what law it is that they mainly desire to be governed. If I understand their claim, they claim a property first in the seals, if not in the seals then in the herd, if not in the herd, then in the industry; and they say that this claim is supported to all of these different subjects of claim by municipal law, and if not by municipal law, then by international law. For example, at page 132-3, in a portion of Mr. Phelps' argument, he says that upon the ordinary principles of municipal law, they claim to be supported, and upon the broader principles of international law it becomes much more clear; and while they say that international law must govern, and while they admit that the municipal law of both countries may well be referred to, and may have great weight in deciding what international law is, they yet say that it must be remembered that the case is not necessarily to be governed by the municipal law of either nation, but by international law. I think, therefore, it will be well for me, without attempting to draw that distinction more accurately, because it seems to me to be difficult, and would only complicate and prolong the argument, it will be better to turn to their claim as they state it generally, and see how it is put by them.

The Tribunal will find their propositions at pages 47, 50, 91 and 132 of the printed argument. I refer to their printed argument, I may say, for the remarks I wish to make, because so far as I know their written argument is not in any substantial respect departed from or added to by the oral argument. Of course it is very much amplified and illustrated, but I do not think it is varied in any respect, added to in any respect or departed from in any way; and therefore, as it is perhaps more convenient for reference, I desire to refer to the written argument of the United States. At the pages I have mentioned, you find the propositions which they say they have established, and upon which their claim of property rests. In the first place, they say that it is an easy thing, clear and intelligible to any ordinary mind, to appreciate the distinction between a property in the herd and a property in the seals. Well, I have only to admit with my learned friends my own utter incapacity to understand how that claim can be supported. If they do not own each individual seal in the herd, how can they possibly own the herd? I do not think it was an exaggerated or an unreasonable analogy which the Attorney General suggested, to a fleet of ships. A fleet is a number of ships, just as a herd is a number of seals; and I do not understand that any different principle of law applies, whether the herd consists of a hundred seals or a hundred thousand seals, or as to a fleet whether it consists of ten ships or a hundred ships; and is it possible that a nation could say as regards her fleet precisely what they say as regards their seals: "It may be you may destroy in any distant part of the world one of our jolly boats, or a small vessel, and we would have no claim against you; but we claim that you must not injure our fleet in any way or incapacitate it in any way so as to, make it inefficient for the purpose for which it was designed. Surely it would be absurd even to state that; and why is it more intelligible when you endeavor to apply the same principle to a herd of wild animals.

I apprehend, therefore, and I assume, that you must consider only the property in the seals. There are other difficulties attached to any contention of that sort, and one difficulty which exists in regard to some of the propositions which have been advanced here, as it seems to me, is that in the first place the propositions are vaguely stated and difficult to understand, and in the next place, they are absolutely impossible to work out. What is said here is, and you find that in two or three places,—at page 105, for example, of their argument—they say the United States do not insist upon this extreme point, that is to say, the ownership of each seal, because it is not necessary. All that is needed for their purpose is that their property interest in the herd be so far recognized as to justify a prohibition by them of any destructive pursuit of the animal calculated to injure the industry, and consequently their interest.

I may say in passing that I at first thought there might be some distinction intended between property and property interest. I do not think there is, because I find at pages 50 and 91 they are used interchangeably. I cannot see for myself what distinction there is, and I do not think there is any intended to be drawn.

If that is what they claim, how is it possible to define or carry out that claim or enforce it in practice. The pursuit is to be allowed until it becomes destructive. Who is to determine when it is destructive? A or B is carrying on pelagic sealing. He has killed a hundred seals, or fifty, or whatever you may choose to say. He has not injured the herd. The United States comes in and says, "Do not kill the hundred-and-first seal, because then you will begin to injure our industry." It is impossible, I submit, upon any legal principle whatever, to advance a claim of that sort. They either own the seals, one and all, or they do not own them. It must be either the one position or the other, and the rights of others with regard to those seals if they are not theirs, unless there is malice, cannot be possibly made to depend upon whether the pursuit is carried to such an extent as to injure the industry founded and carried on by the United States. There are no means, in other words, of practically working out any such claim, nor are there any means of working out, if we are right, a claim of property in the seals. They feel the great difficulty, of course, of the inevitable result of their claim being to entitle them to say to any person pursuing a seal down at Cape Flattery, "That seal belongs to the United States; do not touch it"; and therefore they say they do not make their claim on that ground. But if that is the logical and inevitable result of the claim as they put it, they surely cannot make their claim a legal one or a sensible one by saying they do not want that result.

It is just the same with the Indians. When their claim comes in conflict with the immemorial rights of the Indians, Oh, they say, you may very well leave the Indians to us. We would not interfere with the Indians, provided they carry on their pursuit in such a way as not to hurt us. But the moment the pursuit of the Indians becomes an industry, then it must stop. In other words, we have a right because we have an industry, but the moment the Indians get an industry, then their right stops. Is there any way of putting that sort of claim to make it intelligible upon a legal basis and to a legal mind? And if all our evidence is correct—and I do no more than allude to it now, because it has been discussed once and may come up for further discussion when we begin to speak of regulations—if our evidence on intermingling of the seals is correct, it would be absolutely impossible to work out a property in the seals, for there would be no possibility of saying, when you find a seal

far south of the Aleutians, from which herd it came. Practically those two streams of seals coming from the Commanders and from the Pribilofs are like two water spouts. When the water gets so far down that it wholly overflows the land, it is impossible to tell from which source any part of the water comes. When those seals, pouring out from both islands, intermingle together in the Pacific Ocean, it is absolutely impossible to say from which place they come, or to which place they belong. It is impossible to get rid of the evidence we have adduced upon that subject by the very simple and utterly ineffectual course of saying "there is no identity; it does not exist".

That is the answer made to that in two places in the argument of the United States, p. 49, 103. They simply say as to identity, "There is no identity, and therefore it gives no trouble. There is no possibility of identity, for the herds are absolutely distinct."

The Tribunal will consider the evidence of our witnesses upon that subject, and see upon what ground you can say they are not to be believed. They are added to, I believe, or affirmed, to some extent, by the evidence adduced on the part of my learned friends; but I do not desire to discuss that now.

Again at page 138, they say, they do not admit there need be extermination by our pelagic sealing.

It is not necessary to the argument that this extreme result should be made out. It would be enough to show that the interest in question is seriously embarrassed and prejudiced, or its product materially reduced, even though it were not altogether destroyed.

That is merely another repetition of the previous assertion that all that they contend against, and all that they claim to be entitled to prevent, is the destructive pursuit, to the prejudice to their industry. I need hardly repeat that it must be their property at all times, or it cannot be their property at all. It cannot be their property the day after the first seal is killed which tends to injure their industry, and not the day before.

Senator MORGAN.—Do you, in the position you take, mean to assert that there is no legal restriction upon the right of pelagic sealing?

Mr. ROBINSON.—No legal restriction.

Senator MORGAN.—Yes. No legal restriction?

Mr. ROBINSON.—I should say no legal restriction. That I shall come to afterwards. Of course I need hardly say we are both of us anxious that there should be such restrictions as are reasonable and proper; but when you ask me whether there is a legal restriction, my argument is there is not.

Senator MORGAN.—If you will allow me, suppose the Canadians were to send ships enough to those three or four gateways, I will call them, passes, in the Behring Sea, to intercept the seals absolutely from going to the Pribilof Islands; and that was done in the high seas. Would they be within the purview, as you think, of the legal right of the Canadians?

Mr. ROBINSON.—As far as I know, I should think so. I would only say this: I have never myself seen the utility of putting extreme cases, which have not occurred and which never will occur.

Senator MORGAN.—It is insisted here that it does occur.

Mr. ROBINSON.—No. With great deference, sir, according to my recollection, there is no such assertion made.

Senator MORGAN.—It is made in the argument of counsel.

Mr. ROBINSON.—Then I can only say it is impossible it can occur. My recollection is—I have read to that effect—that the currents are so strong and the difficulty of fishing in those passes so great, that there

is very little sealing done there—in fact, none at all, my learned friend says, who knows the details more intimately than I do, though I have read them at various times. If that were done, all I can say is that I know of no legal principle which would prevent it; and I do not believe any lawyer could point me to any legal principle which would prevent it; but I have no doubt in the world—and that is the true answer to all these impossible suggestions—that it would be stopped by convention and by treaty. It would not be to the interest of either party or either nation to do such a thing, and it would be stopped in that way.

Senator MORGAN.—You think it could not be done under the powers conferred on this Tribunal?

Mr. ROBINSON.—No; I think not except under regulations. Do not misunderstand me. I mean you cannot declare the law to be.

Senator MORGAN.—A regulation when declared by the Tribunal has the effect of a law.

Mr. ROBINSON.—I have nothing to say against that. I am coming to regulations afterwards, if you will permit me to follow the line of my argument.

Senator MORGAN.—I am not trying to interrupt you, but I am merely saying that a regulation between these parties would be a law.

Mr. ROBINSON.—I quite understand that. Regulations might go to such an extent as to change the law. I am not at present arguing that question; but they would change the law to the extent to which they affect any rights which the law gives.

The PRESIDENT.—You mean the law between the parties?

Mr. ROBINSON.—The law between the parties; that is all, of course.

Senator MORGAN.—That is the law I was referring to, the law between the parties.

Mr. ROBINSON.—Yes.

The Tribunal here adjourned for a short time.

Mr. ROBINSON.—I find that with regard to the four questions there was one point as to which I intended to say a word, and unintentionally omitted it, as to the second question. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? With regard to the doctrine of acquiescence I submit it is impossible to see how it can have any application in this case. A nation or an individual cannot acquiesce in any act until it is done, and it is utterly out of the question, and inconsistent with all the facts, to say that as far as Pelagic sealing is concerned Great Britain acquiesced in anything. There was no pelagic sealing before 1867, and there was nothing therefore for Russia to prevent. What we say is, and what the facts will show beyond all question is, that Russia, after those treaties, treated Behring Sea precisely as she and all the other Powers treated all the other high seas of the world. She did not assert or exercise any jurisdiction for the purpose of preventing anything that was not prevented by other powers in any of the high seas of the world. There was a question as to whaling, and when that was objected to, and her Authorities were referred to, they said it would be inconsistent with the Treaties of 1824 and 1825 on their part to attempt to prevent it.

In short, what other Nations desired to do, in exercise of the well understood rights of nations on the high seas, they were allowed to do in Behring Sea just the same as the other nations of the world did elsewhere. Russia never interfered to prevent it.

I admit this, for I think it would be reasonable: If it could be shown that Russia with regard to Behring Sea exercised a jurisdiction and prevented certain things being done which showed by irresistible infer-

ence that if pelagic sealing had been attempted there she would have stopped it also—then I think it could be argued with some show of reason that other Powers had acquiesced in her right to prevent it. If when they came to get what they thought was the only thing worth going for at that time, namely, whales, she had said we have jurisdiction here to prevent your coming and you must not come here to whale; under those circumstances I should have thought it would have been open to them to argue that as Russia had prevented whaling she might endeavour to prevent such operations as pelagic sealing—that is, it might be argued because she has prevented other nations from taking whales, it stands to reason if they had attempted to take seals she would have prevented that also. There would be then some ground to argue that she did exercise as to Behring Sea a sort of jurisdiction which neither she nor other nations exercised over other high seas of the world.

As a matter of fact, beyond all doubt or question, no single act of Russia can be pointed to, done by her with regard to Behring Sea, which was not done by all other nations with regard to all other oceans of the world. In other words, she permitted precisely the same rights in that sea as were open to other nations and exercised by other nations in other seas, and I do not understand how the doctrine of acquiescence, therefore, can have any application. Of course, before this Tribunal, I need not go into elementary doctrines with regard to acquiescence, such as that it implies knowledge, and you cannot acquiesce in a thing unless you know it is done. You might as well talk about a person acquiescing in the running of an electric railway, at a time when they were not known. There was no possibility of acquiescence in pelagic sealing, because it was perfectly unknown.

The PRESIDENT.—There was no prohibition against any sealing or whaling, or sea-faring industry, before the Treaty.

Mr. ROBINSON.—None whatever.

The PRESIDENT.—Before or after.

Mr. ROBINSON.—I cannot put it more strongly, or express it more emphatically, than to ask my learned friends, and indeed to challenge them, with respect to this point, to show anything that Russia did in Behring Sea which showed any peculiar or exclusive rights asserted by her over that sea.

Lord HANNEN.—There was a prohibition of trading with natives.

Mr. ROBINSON.—That was on the shore. I confine myself to maritime jurisdiction. There was a prohibition of trading with the natives, but that was what she intended to prevent, and what nations thought at that time they had a right to prevent.

The PRESIDENT.—There is no prohibition of navigation in the open sea.

Mr. ROBINSON.—There is no prohibition of navigation in the open sea, and no prohibition of whaling or fishing of any kind.

The PRESIDENT.—There was a prohibition of navigating in territorial waters.

Mr. ROBINSON.—Yes, by the Ukase, but that was withdrawn. I am speaking now of the time after the Ukase. Between 1821 and 1867 there was no action of Russia prohibiting any action of any kind by any nation of the world in Behring Sea.

Senator MORGAN.—Except trading with the natives.

Mr. ROBINSON.—Except trading with the natives.

I do not like to repeat myself; but you will understand I am talking of trading on the high seas and maritime jurisdiction. Trading with

the natives is an act done as to the coasts, not with reference to the sea.

Senator MORGAN.—What reason could Russia have had for prohibiting it?

Mr. ROBINSON.—She wished to keep the trade of the country, I suppose.

Senator MORGAN.—What trade,—the fur trade?

Mr. ROBINSON.—I cannot say,—every kind of trade.

Senator MORGAN.—They had not any other that I know of.

Mr. ROBINSON.—No; furs would be the only thing they could get from the natives, but then they would take other things to the natives, and I take it the trade was in supplying things to the natives and getting in exchange furs. That is carried on on the coast, and has nothing to do with maritime jurisdiction.

Senator MORGAN.—That would depend on how it was carried on. Suppose it was in canoes?

Mr. ROBINSON.—I do not think that that would make the least difference, because canoes must land. It is true that I may trade in a canoe; but then I must land, and I do not think, if the natives should come out within the three-mile limit in a canoe, it would make any difference, because it would be within the territorial jurisdiction.

Senator MORGAN.—The general idea was that Russia asserted that they were interested in the protection of the fur-bearing animals.

Mr. ROBINSON.—Not that I know of especially. On paper she asserted unquestionably jurisdiction; but I do not talk about what she asserted, because she asserted it for a short time, and then withdrew it. If she did not, I am wrong; but, as a matter of fact, the rights she exercised were in no sense whatever exclusive as to Behring Sea, and I do not know any instance which puts an end to that argument more thoroughly and emphatically than the fact that she was asked to stop whaling in Behring Sea, and said she could not do it,—it would be contrary to her Treaties of 1824 and 1825. I have done with that, and I am sorry I omitted it in dealing with the first four points. I only call attention to it to show that the doctrine of acquiescence has no application whatever. It may be admitted that if she had done anything which would have implied a prohibition of pelagic sealing, if it had existed and she had known of it, it would have been open to the United States to contend that she would have prevented it.

Now, I was proceeding to consider the claim of property made on the part of the United States and the grounds on which they put it; and I have said I find a difficulty in ascertaining with satisfaction to myself whether they put their claim on municipal law or on international law, or on both. They have a right to put it on either or on any law, and in the alternative; and perhaps, therefore, it is better to discuss it without distinction. When I find, for example, that they refer to Blackstone for their propositions as they do, they are there of course claiming under municipal law; that is to say, they cite a long passage from Blackstone at page 44, and they say under that they have a right *per industriam*. That is a claim, of course, by municipal law. So I understand my learned friend Mr. Phelps' Argument at page 132, where he first says that under the principles of municipal law they would have a property, but; on the broader principles of international law their right is still more clear. There they claim it on both. They say in effect, "We have the right, in all these aspects, in the seal herd or in the industry"; and we have it under municipal law or international law, or both.

Now, what I desire to do is to call attention to the propositions which they themselves put—and I think I have referred the Tribunal to the pages at which they are found—as showing (and for that we are indebted to them) clearly and definitely the grounds on which they rest their claim to property. They are pages 47, 50, 91 and 132. I have attached great importance to these propositions as so stated, and I think they are not stated differently on these different pages, but that they substantially result in the same proposition. I attach importance to them for this reason; that I cannot but believe, looking at it as if I had drawn it myself, that those propositions are an attempt on the part of Mr. Carter and Mr. Phelps so to put their claims as to steer clear of all those principles of municipal law based on the analogy of other animals which they must feel had to be overcome.

We have then to ascertain—and I try first to confine myself to these claims based on municipal law—are those propositions true in fact? and if they are true in fact would they sustain the claim in law? I would desire to refer first to page 47, in which I think there is as much that is open to comment as on any other similar page in any other legal controversy that it has ever been my lot to see I refer to the printed argument of the United States. They say that according to the doctrines which they have adverted to, which are doctrines taken from Blackstone and Bracton, the essential facts which render animals,

commonly designated as wild the subjects of property, not only while in the actual custody of their masters, but also when temporarily absent there from, are—

what they go on to state. Now I understand them to say, in substance, that what they are going to state practically renders animals which would otherwise be regarded as animals *feræ naturæ* animals of the domestic class or which have been tamed or reclaimed. I need hardly, of course, point out that there are three classes of animals—one domestic beyond doubt, which are born domestic and continue so; then there are animals *feræ naturæ*, born of that nature and continuing of that nature; and then animals *feræ naturæ* which by the act and conduct of man have had their nature so changed that they have been taken out of the class of wild animals and placed in the class of domestic animals. With regard to those animals they continue in the latter class only so long as their change of nature remains. We all know this, and I do not desire to delay the Tribunal in discussing elementary matters. I only refer to it to show how I view their proposition. Now they first say—

the care and industry of man acting upon a natural disposition of the animals to return to a place of wonted resort secures their voluntary and habitual return to his custody and power.

Now let me ask, is that statement as applied to the seals founded in fact. Has it a shadow of foundation in fact? I think I may test that by this simple proposition. Is it possible to say that *you secure* a certain course of conduct by your act when, as a matter of fact, that result would have been more certainly secured, or at least as certainly secured, if you had done nothing.

Now that is putting it shortly, is it not putting it conclusively—Is there any answer to it? Can it be said that I secure something by what I do when that thing would have certainly happened if I had done nothing and had not been near the place. There is no logic in saying that a certain consequence happens from a certain cause, if the consequence would have happened without the cause. Would those seals

have returned if the United States had done nothing. Does anybody doubt it? If they would, how is it possible to say that the United States have secured the return?

Now that seems a short argument; but is there any answer to it? If animals are coming, and I know they are coming, and I get out of their way when I see them coming, in order to make certain that they will come, does anything I do secure their coming except my getting out of their way? Do the United States do anything more? Is it possible to say that they do anything more? If they showed themselves visibly, the seals would not come—we all know that. So much for this assertion.

Can it be said, with any show of reason,—I do not desire to enter into nice arguments,—can it be asserted, with any shadow of reason, that they secure their return? Let me ask, if there are other seals (and the illustration has been put before), as there well may be, for our knowledge is not complete—if there are other seals which resort to other Islands not yet known, as these seals do to the Pribilof Islands, what does man do on the Pribilof Islands, to secure their return to these Islands, that is not done on the other Islands to secure their return to those Islands? If they return to those Islands by the imperious, unchangeable instincts of their nature, as they return to the Pribilof Islands, has man any share whatever in securing their return? Unless it can be answered in the affirmative, our proposition is complete. Can it be?

If man were to disappear from the face of the earth, and leave the Pribilof Islands, it would be more certain that the seals would return than it is now, because it is just possible that something done by man might frighten some of them away.

Then the next statement we have is: that man secures their voluntary and habitual return to his custody and power. When you speak of securing the voluntary return of a wild animal—and for the present I am assuming they are wild animals though I know there is an indication throughout their case that they are domestic animals, either domestic animals by nature or because they are reclaimed—but assuming for a moment they are wild animals, what is the meaning of saying that they voluntarily return to the custody of man?

It either means nothing, or it means that they knowingly return knowing that man is there and wishing to be in his custody, just as a wild animal, reclaimed and tamed by me, returns to my custody and power, because I have induced it so to do by the expectation of food or something else which he can get from me. Numerous instances may be put. Suppose I have on my land a den of bears or any other wild animal—I do not care whether it is bears, pheasants, or rabbits. It is very possible that the bear may be returning and that he would not return if he saw me, but does return because I keep out of his way. Can I be said to secure his return? Can I be said to secure the return of the pheasant or rabbit? Much more can it, I think, be said there, because they would not return either to the preserves where pheasants are kept, or to warrens where rabbits are kept, in some cases, unless I provided food for them.

There may be in addition other inducements, such as shelter, or some other inducement offered to return, which is offered by me. There is absolutely nothing done on the Pribilof Islands; so that when you talk of securing the voluntary return to their custody and power, it is not by acting upon their instinct. I should have perhaps referred to that first—for the proposition is that by acting on a natural disposition of the animals he secures their return. How does man act on a natural disposition of the animal at all?

Again, I put a similar proposition to what I put before. He does not act upon their natural disposition in any way. On the contrary, he abstains from interfering with their natural disposition. He leaves their disposition to its own natural operation; and because he does not interfere with its action, because he does not prevent them from acting in accordance with it, he is said to act on their natural disposition. Now, I take it that "to act upon" there means something positive,—it must mean doing something to affect their natural disposition and to influence it. What man does is carefully to avoid interfering with their natural disposition, and to leave their natural disposition to its natural operation. If he did nothing, their natural disposition would secure their return. How can it be said then that he acts on their natural disposition? All that he does is to leave it to act by itself. Then if that is correct and accurate, the proposition, be it right or wrong, sound or unsound, well founded or ill founded, is so simple, that there can be no question about it.

If I am right in saying, that in either of those cases can you say he either secures their return or acts on their natural disposition, then that proposition is not true in fact. I mean it is not supported by the facts. Man neither does act on their natural disposition nor does he secure their return to his custody and power; on the contrary, if these animals knew that they were returning to man's custody and power they would not return. If the wild animal who comes on my land, to his den, knew I was there he would not return. It is because he does not know I am there that he does return; and if I were to show myself he would not return. How then can I be said, in any reasonable sense or use of language, either to act on their natural disposition, or to secure their return? If we are right it is impossible to assert that either of these things is done in the case of the seal; and, of course, the natural inference must be that this proposition is not supported in its application to these animals by the actual facts of the case; and it falls, therefore, without reference to law, because we have not the facts to which to apply the law.

Then it is said that having acted upon their disposition so as by that means to secure their return, it is done "so as to enable him to deal with them in a similar manner, and to obtain from them similar benefits, as in the case of domestic animals:" It is "the nature and habits of the animal which enable man by the practice of art, care, and industry to bring about these useful results that constitute the foundation upon which the law makes it award of property."

Now I venture to think, first, that he does not act on these natural instincts at all: and next, that if he did act on them, he would be doing only what every hunter does in the pursuit of wild game; and what is the invariable course pursued by all people who wish to get wild animals within their power; in other words, what are the invariable devices of the hunter? I can conceive many cases in which man does act on the natural instinct of wild animals, and in which he secures their return, or in which he secures their coming and submitting themselves to his power. I will take an ordinary case and put the illustration—I do not wish by any means to be extreme. The natural instinct of the wild duck is to light with its fellows. I act on this instinct by putting dummy fellows on the water, and I hide behind something to get out of the way. I am acting on their instinct there, so as to induce them voluntarily to come to the decoys and submit themselves to my power, and when they get within range I shoot them, and secure the useful result. Is not that the case with every wild animal?—I do

not care what it is—I do not care whether it is the case of ducks and putting out decoys, or the case of wild animals and putting out food for them—I do not care in what case you do it—it is just the ordinary device of the hunter to get the animals to voluntarily submit themselves to his power, and to come to the place where he can exercise power over them. Take the case of wild geese, which has been referred to. It may be said, there truly that man acts on their instinct. He imitates the call of their mates, and spreads food, and endeavours by every possible means to induce them to voluntarily submit themselves to his power and control; and if they do submit themselves to his control to such an extent as to come within range, so as to enable him to secure them, he does secure them, and with them the useful result.

But is there any result which the United States obtain here except the result of getting the animals' skins?—of being able to kill them and securing the produce? That, I venture to think, is the only useful result, if it can be called a useful result; and that useful result he does not obtain either by anything he secures or by any acting on their instinct. If, then, he does neither of those things, how can it be said, as it is said in the conclusion of that sentence, that it is the practice of art, care and industry on the part of man, which brings about useful results? What "art" does he practise, except that art which a hunter practises to deceive and delude wild animals? What industry does he practise except the industry of killing them and selling their skins? Is not every single element in that proposition unfounded in fact? If it be unfounded in fact, then it is unnecessary to discuss how far the law has any application to it.

I myself do not believe, or rather I submit that you cannot make out—unless these animals are domestic animals, which I shall speak of hereafter—that if all these things were done which it is argued would give property, there is any law to warrant such inference. Suppose they are wild animals—I am assuming, of course, all along, that they retain that class still and have not changed or been diverted from it by any act on the part of man—if they are wild animals, and if, as a matter of fact, man does act on their natural disposition to secure their voluntary return—it cannot be voluntary because if they knew he was there they would not come back—but if he secures their habitual return to his custody and power, so as to make the same use of it as in the case of domestic animals, so as to kill and eat them or sell them, and thus secure the useful result—if he does all that, what does he do with regard to the seals that the hunter does not do in the case of every other wild animal. He acts on their instinct and so secures their return, and obtains the useful result. I submit therefore that it is indifferent whether these facts which are here stated are true as facts, which I have endeavored to show that they are not, or whether they are not true. If they are true as facts we submit there is no law which, by reason of them, gives any property in the people who practise these arts.

My friend says this species of property is well described as property *per industriam*. Now you have only to read Blackstone or Bracton, or any other authority on the subject, and you will see that *industria* as there described is of a wholly different character.

Perhaps I may as well say here that it is difficult to conduct an argument of this sort in any sort of order; and there is a matter which may come in now well as at any other stage, a matter which has been already referred to: namely *animus revertendi*, and the application which, in my view, it has to this case. I submit as an incontestable proposition of law that it has no application whatever to this case, unless these animals

are tamed and reclaimed; and then it can have no application unless there has been previous possession taken of them; and then that its only application, purpose or value, is as an item of evidence tending to show that they have been reclaimed; and as a necessary consequence from that, that it has no application whatever unless this *animus revertendi* is produced by the act of man.

Now, let us see whether that is a correct statement of the law. In the first place, in the case of domestic animals, *animus revertendi* has no application and no place at all, because it is not wanted. It makes no possible difference, if my horse or cow strays, whether they have the *animus revertendi* or not. They are my property wherever they go to, wherever I can follow them, and wherever I can find them. If a horse or a cow strays, it is often because of the instinct to get back to some place with which he is better acquainted, and in which he has lived longer. In the case of wild animals, it has no application, for a totally different reason. It is absolutely useless, and has no value as indicating or rather tending to prove property. A rabbit which leaves my warren and a pheasant which leaves my preserve have, unquestionably, *animus revertendi*; but that does not give me property in them. My rabbit may leave its burrow on my land, and may cross the boundary to my next neighbour, and while I am looking at it he may shoot it. I may protest against it, or beg him not to. I may tell him, "That animal has just left my land—it has got young on my land and will return to them: leave him alone." My neighbour may say, "I am very sorry; but he is on my land and I am going to shoot him." He may shoot him and appropriate him, and I have no sort of recourse. There is nothing clearer there than the *animus revertendi*. He does not deny it; he is not concerned to deny it, but he simply says, "Here is a wild animal on my land: if I can appropriate him to myself, I have a right to do it; and I am going to do it. Your protestations have no force or value whatever. The law is on my side, and I am going to take advantage of my rights under the law". I believe that is a proposition which nobody having looked into the subject will attempt to dispute.

If then *animus revertendi* has no application to either of those two classes, the only one remaining is those animals which, being born *feræ naturæ*, have become by the act of man so tamed or reclaimed that they have passed from the class of wild animals into that of domestic animals. And then, if you desire to prove that though once wild they have now become reclaimed, if you can show that they have a disposition to return and that that disposition to return was created by you, it might have some force and value as a piece of evidence to show reclamation and taming; otherwise it has none.

Take this simple instance. I catch a fox, or any other wild animal, I do not care what, and having got him I keep him for a day and let him go. He goes, and in his first instance of fright leaves my territory. Beyond all question he is going to return? He is going to return because he has got his home on my land and is accustomed to it, or he has got young on my land and natural instinct prompts him to return. But that has no weight or efficacy in enabling me to claim property in him, simply because I had nothing to do with producing it. If, on the other hand, I have kept a wild animal so long that by feeding it and taming it, or by confining it, when it leaves my place it intends to return, not in obedience to any instinct produced by nature, but in consequence of what I have done to it, and it desires to return to me for the purpose of protection or feeding, or whatever it may be which it is accus-

tomed to get from me, then I can point to that *animus revertendi* as evidence to show that I have reclaimed that animal, and that it has passed from the category of wild animals into that of tame.

But, in order to pass from one class into another, there must be a change in the animal's nature;—that is the whole story. There must be a change in the nature of the animal, a change to the nature of a domestic animal; and that change must have been wrought in it by man. Now, let us apply that to the seals. Can anyone pretend to say for an instant that any change in the nature of these seals, good, bad or indifferent, of any sort or kind has been produced by man? In what respect do the seals frequenting an uninhabited Island,—an island never yet discovered, or an island discovered, say, a week ago or a month ago,—in what respect do the habits and nature of those seals differ from the nature of the seals on the Pribilof Islands?

Unless it can be pointed out that there is some change in the nature of the animal which attaches and belongs to the seals of the Pribilof Islands, as opposed to the seals of the other islands that I have referred to, then it cannot be said that there is any change, or that the United States have produced any change; and the animal remains just as it was, a wild animal.

Senator MORGAN.—But you would not insist, I suppose, that the change in the nature of the animal from domestic to wild, when brought about by the interference of man, would give a right of property to any one who might capture it, as *res nullius*; as, for instance, if a man has a colt on his land, and by harsh treatment or in some other way alarms it so that it becomes as wild as a deer, he still would not have lost his property.

Mr. ROBINSON.—If I were to attempt, with deference, to answer that question, I should have to go back into speculation with reference to the nature and habits of animals which are hardly worth reverting to. I believe one great writer has said that all animals originally were domestic, and that those that are wild have been rendered so simply by the brutality of man.

Senator MORGAN.—But if you are right that a wild animal can be tamed, and becomes property because you have rendered it tame by kindness, cannot you turn a tame animal into an animal *feræ naturæ* by reason of your harsh treatment?

Mr. ROBINSON.—I must confess that I have never thought of considering that question as it could not possibly arise. At the same time I do not believe that I can make my cow a wild animal by any amount of brutality.

Senator MORGAN.—I should think not myself.

Mr. ROBINSON.—And, further, I do not believe that any law can be found to say so; but I can make a wild animal a tame animal, and there is abundant law for that. There are many cases where we find the law laid down as unquestionable, or at all events where it has not been questioned, and in such cases I do not trouble myself to hunt out whether the converse is true, or upon what the law stands, because I know that is the law.

Senator MORGAN.—If the dominion over it is the same without cultivation as with, it seems to me it makes no difference.

Mr. ROBINSON.—Yes, but I understand that what you suggest is a speculative view. You certainly can make a wild animal a tame one; but with reference to making a tame one wild, I can only say that the law does not allow it. I never heard of a law that allows it, and never

heard of a wild horse that once was a tame horse, or of a wild cow that once was a tame cow. I do not think the thing is possible. That is all that can be said.

With great deference, one could suggest excellent and natural reasons for it. I do not think a man who has bought a valuable animal and paid a large price for it loses his property in it simply because he treats it brutally and creates an aversion in the animal to him, and it therefore, becomes ferocious. We know that some horses are very dangerous, so in the case of Texas steers which occasionally roam the Streets of New York and frequently do damage, but I never heard that they were wild animals, though they are infinitely more dangerous and destructive than many. I can say nothing more as to that. With regard to the question you have put to me I reply there is no possibility in law of making a tame animal wild, while it is clearly possible to make a wild one tame. That is the only answer that I can give.

Then again, let me put what has been put by my learned friends within a very short time, and which I only advert to for the sake of a few remarks. What would be the result of this property being in the United States? They claim the finding that these seals are the property of the United States, which must mean that it is prohibited to all persons to destroy them.

I seldom venture to prophesy, and, I should not dream of doing it now if I were not prophesying in the Company of a person in whom I have the confidence that I have in Senator Morgan; but a speech of his was read here some time ago in which he says that the Pacific fisheries are destined to become more important than the Atlantic. For myself, having been to that coast several times, I may say that I think they will, and may become so in a shorter time than people who have never seen that part of the country are inclined to believe. When they do become of importance the seals in all probability will go, and no laws will save them, for the reason that public opinion will be against them. Whenever the seals come into conflict with the food fishes in that part of the world the fate of the seals is decreed; no regulations, no laws, no statutes, will ever be available or effectual to save them.

The PRESIDENT.—Perhaps you will have to consider that feature of the case on the question of Regulations?

Mr. ROBINSON.—I am bringing it to the attention of the Tribunal for that simple reason. It was well said, I forget by whom, that laws were like water, they could never rise higher than their source, that source being public opinion; and it makes no difference what Statutes are on the Statute-book, or what is the municipal law of any country. If that law has for its object to protect seals as against a food fish, in that part of the country the law, cannot be enforced because public opinion will be against it.

What is the effect of what our friends are asking this Tribunal to declare? That these seals are their property? It is quite impossible, if they are their property, to get rid of the effect of that finding, because they are their property wherever they go and whatever they are doing. No man has a right to destroy them. He must answer to their owners if he does. Now, if they should become injurious to the fisheries industry as they possibly may—and I say possibly because, confident as I am of the prediction alluded to, it is still only a possibility—we know that the canning industries are enormous and are growing year by year; and we know that the seals feed and feed in increasing quantities upon the fish which support those industries. Now, suppose the seals should gather at the mouth of the Fraser, where some of

these largest Canneries are, as it is only natural they should; and as, the salmon close in to go up the River the seals should also close in and destroy them?

Senator MORGAN.—Is there any evidence that they have ever done so?

Mr. ROBINSON.—There is evidence that they follow the fish.

Senator MORGAN.—But I am talking of the Salmon Fisheries at the mouth of the Fraser River or any other River?

Mr. ROBINSON.—If you ask me, if I have any evidence that, because salmon have collected at the mouth of the Fraser, therefore seals have, I cannot say that I have. But I am content to ask any member of the Tribunal if that is not to be apprehended.

Senator MORGAN.—I merely enquired if there was any evidence of it?

Mr. ROBINSON.—No; there is none.

The PRESIDENT.—Where is the Fraser River?

Mr. ROBINSON.—It is 6 or 8 miles to the north of Vancouver, near the line of the boundary.

General FOSTER.—That is an interior water.

Mr. ROBINSON.—Yes; it is an interior water.

The PRESIDENT.—Near to the line, of course, taken by the seals?

General FOSTER.—And it empties into an interior water.

Mr. ROBINSON.—Yes, just where the seals would come.

General FOSTER.—No; that is why I make the point, it empties into an interior water.

Mr. TUPPER.—Which connects with the Pacific Ocean.

Mr. ROBINSON.—At all events, I accept that statement. I know the Fraser very well and have been up it some distance.

The PRESIDENT.—Is it the mouth of a channel?

Mr. ROBINSON.—It empties into one of those channels; but, if General Foster has been there, I have nothing to say. I have been there, and have seen the mouth of the Fraser; and, if I was asked where it emptied itself, I should have said it emptied into the sea.

The PRESIDENT.—If you have both been there and cannot agree upon the facts, how shall *we* get on.

General FOSTER.—We are really both agreed.

Mr. ROBINSON.—At all events let me take the Skena, which is a British Columbian river. If the Fraser does not empty itself into the Ocean, it would make no difference, as we know from the evidence that seals follow the fish into interior waters, and I have read evidence and can point it out that they are found in interior waters following the salmon and schools of fish,—

Lord HANNEN.—Is there any evidence that they follow them up the Rivers?

Mr. ROBINSON.—I believe not.

Senator MORGAN.—In San Juan de Fuca they pass in. Would it incommode you, Mr. Robinson, if I asked you a question for my own information?

Mr. ROBINSON.—Indeed, it would not, Sir.

Senator MORGAN.—I wish to know what you call interior waters are those lying behind Vancouver Island and along the coast,—are they navigable waters?

Mr. ROBINSON.—Yes.

Senator MORGAN.—Are they navigated by the ships of the world?

Mr. ROBINSON.—Yes.

Senator MORGAN.—Going up and down the coasts of British Possessions and Alaskan Possessions?

Mr. ROBINSON.—Yes. You probably know this, that there is regular navigation between Victoria and Vancouver, and that is Inland Waters. It is an archipelago of Islands. I have been there, and can speak to that. If you turn and look on the Map, you will see it in a moment.

Senator MORGAN.—Those waters lie between the Islands and the main Continents, and are navigable waters?

Mr. ROBINSON.—Oh! yes, I think so.

Mr. TUPPER.—It is a Steamer route.

Mr. ROBINSON.—It is the popular tourist route from Victoria and San Francisco. In point of fact it runs along that archipelago, and that forms the attraction of the route. It is one of the peculiarities of that coast from Vancouver to San Francisco, if I am not mistaken, that it is an open coast devoid of islands or harbours, but from Vancouver north it is a continual archipelago. It would make no difference in my argument whether the seals come into the interior waters to get the salmon as they are preparing to pass up the Fraser or into the ocean—I had, perhaps, better take the Skena in British Columbia, which I believe passes into open water. I have not spoken of it before, and I do not speak of it positively, but I know a canning industry is carried on, and that the salmon brought from the Skena—which is another illustration of some interesting statistics that my friends have stated—is said to be of a finer character than the salmon that come from the lower waters. When speaking of canned salmon I have heard it said, “Get it from the Skena.” Then take that river. Suppose the seals collected there to prey on the salmon, and seriously to interfere with the canning industry, as they will do if your view, sir, should be sustained, as it may be in a short time—probably in our time and before very long—that those fisheries will become of immense importance: on that day those seals will be doomed. They will have no friends. Public opinion will be against them, and they will be exterminated. Is it possible that an animal as to which that can be said with truth can be the property of an individual so that he can own it wherever it goes and be entitled to protect it?

When we add to that what is not improbable—for we know, that sealskins, which are an article of luxury and taste, may diminish in value, that the taste for them may diminish, and that the seal industry would then be of little importance and yield little return, and might not be worth carrying on, while the industry connected with the food fish must be of increasing importance, and of enormous value, and of absolute necessity to the population as a means of subsistence—when we say that that may happen, how is it possible to talk of protecting the seals, not now, but for all time, by giving them as property to any particular nation or individuals. The thing is impossible, because it would be contrary to every interest of the world, and to every reasonable principle.

Therefore I say that that forms another reason why this claim of property is not possible on reasonable grounds. I am not going now into nice principles of law or citations of authority. I am talking to reasonable men; and on reasonable principles I ask is it possible to assign any property in these animals that will give a right to protect them irrespective of the circumstances, as they may change from time to time, and as the interest of the world may require them to change? If not, it is not possible to assign property in these seals to any particular nation or to any particular individual.

If I were to ask any ordinary person what the seal is—and I am recurring for a moment to its character in natural History—what is a

seal? I think the answer would be without question that it is a marine animal, a free swimming animal of the Ocean, and the property of anybody who can take it.

But if we ask my learned friends here what is the Alaskan fur-seal, the answer is that the Alaskan fur-seal is a terrestrial domestic animal and belongs to the Government of the United States.

Now for what reason or on what ground is it that the fur-seal of Alaska differs from all other fur-seals of the world which have yet been discovered, because that is the result of the definition now assigned to them, that they are terrestrial and domestic animals and the property of the United States, the ordinary fur-seals and hair-seals all over the world being marine animals according to the classification of all Naturalists, and animals *feræ naturæ* belonging to nobody?

While I am at that point I may ask—a question which has always been to me one of doubt and perplexity. It is not of great importance, and my learned friends may therefore—perhaps I should not say “therefore”, because I believe they would do so whether it was of great importance or not—endeavour to clear it up for me. I find in the United States Case at pages 295 and 296 as one of the propositions which they say they have established, that it never mingles with other herds. At page 295 they say that the Alaskan fur-seal is essentially a land animal, and then I find on the next page it is said it never mingles with any other herd, and the identity of each individual seal when in the water can be established with certainty. I really do not know what is the meaning of that assertion. I have seen seals in the water, and how it is possible for anybody to say that at all times, when in the water, the identity of each individual seal can be established with certainty, I have been unable to understand. I do not think it is of great importance what is meant by it, but how the statement came into the case, and how it is to be supported, I do not know.

If you knew each seal, as the President once suggested, as the shepherd knows his sheep, in the millions, it would be impossible to tell them individually, even if you were alongside of them, and I do not know why that allegation is put in or what is the meaning of it. I thought it meant the identity of each seal-herd; but even then it would be wrong, unless it means that it can be established with certainty by reason of its position and locality. If they mean to say the identity of each seal-herd can be established, because you only find one herd on the eastern coast and the other on the west.

Lord HANNEN.—That is the meaning of it, I think. It says it never mingles with any other herd.

Mr. ROBINSON.—That probably may be so.

Lord HANNEN.—It means the identity of seals belonging to each herd.

Mr. ROBINSON.—Yes, that is the only construction that can be put upon it; but it is certainly not put plainly. I know it has struck others besides myself, and I mention it, because I have not known what was intended by it.

Then, further, with regard to its domestic nature, one thing is absolutely certain, if you look at our Counter Case. I do not delay to read extracts, but at page 113, there are numerous extracts which show that the seal is an animal very easily frightened and terrified, and is subject to what we call stampedes. There are numerous extracts given there which show it is a timid animal.

I need not stop to read the extracts, nor to insist upon the proof, for we have it in evidence that all precautions are taken by the United

States upon the Islands for the purpose of keeping men out of their sight, and of not going near them, not frightening them, not terrifying them: they will not allow men to smoke; they will not allow them to whistle; they will not allow a noise; they will not allow dogs—every possible precaution is taken to avoid frightening the seals or acting upon their peculiar sensibility and timidity.

In addition to that, how can you call an animal a domestic animal when it is beyond all question that for eight months of the year it disappears altogether; its master cannot follow it, or identify it; its master does not know where it is; and it would die if it remained with him? If they, here again, insist on the *animus revertendi* at the end of that time, I would say, what probably I should have better put in its proper place, there is no instance I know of in which the migratory instinct of returning to any place has been relied upon as *animus revertendi* tending to enable a person to acquire the right of property, or where it has been called the *animus revertendi* to which the law applies. If there be *animus revertendi*, what has puzzled me in this case, and I should like very much to see if it can be answered satisfactorily, is, who has the best right to claim the *animus revertendi*. The nations who are all interested in the Pacific Ocean may say they have the *animus revertendi* to the Ocean, imperious and unchangeable,—more imperious and more unchangeable than to the Pribilof Islands, for this reason: if the Pribilof Islands were submerged the seals would find another place,—I do not think anybody doubts that, though in my learned friends' Case it may be doubted,—but I do not doubt that if the Pribilof islands were tomorrow submerged these seals would find some other place to haul up and breed on, while if anything happened to the Pacific Ocean those seals must die. They must feed; they must go out to the sea and cannot remain on the Islands. Then I put myself in the position of a person interested in pelagic sealing in the Pacific Ocean, or a nation interested,—all rights being equal among us. They say “when those seals leave us they must come back to the Ocean by the imperious instincts of their nature, and not only that but all the food they get they get in the Ocean, and not only that but they would die if they did not come back to the Ocean. If *animus revertendi* has any application at all, why cannot it be claimed as much at one end as at the other?”

Take the ducks, take the geese, the northern ducks, as we know being bred, many of them, within the Arctic Circle. They have the *animus revertendi* there, and the Esquimaux may claim them because they come there to breed and have the *animus revertendi*.

The PRESIDENT.—Would you not make any difference between the *animus revertendi* to a place which is the property of a nation and the *animus revertendi* to the ocean, which belongs to nobody?

Mr. ROBINSON.—None that I can see. I had thought of that, Mr. President, but there is not—I speak, of course, subject to correction if any difference should occur to you—I am not aware that there is anything that can make any difference in the principle. The learned President of course understands what I mean. I mean for the purpose of giving property I am not able to see any difference. There is a distinction, not a difference.

The PRESIDENT.—I merely inquired what was in your mind.

Mr. ROBINSON.—There is a distinction; but is it a distinction which makes a difference in legal principle? I have not been able to see that it can do so.

So, then, the *animus revertendi*, I submit, is out of the question. We now come to another subject. I have endeavored so far as I am able

to discuss this question upon the principles of municipal law which they say apply to it, and which they say distinguish it from all other animals *feræ naturæ*, which they say make it a domestic animal; and if it is to be a domestic animal I venture to say that it must be a domestic animal by its nature. I have had this difficulty also, that in some parts of my learned friends' argument I find statements from which I should gather that they claim it to be a domestic animal by nature, and in others I find statements which go to show that their argument is that it is a domestic animal made so by them, although a wild animal originally. One thing I think is clear, that unless it is a domestic animal by nature they certainly have not made it one; and I think they are driven back in some portions of their argument.

Lord HANNEN.—What is a domestic animal by nature?

Mr. ROBINSON.—I can say nothing more than it is a domestic animal by nature. I hardly know how to describe it, except that I would say that it is an animal which has a domestic nature. Lord Hannen will remember the question that was once asked, what was an archdeacon, and it was said he was a person who performed archdiaconal functions. I really do not know that I can say what is a domestic animal by nature, except by saying it is what we recognize as such.

Lord HANNEN.—You seemed to be relying on the distinction, and therefore I wanted to know what you meant.

Mr. ROBINSON.—If Lord Hannen asks me my opinion I can say at once that I think there is a plain distinction between an animal which is a domestic animal by nature and an animal which has been temporarily brought within the class of domestic animals by reason of the industry or art of man exercised upon it.

There is just this difference: That a domestic animal proper remains a domestic animal forever, and must remain a domestic animal forever; it was born so, and must die so; but an animal that has been tamed and reclaimed belongs to the class of domestic animals only so long as it retains that nature. If that animal should escape and regain its wild nature then it relapses into the class of wild animals.

The PRESIDENT.—Do you regard the bee as a reclaimed animal or as a domestic animal?

Mr. ROBINSON.—I should say when the bee is hived and reclaimed, as they put it, then it would be a reclaimed animal. You get your property in bees, as Bracton says, by reason of occupation and hiving. If that occupation and hiving has been such as to give you a property, it is because you have reclaimed it.

The PRESIDENT.—Then the bee, you think, is an animal *feræ naturæ*.

Mr. ROBINSON.—I should say it was originally a wild animal, but when you come to hive them and confine them, you make them for the time tame. That is you bring them into that class.

The PRESIDENT.—The reclaiming is the hiving?

Mr. ROBINSON.—The reclaiming is the hiving and confining. Yes, sir.

The PRESIDENT.—Confining?

Mr. ROBINSON.—Confining it in the hive. I will not say confining, because it is perhaps hardly a proper expression to be used.

Lord HANNEN.—Homing.

Mr. ROBINSON.—Homing; yes sir. Of course you have the power of confining them, as my learned friends say.

The PRESIDENT.—Putting them into the hive.

Mr. ROBINSON.—Putting them in the hive, and their coming back to the hive and living in the hive, and your providing shelter, food, etc.

If it comes within any of those classes it must come within the class of reclaimed animals. That is to say it is temporarily in that class. I do not know how else I can put it. I may say that there was a case reported only the other day—possibly it may have attracted the attention of some members of the Tribunal—in which the question of the length of time that is necessary to confine a wild animal in order to bring it in that class came up. It is perhaps known to some of the Tribunal that there is a law in England for the prevention of cruelty to domestic animals; and the Humane Society proceeded against persons who were carrying on in some of the northern counties the game of rabbit coursing. It was said that these rabbits had been kept for a week or ten days in confinement prior to turning them out to course, and that they had thereby become domestic animals. Mr. Justice Wright held that he could not possibly say that that made them domestic animals; and the paper, which seemed to agree with that, said they feared there was no doubt that the decision was correct, but they wished it could be otherwise.

The PRESIDENT.—Do you think a hived bee would fall under that law?

Lord HANNEN.—I do not think cruelty to animals is extended to bees.

Mr. ROBINSON.—I do not think it is; though I am afraid they are subject to a great deal of cruelty very often in order to get at their honey.

I pass then to those propositions which my learned friends assert are founded either on international law or the law of nature; and so far as I can understand they are the same. I find that what my learned friends assert in substance, if I can properly state it in substance, is that international law is founded upon the law of nature. Differing from the view of the learned Attorney General, they say that whatever part of the law of nature is not rejected in international law may fairly be presumed to be assented to, and therefore that anything they can say comes within the law of nature, if you cannot discover that international law has rejected it or dissented from it, forms part of international law. I venture to say that is contrary to all theories upon which international law has hitherto been founded. But we may at all events take for a moment the different propositions which they found upon that. They go at great length into a discussion or disquisition of the original principles and foundation of the institution of property, from which they deduce certain principles. I can only say of those principles that they find no place in the municipal law of any portion of the civilized world. They may be valuable abstract discussions. They may be very useful speculative theories for the guidance and assistance of those who are making laws, in order to decide how far it is advisable, how far it is practicable, to make their municipal law conform to them; in other words, how much of the principles laid down and enunciated by these authors as part of what they are pleased to term the law of nature, it is practicable or useful or desirable to incorporate into their municipal law. For any other purpose I venture to say that they are absolutely useless, because not only are they not founded on any positive system of either municipal or international law, but they are theories which it would be utterly impossible to incorporate into any system of laws with a view to carrying them out.

Let me for a moment turn to the first assertion which is made—and I think it is perhaps a typical assertion—with regard to this property, founded upon that law. They assert that they are trustees: That this property is not their own, that they are trustees of it for the civilized world, and are conferring upon the civilized world the blessings which

sealskins will inevitably bring to those who can afford to buy them; and they say that that is an obligatory trust. My learned friends differ about that however; and I do not wonder they differ about it. My learned friend Mr. Carter, at one page which has been pointed out, asked if anybody can doubt that it is an obligatory trust; if it can be doubted that, if a nation having that trust incumbent upon it were unfaithful to it, other nations could intervene and depose the unfaithful trustee. My learned friend Mr. Phelps, as I understand, founds to a certain extent, though I am quite free to admit more guardedly and cautiously, his claim to property upon that theory. He says that if the only object of the United States in keeping this property is to allow pelagic sealing to exterminate it, of course they are free to destroy it, and that their abstinence therefore entitles them to a property. There is another place where I had found an extract in which it was said they had a right to destroy it. I must look for that again, for I have not the reference just now. But at all events there is that difference of opinion.

After stating that, they state that self-interest is a sure guarantee for the performance of those trust obligations. They say that that trust extends to the means and capabilities of a nation for production, and that those who are wronged by a breach of it have a right to redress the wrong, which would be nothing but a removal of the unfaithful trustee. Then they go on to add that this fundamental truth, that this useful race is the property of mankind, is not changed by the circumstance that the custody and defence of it have fallen to the United States, and if the world has a right (as it certainly has) to call on the United States to make its benefits available, they must clothe them with the requisite power.

Now in discussing this question I would like to say, first, from what point of view I approach the discussion of any question of trusts. I know nothing whatever of trusts except what I find laid down in certain treatises in America and in England. There are treatises of acknowledged authority on that subject both on the other side of the water and on this side.

Before I proceed I should like to recur a moment to another matter. I find at page 554 that Mr. Coudert, in arguing as to the question of property, unfortunately forgot himself, or at all events he stated views which were diametrically opposed, as I understand it, to his colleagues. He says:

To put an extreme case, suppose it were deemed important by the United States to kill every seal upon those islands, what nation in the world would have a right to find any fault? What nation in the world would say if it were deemed good policy,—if it were advantageous to us—if there were a profit in it—would any nation have a right to say that it is not our property, and we have not a right to kill them for our useful purposes? I take it that the best test of an exclusive property right is the question whether or not any other human being has a right to interfere.

You can reconcile that to a certain extent with what is said in Mr. Phelps' argument, but you cannot reconcile it with Mr. Carter's argument. My learned friend Mr. Coudert, I know, ought to have followed one of my learned friends or the other; but my own interpretation is that he was not thinking at the moment of making his choice. He was surprised for the moment into assuming the position of a lawyer. I think he forgot for the moment that he was arguing theoretical and metaphysical questions; that his old training returned to him, and he enunciated ordinary common sense law for a moment. I think that is the explanation of Mr. Coudert's unconsciously asserting a doctrine so

diametrically opposed to the arguments of my learned friends, but so useful for his then immediate purpose. When a lawyer trained in the doctrines of the common law and municipal law is discussing a question of property, and is told that it must be discussed not upon principles which he finds laid down in any system of law, but upon abstract theoretical propositions not of what the law is, but what it ought to be, and those are the propositions he is endeavoring to support, he is very apt indeed to forget himself, and to say. "Surely I have a right to destroy these things: they are in my power. Who could interfere with me, if I chose to destroy them all? Is not that the best proof that they belong to me?" I think Mr. Coudert forgot for the moment the propositions which it was his purpose to support. But however that may be, and founding my knowledge of trusts upon nothing in the world but upon those treatises which I have referred to, let us make those few inquiries which every one would make when he was told that a trust was asserted and was denied. I think the questions would naturally occur to him, How was the trustee appointed? What is the nature of the trust which he is to perform? How is the performance of that trust to be enforced?

Now then, let us see how this trustee is appointed. Who are the *cestuis que trusts*. Who appointed the United States trustees of these seal islands? At page 137 it is said that the interest of Great Britain in the preservation of the seal herd is almost as great as that of the United States. Great Britain, then, is one of the most influential of the *cestuis que trustent*. But Great Britain is here objecting to the assumption of this office of trusteeship by the United States. Great Britain says, "If I have any interest in this seal herd—and I either have or have not—I am of age, and I wish to manage my own property for myself." On what principle is she not to do it? We are talking now about trusteeship. The other nations of the world, so far as we know, have neither assented to nor dissented from the assumption of this trusteeship on the part of the owners of the islands. Then, what is the next thing to be considered. Who are the trustees? They are the persons who have the largest interest, beyond question, in the trust property, and their interest is diametrically opposed to that of the persons holding the next largest interest, for whom they appoint themselves trustees. It is contrary to all one's ordinary notions that they should be the trustees appointed: because their interest and the interest of the *cestui que trustent* do not concur.

Then let us ask what is the nature of this trust? The trust is to sell the trust property to the *cestuis que trustent* at a price to be fixed by the trustees. Can you conceive a trust like that? It may be a trust according to the law of nature; it may be a trust according to international law; but is it a trust according to any other law that any lawyer ever heard of?

Senator MORGAN.—*Trust in invitum*. What is that?

Mr. ROBINSON.—I hardly know. If you will explain what you mean by a *trust in invitum*. I am not quite sure what you have in your mind.

Senator MORGAN.—A trust imposed upon a man by the attitude that he holds to a particular piece of property.

Mr. ROBINSON.—Yes; there may be such a thing.

Senator MORGAN.—Of course there is.

Mr. ROBINSON.—Yes; I should say there is; but I am not aware of any instance in which there is any trust even in the remotest degree approaching this trust. I am quite aware that a man could hold some

property which would make him a trustee, and I am also aware, as a general rule, that people would rather not be trustees; but I do not understand a trust, the nature of which trust is to sell the property to the *cestuis que trust*, and to fix your own price upon it. Then it is not a price, recollect, to be regulated by what it may cost the trustee for the performance of his trust, what it may cost him out of pocket, or for his time required to perform the duties of the trust. On the contrary, I find in Mr. Palmer's letter that 18 months before he wrote, it was generally supposed this property would pay to the trustees an interest on the outlay of two thousand per cent.

Now, under these circumstances, is it any wonder that other nations, contrary to all the usual rule in trusts—because if there is one thing better known about trusts than another, it is that a trust is said to be an onerous and thankless office, which every one is unwilling to undertake, and which everybody is anxious to escape from—surely it is no wonder that the other nations of the world, and England in particular, are very anxious to range themselves among the trustees in this case, rather than to be numbered among the *cestuis que trust*. It is a very unusual case, but it is the case here. England says, "I would rather help you in discharging the benefits of this trust to the world. I would infinitely rather assist you and be trustee, than retain the position which you are good enough to assign me of *cestui que trust*." Is there any reason why she should not do it?

However this may present itself, in whatever almost ludicrous aspect, is there anything contrary to the facts. Is not that the exact nature of the trust which the United States are assuming; and they are assuming that trust upon the plea that they are conferring blessings upon mankind. This is certainly the most attractive form of philanthropy ever heard of, and all men would be very glad to practice it if they only could get the opportunity. To assume the trusteeship of a property out of which you make a thousand per cent, and have at the same time the blessing of an approving conscience and the satisfaction of conferring blessings on the world, is a thing very desirable, if it can be attained by law. But it is no wonder that other nations think that this trusteeship, so peculiar in its character, and peculiar in its benefits, should not be altogether assumed by the United States.

Then how is the performance of this trust to be enforced? It is carefully stated that it is beyond question. Perhaps I had better read that sentence, because I do not wish to over-state or under-state anything. At page 92 of the United States Argument, it is said:

It is in the highest and truest sense a trust for the benefit of mankind. The United States acknowledge the trust and have hitherto discharged it. Can anything be clearer as a moral, and under natural laws, a legal obligation than the duty of other nations to refrain from any action which will prevent or impede the performance of that trust?

At page 59 the same subject is recurred to, and at page 61 it is said:

It is the characteristic of a trust that it is obligatory, and that in case of a refusal or neglect to perform it, such performance may be compelled, or the trustee removed and a more worthy custodian selected as the depository of the trust.

Now, let me ask in all seriousness—for that must be meant seriously or it is not meant at all—supposing Great Britain, as the most largely interested of the *cestuis que trusts*, should believe, and have good reason to believe, that the United States were unfaithful trustees; that they were wasting the trust property; that they were mismanaging it; that they were not conferring the blessings upon Great Britain in particular—for I do not think she would trouble herself much about the rest of

the world—which she had a right to obtain from it; and supposing she were to say to the United States, “We desire to remove you; you have been unfaithful to your trust; we propose to take possession of the Pribilof Islands, and put in a trustee who will manage them better”: could any body doubt for a moment how the proposal would be received! Do you think there would be any arbitration about that? Do you think there would be met in any way but at the cannon’s mouth, in an attempt to compel the performance of that trust; and is it really possible seriously to discuss this question,—how can the existence of a trust in this case be made to conform to any known system of law or to any ordinary rules of common sense?

There are other propositions connected with this matter, which it will not take any great length of time to discuss, but which, as it is now 4 o’clock, had perhaps better be postponed until tomorrow.

Mr. CARTER.—Mr. President, before the Tribunal separates I will give the reference which Lord Hannen, I think, asked for, as to the statutes conferring jurisdiction upon the United States Court of Alaska:

The act providing Civil Government for Alaska, which is contained in volume I, page 481, of the Supplement of the United States Revised Statutes is a special act, and section 3 is as follows:

Sec. 3. That there shall be, and hereby is, established, a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with the act, as may be established by law.

It will be perceived that it refers to the jurisdiction of the district courts as the measure of the jurisdiction which it possesses.

Then the United States Revised Statutes, section 563, is as follows:

The district court shall have jurisdiction as follows:

Quite a number of cases are mentioned, among which is.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. (And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.)

I should say that that paragraph refers to cases where prizes are made in consequence of any insurrection in the United States—a recent amendment, not particularly applicable.

Sir RICHARD WEBSTER.—Would Mr. Carter kindly let us have the book, in order that we may look at it. I mean to say I should like to follow it out. It seems to me as though that was giving what we should call jurisdiction *in rem* and jurisdiction *in personam*, and that it was not made a prize court in the sense in which we have been using the expression.

Mr. CARTER.—The paper is here, Sir Richard.

Sir RICHARD WEBSTER.—It had better appear upon the note. It will go upon the note, and I will see it.

The PRESIDENT.—The Tribunal will meet tomorrow at 11 o’clock for private consultation; and at the issue of the private consultation the public hearing will begin.

[The Tribunal accordingly adjourned until Thursday, June 8, 1893, at 11 o’clock A. M.]

THIRTY-FIFTH DAY, JUNE 8TH, 1893.

• Mr. ROBINSON.—I may perhaps, before continuing, complete two references which I had not at the moment before me, as I ought to have had yesterday. One was to a letter from Mr. George Canning of the 29th of May, 1824. It is to be found in our Appendix, Volume 2, part I, at page 61. It is not of very great importance, but these are the words I refer to:

We take for granted that the exclusive claims of navigation and jurisdiction over the North Pacific Ocean, which were put forward in the Ukase of September, 1821, are to be altogether withdrawn.

And I refer as well to Mr. Blaine's words in the 3rd volume of our Appendix, page 498.

If we take the words of Mr. Adams with their literal meaning there was no such thing as Russian possessions in America, although 44 years after Mr. Adams wrote these words the United States paid Russia 7,200,000 dollars for these possessions, and all the rights of land and sea connected therewith.

Now, I am not sure, if Mr. Senator Morgan if you will allow me to say so, whether, misled you yesterday in any way in explaining the position of the Fraser River as to where it comes out. Of course, it is not in the open sea in this sense, that Vancouver Island is between it and the main Pacific Ocean; but where it debouches at its mouth the Strait is about 40 miles wide, and there are a great many islands. That is the position of the water there. If I led you to believe that it opened on the open ocean without anything to obstruct the view, I was wrong in that, because it opens into a Strait 40 miles in width, the Straits of Georgia I think they are called.

The PRESIDENT.—It opens in that channel?

Mr. ROBINSON.—Yes.

Senator MORGAN.—The Straits of Fuca are different?

Mr. ROBINSON.—Yes. I think they call this the Straits of Georgia.

Senator MORGAN.—They run up on the other side of Vancouver?

Mr. ROBINSON.—Yes; the other is called Juan de Fuca.

The PRESIDENT.—The line with reference to the Arbitration of the Emperor of Germany went higher up, according to the map?

Mr. ROBINSON.—Yes, into the Straits of Georgia.

Sir JOHN THOMPSON.—The Fraser River debouches into the Straits of Georgia.

Mr. ROBINSON.—Then, some references were made yesterday by my learned friend, Sir Richard Webster, as to the point raised by Mr. Phelps, when he said that they did not intend to discuss the validity of the seizures not considering that they were in issue here. I wish to give the Tribunal two more references which seem to us to bear on that point. In the first place, in the American Argument, at page 217, we find this expression. That is the section which deals with the damages claimed by Great Britain.

We, however, preface what we have to submit on this feature of the case by saying that, if it shall be held by this Tribunal that these seizures and interferences with British vessels were wrong and unjustifiable under the laws and principles

applicable thereto, then it would not be becoming in our nation to contest those claims, so far as they are just and within the fair amount of the damages actually sustained by British subjects.

That seems plainly to contemplate that this Tribunal is to hold one way or the other whether the seizures and interference with British vessels were wrong or justifiable or not under the laws and principles applicable thereto. If the Tribunal will turn to our Appendix Volume 3, No. 1, 1891, at page 55, they will find in that very long letter of Mr. Blaine, of I think the 17th December 1890, these words referring to a proposal made by Great Britain:

Her proposition is contained in the following paragraph, which I quote in full:

"I have to request that you will communicate a copy of this despatch, and of its inclosures, to Mr. Blaine. You will state that Her Majesty's Government have no desire whatever to refuse to the United States any jurisdiction in Behring's Sea which was conceded by Great Britain to Russia, and which properly accrues to the present possessors of Alaska in virtue of Treaties or the law of nations; and that, if the United States Government, after examination of the evidence and arguments which I have produced, still differ from them as to the legality of the recent captures in that sea, they are ready to agree that the question, with the issues that depend upon it, should be referred to impartial arbitration. You will in that case be authorized to consider, in concert with Mr. Blaine, the method of procedure to be followed."

Now that is an extract from a letter by Great Britain speaking of the hypothesis, which of course was a certainty, of the United States differing with them as to the legality of the recent captures in that sea, and the issues dependent upon it, and saying that they are ready to agree that the questions with the issues depending upon them shall be referred to an impartial arbitration. Having cited that Mr. Blaine goes on to say:

It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years. I shall endeavour to state what, in the judgment of the President, those issues are.

As I understand, he refers back to issues that depend on the legality of the recent seizures; and then he states, for the first time, these 5 questions—or 6 questions as they were then, the 6th having become the 7th in the Treaty,—as he proposes them; and, as the Tribunal are aware, they were accepted with certain modifications.

I now proceed to the argument which was in progress yesterday when the Tribunal adjourned. I had said all that I desired to say with regard to the assumption or argument by the United States, that they were in the position of trustees in this particular matter, and the only element I had omitted to notice was that I remember my learned friend Mr. Carter did attach to that argument the condition that the prices should not be prohibitory. Now we know as a matter of fact that the price is prohibitory, that is to say, when you speak of being trustees for mankind at a price at which you are ready to sell the produce of this trust property, I suppose it would be a very fair average in all probability to say that there is not one in 10,000, if one in 100,000, to whom the price is not prohibitory. In truth it is an article only within reach of very rich persons; and in reality this trust obligation—which my learned friends assert is incumbent upon them, with which they assert other nations are bound not to interfere, as to which they say there can be no question whatever of the blessings which they are conferring upon mankind—is really, without exaggeration, reduced to this, that they are to sell seal skins to millionaires at a profit of 1,000 per cent. That is the precise duty asserted here, and the precise obligation incumbent upon them.

I now leave that subject, and proceed to the other two or three propositions which I find laid down by my learned friend as facts, by which they can settle the question whether this property does belong to the United States or not. The Tribunal will find that for about 20 pages, I think beginning at page 50, the attention of the Tribunal is invited to a somewhat careful enquiry into the original causes of the institution of property and the principles upon which it stands; and having discussed the origin of that institution, and the principles upon which it stands, for some 20 pages, we find it said at page 68 that.

The foregoing discussion concerning the origin, foundation, extent, form and limitations of the institution of property will, it is believed, be found to furnish, in addition to the doctrines of municipal law, decisive tests for the determination of the principal question, whether the United States have a property in the seal herds of Alaska; but it may serve the purposes of convenience to present, before proceeding to apply the conclusions thus reached, a summary of them in concise form.

I do not think it is necessary to read the first two or three propositions. The ones with which I am mainly concerned are to be found at page 69.

The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the earth, is limited in two ways:

1. They are not made the absolute owners. Their title is coupled with a trust for the benefit of mankind. The human race is entitled to participate in the *enjoyment*.
2. As a corollary or part the last foregoing proposition, the things themselves are not given; but only the *increase* or *usufruct* thereof.

Now it is said those are the principles upon which this contest as to the property between these two nations is to be decided. In the first place I venture to say that those principles are not found in any system of law of any nation in the world, never have been part of any system of law, as we understand the term "law", never will be part, and in the nature of things never could be part of it. Is it really seriously asked that this question of property between two nations is to be decided upon principles which never formed part of the law of any nation in the world? I mean by "law" a system which declares and enforces legal rights.

I think the simplest test of that is this: Let anyone go to Congress or to the Parliament of Great Britain and ask them to embody in an Act of Parliament these provisions: first of all, that people are trustees for mankind of the property which they possess; in the next place, that they are not the absolute owners, and that the things themselves are not owned by them, but only the increase or usufruct thereof. What would be said to any such proposition? What would be said in either country would certainly be, that a man bringing forward such propositions could know very little of human nature; and yet it is said this is the law of nature, and that such propositions are to govern this case. Is that an unreasonable test or a reasonable one? Would any man be listened to as a man of ordinary practical intelligence, fit to deal with the affairs of human life, if he were to propose that either of those two propositions should be embodied in any system of law on the ground that they were following the law of nature? Would not the answer be, the man that brings forward those propositions as desiring them to form part of practical law must be utterly unacquainted with human nature?

Senator MORGAN.—Does not the law of descent and distribution all depend on the fact that it is part of the law of nature?

Mr. ROBINSON.—I should have thought very distinctly not, if you ask me; but I must first ask, though I do not ask it from any feeling of presumption—I first ask some one to tell me what nature has enacted. I have not the slightest idea of what the law of nature is, and I do

not believe anybody else knows. It is an indeterminate something; nobody can tell what it means anywhere, and it is certain that it means something different in every nation of the world.

Senator MORGAN.—Might it not be called Divine Law, in the sense that it is used in the Scriptures?

Mr. ROBINSON.—Well, I did not wish to touch on Divine Law; but as that has been referred to, I would say this: the only instance I know of where property has been taken from a man on the ground that he had not made good use of it, except on the ground that he was a lunatic, is in the parable of the ten talents. I have never heard of it since, and I do not believe that anybody has been encouraged by that instance to endeavour to embody those principles in any code of laws as a proposition of law.

Now you have asked me if the law of descent and distribution is not part of the law of nature? I ask, is it part of the French nature, or British nature, or American nature?

Senator MORGAN.—Well, it depends on the nature.

Mr. ROBINSON.—I agree, it depends on the nature; but I do not understand a law which varies according to the nature of different individuals or different nations. If so, it means nothing, and I really believe it does mean nothing. I do not believe the law of nature means anything except in some elementary particulars. You may say that the law of nature teaches affection for children and offspring, and things of that sort.

Senator MORGAN.—Well, it has been so much written about, that I supposed it to exist.

Mr. ROBINSON.—Yes; there has been a good deal written about it; and, if you refer to two references given to the Tribunal by the learned Attorney General, you will find the highest authorities known in that branch of jurisprudence say it practically means that it is an indeterminate something which people refer to without knowing what they mean, and being utterly unable to tell what the law to which they refer ordains or directs.

I venture to submit, again, that the illustration I have suggested is absolutely conclusive. If this property between nations is to be determined upon these propositions, which were asserted to be reasonable propositions, they are propositions which ought to be found in some system of law. If they are new discoveries are they propositions which by their reason would recommend themselves to any Legislature or to any country which was invited to embody them in their system of law? As a matter of fact, anybody who has a child's knowledge of human nature must know that it would be absurd to attempt to embody them in any practical system of law, or to enforce them. You can not make people trustees for mankind of their property. You may say to people, "You should not waste your property; the principal does not belong to you. You are only entitled to the interest". I am aware that many things are spoken of as rights which are simply rights in the ordinary sense of ethical rights or wrongs and moral duties. You may say that a man has no right to waste his substance and leave his family penniless. That is practically true; but in what sense? It is absolutely impossible to say that he has no legal right to do it, because he has, and no law can prevent it if the man is sane. Again, you may say that no man has a right to lose his temper, and make charges against people without just grounds. No more he has; but can you imagine any law that would attempt to prevent it? You may also say that a man is bound to be careful of what he has got, and to make the most of it; and, in a

certain sense, he has no right to do otherwise. In the case I first put it might be fairly said that it would be disgraceful and discreditable to him if he dissipated his property and left those dependent on him in want; but the world is full of such instances, and also of people who deplore them and would do anything to prevent them, and who if it were possible to make a law to reach them, would try to make that law. But no nation has attempted to do it, and no sensible man has attempted it; and yet they say it is upon such principles this question between these two great nations is to be decided by this Tribunal.

I venture to say, with great respect, it is impossible so to decide a question of this sort, and if those are said to be the decisive tests, very few minutes' argument will show that they are tests which can not decide that question, if we are right in saying that the question submitted to the Tribunal relates to rights to be decided according to law.

I will not delay the Tribunal by going into the further question of the necessity and propriety of applying to everything which is capable of ownership, or giving to everything capable of ownership, an ownership, except to say that one reason on which it is said to be founded does not seem to me to apply here. One of the main reasons is that the arts would not be practised, that the fruits of the earth would not be rendered available, unless the institution of property was awarded to encourage people to exercise their industry so as to obtain for themselves and for others those benefits. I have never heard it said that the awarding of property in animals *feræ naturæ* to the first man that can take them has discouraged the practice of hunting. On the contrary, it is that on which it rests. The only way to get these animals is by the chase; and nobody has said that animals *feræ naturæ* are not made available to human wants to the best extent they can be by the practice of hunting, which is the art, I suppose, referred to in connection with that subject.

Then they say these animals are useful, and an object of eager human desire, and that there is no substitute for them.

Is not that language very greatly exaggerated? Is there any one thing—perhaps you might include three or four others,—without which the world could do better than seal-skins? Seal-skins and diamonds, and things of that sort, are about equally useful and equally necessary. I admit that they are valuable, and I admit it is desirable to have them; but when you say that they are eager objects of human desire, they are eager objects of human desire to some of the people who can afford to pay for them, and with some few only even of those; and to speak of them as one of the things which there is any special necessity to continue to give to the world is to exaggerate, and to say what has no reasonable or proper, or sensible application to the subject we are considering.

Then, I desire to say a few words on the question of cruelty and of waste. Now, my learned friends, in many sentences,—(I have them all before me, or I have them near by)—at all events, in 8 or 10 sentences, at least, at different places, have as part of their argument, and in that part of the case which deals with the right of property and protection, not with Regulations, charged the pelagic sealers with cruelty, involving useless suffering; and with waste.

Now, first, I would ask, how far can either of those charges have any bearing whatever upon, or any relation whatever to, the question of the right of property? Their charge is that we are either injuring their industry, or destroying their property. Does it make a particle of difference whether it is done cruelly or not? I am not speaking of cruelty as I hope to do in a few minutes, or defending it. I consider simply the

legal question. Has the question of cruelty, or the fact of cruelty or the absence of it, anything to do with the right of property, or can it have?

Suppose the pelagic sealers tortured to death every seal they captured, but did not injure the United States industry, and supposing those seals were not the property of the United States, or even that they were the property of the United States, the fact that we tortured them to death would not make any difference in their rights. They could recover if they have a claim for the injury to the industry or if they own the seals. Suppose we tortured to death every seal killed but did not hurt the industry, what possible right could that give them to complain? Suppose, on the other hand, we chloroformed every seal we killed, and they did not suffer at all, but still we killed enough to injure the industry, then they would have a right to complain because we had injured it. Cruelty has no bearing upon the matter, as I submit. If so why were those charges introduced here, if not simply to endeavour to prejudice our claim, which is adverse to their own, by sensational charges which have no bearing on the legal rights or legal wrongs of the case?

In the next place, what has our waste to do with the question of legal right? My learned friends were asked very emphatically and distinctly by the learned Attorney General to define their position. Do they mean to say their right depends in any way or sense upon the mode in which we deal with these seals—economically or uneconomically—wastefully or with an absence of waste? No answer was returned to that. I do not ask the question again, because I am certain that what they would not tell the learned Attorney General they are unlikely to tell me.

Now let us see what effect it can have. Can the question of whether a thing is my property or not depend upon the use which some one else makes of it, wasteful or economical, when he gets it, or the use he is going to make of it? If it is my property I am entitled to it. If it is not my property, how can the fact that when he gets it he intends to burn it or sink it in the sea or destroy it, tend to make it my property? Again, how can the question of waste affect their right to protect their industry? If we kill 1,000 seals and it affects their industry, and they have a right to prevent our affecting their industry by the destruction of seals, how can it affect the question what we do with the seals? Their industry either prevails over ours or it does not. If it does prevail over ours, we have no right to exercise ours in any way, economically or uneconomically, to their prejudice; and if it does not prevail over ours, as we contend, we have a right to exercise ours. But how the waste, or rather uneconomical use, of the thing itself which they claim a right to protect, by us when we take it can affect the question, I have always been unable to understand, and I venture to submit every other person who considers it with a view to working out the question of property, will also be.

Then my learned friend the Attorney General calls my attention to the fact that the same argument is used by Mr. Condert as a portion of his argument at page 713, in answer to the charge of mismanagement on the Islands that we were then making:

One single word more as to the management. The British Government have endeavoured to show that too many male seals have been killed on the Pribilof Islands beginning with the year 1870, and that a gradual deterioration in the herd has been taking place. Even if this could be shown it would form no justification for pelagic sealing, and would therefore be considered irrelevant. Suppose it were true; suppose the United States had been reckless or had employed corrupt and bad

agents, the principle is admitted to be good. The property—I will not say is conceded—but is proved to be theirs on the islands; and if pelagic sealing is destructive, the fact that we must do our sealing on the islands cannot be disputed. Suppose these seals were under the control of the United States, as well as the islands, would that make any difference, and would anybody say that we had less right to protect seals at sea because they were not treated well on the shore?

In other words, it is precisely their argument in answer to us. They say what business is it to you how we treat the seals on the islands?

That may be a sound argument on the question of Regulations, with which I have nothing to do at present. I deal simply with the legal question as to the right of property or the right to protect the industry. The truth is it has no bearing upon it. It cannot affect it in any way, and why it was introduced except for the same reason as the charges of cruelty we are at a loss to understand.

Now I pass to the charge of cruelty, which is made against us as an offence. I wish to deal with that for this simple reason. I am supposed probably to represent more particularly that portion of the Empire which is especially interested in this industry.

I do not desire to speak of the interest of Canada or British Columbia in this question at present, though it is very vital. I do not desire to do so now, for the reason that what we are discussing here is the question of legal rights. The law has to prevail; the law has to be obeyed; and it could make no difference whatever even if British Columbia lived exclusively on this industry; if she claimed to do so without legal right she must give it up and take the consequences. I agree that on the question of Regulations those considerations may have a different weight and be entitled to a different influence. Here I speak of this charge of cruelty because the charges are made against citizens of British Columbia, and my learned friends will not be offended at what I say, because they charge their own citizens in the same way with committing a crime which every civilized nation is bound by the law of nature and by their obligations to civilized society to put down and punish.

Pelagic sealers are described as *hostes humani generis*, and I think it is very difficult to express too strongly the atrocious character which they assign to what we think is a perfectly justifiable and proper industry in which we and their own citizens are concerned.

They tell us that it is abhorrent to the law of nations, and that the law of nations is founded on the law of nature. I might have said at an earlier portion of my argument, but I venture to say it now as not altogether inappropriate, that my learned friends have this formidable difficulty to contend with: that the law of nations, which is founded on the law of nature, does not interfere with but permits slavery. I should like to know how they can call upon that law to put down pelagic sealing. Is it possible that the great principles of morality upon which that law is founded, but which, nevertheless, through that law, permit slavery with all its horrors to continue—is it seriously arguable that the same principles of morality must nevertheless put down pelagic sealing? That, at all events, is the proposition which my learned friends have to contend with, which they have seen that they have to contend with, and which they answer only by saying that perhaps, if the question should come up again it might now be decided differently. It could not now be decided differently by that most eminent judge, or by any other judge acting on principles of international law, unless it could be shown that nations in the meantime had assented to make the prohibition of slavery a part of international law. The question would.

not be, as he himself most clearly and explicitly said, what was his own nature and feeling, and the feeling of nearly all the nations of the civilized world—it was not what they would dictate; but the question would be, what had all the nations of the world consented to; and neither Chief Justice Marshall nor any other Judge could make international law different, because the feelings of those nations that had put down slavery if there were other nations which did not consent to make it had grown stronger against it, part of the law by which they would all be bound.

Now as to this question of cruelty, I shall not read passages again, in the United States argument, which have been read already, and which are plainly sensational and exaggerated, or any passages on our own side. There is one passage which Mr. Carter read, in which he describes the gravid females being opened, the milk and blood flowing in streams upon the deck; but let me ask, what special cruelty is there there more than any other killing. I do not defend this or say that it is right; but cruelty I understand to be the infliction of suffering; and what more cruelty is there in shooting a gravid female than a young male, as a matter of cruelty. I think it is right to make this correction with regard to cruelty, as my learned friend the Attorney General reminds me, namely, that it is the gratuitous infliction of suffering—suffering which is gratuitous, useless and unnecessary; but in that sense there is no more cruelty, and no more gratuitous infliction of suffering in shooting an animal in one condition than in any other. I will venture to say this with regard to cruelty: Of all the witnesses we have cited, Mr. Palmer at all events has stood so far unquestioned, and Mr. Palmer is a gentleman of science sent by an institution which stands, if not at the head, almost at the head of science on the continent of America. He was sent by the Smithsonian Institute to examine the state of affairs in those islands.

General FOSTER.—We most seriously question that.

Mr. ROBINSON.—I do not speak of your seriously questioning. The accuracy, of course, they question—they question the accuracy of every charge made; but I speak of their questioning the veracity and high character of Mr. Palmer: nothing else. I do not think there is much object in their questioning a thing unless they can disprove or impeach the veracity of the witness.

Now Mr. Palmer's letter, at all events, is to be found in the report of the British Commissioners at page 189, and you will see what is said by him. This is a paper read before the Biological Society of Washington.

General FOSTER.—A part of a paper.

Mr. ROBINSON.—Yes, said to be an extract of a paper. The other portion of it, I may say, is given by the United States in their Counter Case.

General FOSTER.—The whole article in full is given.

Mr. ROBINSON.—No, I think not. I think what you have given is what we did not give, but I may be wrong about that. However, that is my recollection. I think they gave what we did not give, but we have the whole paper between the two, so that it is of no importance whether I am right or General Foster is right. I am quite content to assume that I am wrong in a matter of this kind.

Now I will not weary or pain the Tribunal by reading that letter again, which has been partially read already. I repeat, whatever may be said about Mr. Elliot, or whatever may be said about others, I am not aware that there is a shadow of ground for doubting Mr. Palmer's

entire veracity. He speaks of what he had seen, and testifies to what he knew by personal observation; and it is not too much to say, and I speak to those who can verify my assertion by their own reading, that a more pitiable, painful story of utter useless, barbarous cruelty inflicted upon dumb animals cannot be imagined. I do not think that these words are in any way or sense exaggerated. I am speaking now of the method of driving the seals which Mr. Palmer observed on the Islands and its effect, and the words which I have used I attribute to that system. I am not reproaching the United States in any way. As Mr. Palmer says, they have to manage dumb animals through the medium of half-civilized men, and until they get a different class of supervisors, it will be utterly impossible to do very much to moderate that—I believe it will be found wholly impossible;—but Mr. Palmer describes what I have said, and to put it shortly, it is this. “Countless thousands”, to use his own words, of those dumb animals have been done to death—to a death of long, lingering agony—simply by mismanagement; and their bodies have been wasted. Anybody may test what I say, and form for himself his own judgment by more than reading, because he may do it by personal observation. Let any one go to either of the Gardens here, where the seals are to be found, and watch one of those animals proceeding at its leisure, without being urged, along the smooth gravel path; and then let him try to imagine what the sufferings of these poor brutes must be when driven from one mile to three over sharp stones by boys or savages or half-civilized men. Now that is what is done there. I say nothing about the United States. I make it no subject of reproach; I merely say they are not in a position to reproach us. I venture to say this—If this case depended on the question, by whom has the greatest amount of gratuitous and unnecessary suffering been inflicted upon the seal race, and by whom has the larger number of that race been utterly wasted—by the system pursued upon the Islands or by pelagic sealers; if this case depended on that question, and if the seals could speak of what they knew and had felt, I should be perfectly content to leave the case to their decision. There is no question, if Mr. Palmer tells the truth, as to what the result has been. The system has to be altered there, and it may be altered as far as it is in their power to do it; but it is very difficult in an out-of-the-way part of the world, and with the class of men they have to deal with, to secure the right class of men.

Now Mr. Carter at page 204 of their argument, answers a remark of the British Commissioners, in which they say that, in anything said in favour of pelagic sealing, it must be remembered that it is an industry followed by the United States citizens and open to the United States citizens as well as to us, and they are not speaking in the interests of one nation only when they speak of it as being rightful, or discuss by what means or by what regulations it can be reasonably or properly pursued. The answer which is made is that the United States—

Deems itself bound by the spirit and principles of the law of nature, holds itself under an obligation to use the natural advantages which have fallen to its lot, by cultivating this useful race of animals to the end that it may furnish its entire increase to those for whom nature intended it, wherever they dwell, and without danger to the stock. It holds, as the law of nature holds, that the destruction of the species by barbarous and indiscriminate slaughter is a *crime*, and punishes it with severe penalties. Its enactments, adopted when it was supposed that the only danger of illegitimate slaughter was confined to Behring Sea, were supposed to be adequate to prevent all such slaughter. Are the United States to be deprived of the benefit of the seals unless they choose to abandon and repudiate the plain obligations of morality and natural law?

Now, if they thought that there was no illegitimate slaughter outside Behring Sea, the United States have learned long ago, or some years ago at all events, that this was a mistake,—and how it is possible many people could have thought so, it is difficult to see if they knew anything of the habits of the seals then. If they believed that it was their duty to other Nations and to the civilised World to put down and punish the perpetrators of this crime, why did not they put it down and punish it outside Behring Sea? I understand why; because this kind of language and argument was not in their minds. Their Legislation was intended, as the Legislation of all nations has been intended, not in the interest of the feelings of animals *feræ naturæ*, but in their own material interest and for their own benefit. Let me see what answer is given by my learned friend, Mr. Carter, when in the course of his argument. It was pointed out that they had the power, because they can prevent their nationals committing this crime against nature any where, and—if they are *hostes humani generis* all over the world, why do you say they must not be so in a portion of the world only, namely inside Behring Sea?

The answer was,

Of course, it might be said by Congressmen, if all the world is to be permitted to go up there and take the seals, we might as well let our own nationals go. We will not protect the seals against attacks by our own citizens if other people are to be allowed to attack them.—

In other words, and the President has put that very strongly in reference to the suggestion made by us, if they were correct in their argument, they should have prevented it everywhere,—I ask are those positions consistent? Is my learned friend really saying that one of the Members of their Congress might say.

This is barbarous and inhuman, and an act which every civilised nation is bound to put down; but if other nations are going to carry it on, then we will let our own people carry it on with them?

What my learned friend says is, it might be said by Congressmen; or, in other words, it might be said by the Members of a Parliament of a civilised Nation, that.

Other Nations are guilty of this barbarity; why should not our nationals share in it, till other Nations choose to put down such enormities?

I am really treating this matter in a reasonable spirit, I venture to submit, and in the spirit in which only it can be approached with any reason.

I am saying nothing invidious here, because I have no charge to make against the people of the United States which I believe does not lie against every other nation of the world. But it is true, and we might as well look that in the face, that neither law nor legislation of civilised nations up to this time have ever been prompted or influenced by the feelings of animals *feræ naturæ*, to any extent whatever; they have been dealt with as best suited what were supposed to be the material interests of the Nations.

Take the case of the Buffalo, which we all know. I have extracts here from Mr. Allen, a man vouched for by the United States as a man of high character and attainments; who has published a monogram on the Buffalo, warning the United States that they were being destroyed, and calling upon them to save them. Those animals, both in the United States and Canada,—this affects both Nations,—were slaughtered recklessly and ruthlessly, without regard to time, or place, to sex or age. They were slaughtered by thousands, and left lying on the Prairies,

for the sake of their skins. As a matter of fact, their skins were much more useful than seal-skins. I venture to say, and those gentlemen who know that part of the world will say if I am right or not, that for one person to whom seal-skins have brought comfort and warmth, in all probability buffalo skins brought it to ten. They were articles sold for a moderate price, and I recollect myself when you could get them for 4 or 5 dollars, and were universally used by people of moderate means. But the Buffalo rae had no influential Corporation interested in their existenee, and yielded no revenue to the Government and nobody took the slightest interest in them. They were slaughtered by white men called "skin-hunters" and Indians; and, if we may resort to the law of nature, I do not know how we are to get nearer to it than to see the method in which those Tribes, who have been called by some of the greatest novel-writers "the untutored children of nature", were prompted by the laws of their nature to deal with dumb animals.

Uncivilized men were acting under the law of nature; civilized men never interfered to prevent it. Other instances can be found, in the feathered tribe for instance. I am sure one or two members of the Tribunal to whom I am speaking remember the Passenger Pigeon.

Senator MORGAN.—With referenee to the Buffalo. In order to civilise these Indians and get them into agricultural pursuits we were obliged to permit their support of wild game to perish.

Mr. ROBINSON.—I accept the suggestion. I am very glad you have mentioned it, Sir, for this reason. That matter is alluded to in either the argument or Counter Case of the United States, and it is said that it was necessary to exterminate the buffalo in order to make way for the Ranchmen, and for a better and superior rae of domestic cattle.

Senator MORGAN.—That is true also.

Mr. ROBINSON.—That is true to a certain extent. I am perfectly willing to admit that eventually the buffalo would have had to give way; but there are at this moment thousands—nay, tens of thousands of square miles where the Buffaloes have been exterminated, but where civilization has never come, and where, for the best part of another generation, both in Canada and I believe the United States, it may not come, but the buffalo has been exterminated because it had no friends—that is the whole story. The Ranchmen did not like them; the Settlers did not like them; and nobody cared either for humanity, or civilization; or for the interests of the buffalo.

Senator MORGAN.—Very much like the rabbits in Australia and in England, they may be considered to be noxious animals.

Mr. ROBINSON.—With great deference, I do not think the buffaloes could be considered like the rabbits in Australia. I venture to say that you yourself Sir, on reflection, will hardly consider it a fair analogy. But we all know—those who have journeyed over the prairies—that we have found the bones by hundreds of these animals which have been slaughtered. I have been told by one person that he has seen 2,000 killed in what is called a single run in a small portion of the day. The bodies were left on the prairies, and nothing taken but the skins. At all events neither civilization, humanity nor anything else interfered to prevent it.

I was going to refer to the Passenger Pigeon as another instance in referenee to birds. They are birds, whose habits in one respect, are strongly analogous to the habits of the seals. The Passenger Pigeons, within my recollection, were in absolute myriads in the United States and the Northern States of Canada. Their habit was in the breeding season to take up their abode in an enormous tract of wood. I have

seen two such "Pigeon Roosts"—one some miles long, and about a mile broad—in which there would be found from two to twenty nests, on every tree, and the birds were there in absolute millions. The people round about shot the birds in their nests, and they destroyed the young, and tried in every possible way to slaughter them, and thus a most useful food bird to man was exterminated. Nobody interfered to prevent it. The Walrus was destroyed in the same way and exterminated, or nearly so, and the sea otter; and when my friends say that cannot be prevented, they have Statutes on their Statute Books, which, according to our evidence, have not been enforced. And we show there is a possibility of practising husbandry with the Sea Otter: that the Russians have tried to keep preserves, but the Sea Otters are gradually becoming extinct.

As to the seals themselves, I would ask the Tribunal to be good enough to refer to the British Commissioners' Report, page 89, sections 511 to 514. You will find, Sir, that as late as 1881 these seals were treated thus—10,000 of them were actually destroyed simply to prevent the Japanese from getting any of them. Perhaps I may as well read just a few sentences to show how it came about.

Section 511 of the British Commissioners' Report is as follows:

In 1871, this island—

that is Robben Island—

with the Commander Islands, was leased to Messrs. Hutchinson, Kohl, Phillipens, and Co., who transferred their rights to the Alaska Commercial Company. Mr. Kluge went there in the same year in the interests of the lessees, and found that, in consequence of the raid in 1870, there were not over 2,000 seals to be found on the entire island. The island was watched in that year, but no seals were killed. A few may have been killed in 1872, though, if so, the number is not known; but from 1873 to 1878 rather more than 2,000 skins were on the average taken annually by the Company from this one small reef.

512. About the year 1879, schooners sailing from Japan began to frequent the island, and were in the habit of raiding it in the autumn, after the guardians had been withdrawn. In 1881, the Company's agent remained on the island as late as the 5th November, at which date five or six Japanese schooners were still hovering about, looking for a chance to land. The Dutch sealer "Otsego" was warned off by the Company's trading steamer "Alexander." In consequence of such raids, the number of seals declined from year to year.

513. Probably discouraged by the cost and difficulty of protecting the island, and in order to prevent competition in the sale of skins, the Company in 1883 made a barbarous attempt to extirpate the seals on it. A full account of this attempt is given in the deposition of C. A. Lundberg, who arrived at Robben Island in the schooner "North Star" from Yokohama, and found the mate of the schooner "Leon," a vessel in the employ of the Alaska Commercial Company, living on the island with about fifteen Aleuts. Lundberg found a great mass of dead and decaying seals upon the shore, which had been killed by these men, as they said, in order to "keep any of those Yokohama fellows from getting anything this year." The crews of the "North Star" and another schooner, the "Helene," then set to work to remove the carcasses, which included those of many females and young, and proved to number between 9,000 and 10,000. In the process, they managed to pick out some 300 skins in good condition. There were thousands of seals in the water, but they would not pull out on the beach on account of the stench and filth.

Senator MORGAN.—What was that Company?

Mr. ROBINSON.—The same Company as I understand.

Senator MORGAN.—Holding a lease under Russia, was it?

Sir CHARLES RUSSELL.—They were holding a lease of Robben Island under Russia.

Mr. ROBINSON.—This the Tribunal will find verified by the affidavits of Captain Folger, and Captain Miner, which are to be found at pages 89 and 113.

Senator MORGAN.—Let me ask, was this massacre of the seals ever called to the attention of the Russian Government.

Mr. ROBINSON.—I cannot say—I do not know whether it was or was not; but it was a vessel in the employment of the Company.

Then the British Commissioners say this in paragraph 514:

We were also informed that Captain Hansen, afterwards master of the German schooner "Adele," was present on this occasion. Captain Miner, an experienced sealing-master of Seattle, also visited the island in the same year, and described to us the great heap of carcasses which he found on the island, and the manner in which the skins had been slashed in order to render them useless.

In other words, lest they should get into the hands of rival traders—into the hands of the Japanese—10,000 animals were slaughtered and their skins were destroyed.

I have also another extract here which carries out what I say as to the difficulty of securing anything like humanity to these poor beasts when in charge of such people as it is necessary to employ. In the Report upon the Fur-Seal Fisheries of Alaska (which has been referred to several times in the case here on other points), I find this sentence at page 32. It is evidence taken before Congress on the Fur-Seal Fisheries:

Q. Did the Company, in its administration of affairs there, seem to take care for the preservation of seal life as well as care over the natives?—A. Yes, Sir. We could not get the natives to try to preserve the seal life. Boys of twelve and fourteen years old would kill the seal pups. They say they are mild sort of people, but they never have a chance to abuse a dumb creature but what they do it. The only time I had any person incarcerated was a boy about eighteen years old. I took him and put him in the cellar of the store and kept him there two days for killing pup seals.

And so on. That is a small illustration of the difficulty which is found in securing humane treatment with the appliances at hand.

The place is far off; the climate is inhospitable; the drives take place at two o'clock in the morning in charge of people of this description, who, as Mr. Palmer has said, much prefer their beds to a cold wet foggy place at that time of the morning, and the Seals are hurried on with the result which is described.

Senator MORGAN.—What is the object of driving them so early in the morning.

Mr. ROBINSON.—Because they are killed at 7.

Senator MORGAN.—Why not at 12, or 1 o'clock?

Mr. ROBINSON.—Because of the heat, I fancy—I should think so; I cannot say I know.

Now my friend Mr. Coudert has talked about tampering with the law of nature, and he has told us that the law of nature can never be tampered with impunity; that the punishment is inexorable. I venture to say the greatest defiance of the law of nature we have heard of is to drive poor beasts not intended for progress on land for two or three miles over ground of the description which is given there—over stones so sharp and so pointed that even the natives themselves avoid them and take another path. That is tampering with the law of nature, and tampering with the law of nature in the very worst possible manner. It cannot be done with impunity, but the difficulty is that the punishment does not come to those who practice it, but to the animals themselves, and thousands of the race have been wasted simply by the methods adopted there.

Now pelagic sealing may have its objections—I think it has. There is some cruelty about the pursuit of all dumb animals. I only call attention to this because it is right to say that these charges are unjust and unreasonable when you charge pelagic sealers, many of whom are most respectable men—many of whom are supporting their

families by what I believe to be and what I have no hesitation in saying is a respectable employment—when you charge these men with all the crimes of the Decalogue, we have the right to turn to the conduct of those by whom the charge is made, and ask if it lies in their mouth to make it. I venture to say it does not.

I do not think, Mr. President, that there are any other topics which, in the view I have taken of this case—(the only view, as I said in the beginning, in which it seemed to me I could be of any possible use to the Tribunal)—it seems necessary for me to make. Recurring again to what I ventured to say with regard to International Arbitrations at the opening of my argument, I may add that when nations submit to a Tribunal of this character their rights, they mean their rights to be determined by law, and they mean a definite certain law which can be found by anyone laid down somewhere—a law, which may afford a sensible guide in the conduct of human affairs—not theories, not speculations, not the opinions of metaphysicians as to what the law ought to be, and as to what it would be well to make it, or what the law would be if human nature were changed; but their rights are to be determined by the law as we find it, which I take it is always, and on all occasions, the embodiment of what nations believe to be right and desirable, and what in practice can be enforced. We believe this claim, judged by these common sense principles, fails altogether, and we submit there is no reasonable ground—no legal ground—upon which the United States can claim either a property in these animals or an industry which they have a right to protect.

I do not desire to add any remarks upon the question of the right of protection, and merely for this reason: in the first place it has been very thoroughly discussed, and in the next place I entirely agree, if I may venture to say so, with what my learned friend the Attorney General has said. If it is their property, we have to respect it; and it is very little use (except as regards the past, and the seizures) to discuss it further. If they have a right of protection, or if they own the seals, their property and their right will have to be respected.

As regards the right to condemn and to seize vessels, I do not profess to be very familiar with the subject, but I should have thought it was absolutely clear that condemnation and seizure were things which can be enforced only by some positive maritime law. If a vessel of any nation, for instance, were to come to a port of England and steal some government property, it is inconceivable that there would be any right to follow that vessel, seize her, bring her in, and condemn her—condemn a vessel of the value of £10,000 because she had stolen £10 worth of property! You could only do that under some international law which gives the right according to the law of nations; and this can never be except in the case of piracy, or under some municipal law—some valid law—within the territory of the nation in fact, and which therefore can be enforced.

That, Mr. President, is all I think I can add with any hope of being of the least use; and I can only thank the Tribunal for the patience with which they have listened to what I am perfectly well aware must have been, to a large extent, repetition.

THE PRESIDENT.—Mr. Robinson, we think you have made very good use of what you were pleased to call (with I think excessive modesty) the scraps and leavings of your leaders; indeed you have made very good work from those, and we are thankful for it.

SIR RICHARD WEBSTER.—If General Foster will forgive me for a moment I want to refer to the statutes. Mr. Carter was good enough,

Mr. President, to give us the reference. The point will probably become unimportant from the point of view of my friend Mr. Phelps, but inasmuch as reference to it was made, it is important that the Tribunal should know, and have on the record, the whole facts with regard to it.

The District Court, as Mr. Carter told us—was established by the Act of 1884. And the reference to that will be found, as Mr. Carter said, on page 431 of the First volume of the Revised Statutes of the United States.

Section 3 of Chapter 53 (1884) 48th Congress, is as follows.—

That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established law.

Then Mr. Carter read one Section only, (saying there were others), from the definition of the jurisdiction of the District Courts. I desire that the others should be read, because as was surmised by several members of the Tribunal, the Court has a variety of jurisdictions, and from this section read it will be seen that there is not any foundation for the suggestion that the Court, was acting as a Prize Court.

The section is 563 of the Revised Statutes giving jurisdiction to the District Courts, and these are the jurisdictions:

The following is the text of section 563, of chapter 3, title XIII:

THE JUDICIARY.

The district courts shall have jurisdiction as follows.

First. Of all crimes and offences cognizable under the authority of the United States, committed within their respective districts, or upon the high seas, the punishment of which is not capital, except in the cases mentioned in section fifty-four hundred and twelve, Title "CRIMES".

Second. Of all cases arising under any act for the punishment of piracy, when no circuit court is held in the district of such court.

Third. Of all suits for penalties and forfeitures incurred under any law of the United States.

Fourth. Of all suits at common law brought by the United States, or by any officer thereof authorized by law to sue.

Fifth. Of all suits in equity to enforce the lien of the United States upon any real estate for any internal-revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest.

Sixth. Of all suits for the recovery of any forfeiture or damages under section thirty-four hundred and ninety, Title "DEBTS DUE BY OR TO THE UNITED STATES"; and such suits may be tried and determined by any district court within whose jurisdictional limits the defendant may be found.

Seventh. Of all causes of action arising under the postal laws of the United States.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. [And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.]

Ninth. Of all proceedings for the condemnation of property taken as prize, in pursuance of section fifty-three hundred and [seventy-six,] [eight,] Title "INSURRECTION".

Tenth. Of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.

Eleventh. Of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to his person or property, or of the deprivation of any right or privilege of a citizen of the United States by any act

done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty five, Title, "CIVIL RIGHTS".

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the constitution of the United States, or of any rights secured by the law of the United States to persons within the jurisdiction thereof.

Thirteenth. Of all suits to recover possession of any office, except that of elector of President, or Vice-President, Representative or Delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appears that the sole question touching the title to such office arises out of the denial of the right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude: *Provided*, That such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States, and secured by any law, to enforce the right of citizens of the United States to vote in all the States.

Fourteenth. Of all proceedings by the writ of *quo warranto*, prosecuted by any district attorney, for the removal from office of any person holding office, except as a member of Congress, or of a State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States.

Fifteenth. Of all suits by or against any association established under any law providing for national banking associations within the district for which the court is held.

Sixteenth. Of all suits brought by any alien for a tort "only" in violation of the law of nations, or of a treaty of the United States.

Seventeenth. Of all suits against consuls or vice-consuls, except for offences above the description afore said.

Eighteenth. The district courts are constituted courts of bankruptcy, and shall have in their respective districts original jurisdiction in all matters and proceedings in bankruptcy.

Therefore I point out that the Court has a variety of jurisdictions, and particularly the one under which these proceedings were taken, namely for penalties and forfeitures incurred under any law of the United States.

Then, Mr. President, by Sections 3059, 3067, 3084, and 3088, proceedings can be taken for a violation of those laws set out in the United States appendix by a Custom House or Revenue Officer who is entitled to institute, under this Statute, to take the very proceedings which were instituted in the Court of Alaska for penalties for breaches of those Statutes. Of course I am not going to repeat my argument—I only desire that the Tribunal should be in full possession of the fact that the Court had jurisdiction to act and did act under these Sections to which I have referred; and I think the idea that it was acting as a Prize Court will not be found to be well founded. I am aware that my friends do not contend for it, but I thought it right to mention it.

Section 3059, of chapter 10 Title XXXIV, collection of Duties, is as follows:

It shall be lawful for any officer of the customs, including inspectors and occasional inspectors, or of a revenue-cutter, or authorised agent of the Treasury Department, or other persons specially appointed for the purpose in writing by a collector, naval officer, or surveyor, to go on board of any vessel, as well without as within his district, and to inspect, search, and examine the same, and any person, trunk, or envelope, on board, and to this end to hail and stop such vessel if under way, and to use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby, or in consequence of which such vessel, or the merchandize, or any part thereof, on board of or imported by such vessel, is liable to forfeiture, to make seizure of the same, or either or any part thereof, and to arrest, or in case of escape, or any attempt to escape, to pursue and arrest any person engaged in such breach or violation.

Section 3067: It shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue-cutters, to go on board of vessels in any port of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests, and of examining and searching the vessels; and those officers respectively shall have full access to the cabin, and every other part of a vessel.

Section 3083: Whenever any seizure shall be made for the purpose of enforcing any forfeiture, the collector, or other person causing such seizure to be made, shall immediately give information thereof to the solicitor of the Treasury.

Section 3084: The several collectors of customs shall report within ten days to the district attorney of the district in which any fine, penalty, or forfeiture may be incurred for the violation of any law of the United States relating to the revenue, a statement of all the facts and circumstances of the case within their knowledge, or which may come to their knowledge from time to time, stating the names of the witnesses and the provisions of the law believed to be violated, and on which a reliance may be had for condemnation or conviction. If any collector shall in any case fail to report to the proper district attorney, as prescribed in this section, such collector's right to any compensation, benefit, or allowance in such case shall be forfeited to the United States and the same may, in the discretion of the Secretary of the Treasury, be awarded to such persons as may make complaint and prosecute the same to judgment or conviction.

Section 3088: Whenever a vessel, or the owner or master of a vessel, has become subject to a penalty for a violation of the revenue laws of the United States, such vessel shall be holden for the payment of such penalty, and may be seized and proceeded against summarily by libel to recover such penalty.

The only other matter I ought to mention is with reference to an enquiry made by Mr. Justice Harlan as to the third projet for the Treaty mentioned at page 74 of the second volume of the Appendix to the British Case; and I think I cannot do better (inasmuch as Mr. Foster indicated the other day for the first time that he desired particularly to have the paper) than tell the Tribunal, so that it may be put on record, exactly what happened. I will read from an Official Document from the Foreign Office. You, Mr. President, will remember that Mr. Justice Harlan asked me whether we could produce it. In the letter of the 8th December 1824, four documents are referred to. First: the projet which Sir Charles Bagot was authorized to sign and conclude, 2nd, the "contre-projet" drawn up by the Russian Plenipotentiaries, 3rd, a despatch from Count Nesselrode accompanying the transmission of the "contre-projet" to Count Lieven. That I have not got.

Mr. Justice HARLAN.—That is in the papers.

Sir RICHARD WEBSTER.—No, that document is not in the papers.

The PRESIDENT.—There is a second Russian projet.

Sir RICHARD WEBSTER.—The projet as it stands, according to the observations of the despatch, is enclosed. That is referred to at the bottom of page 74, and I will say in passing that the document cannot be of any substantial importance because we have got all the alterations which were to be embodied in it, suggested in this very letter of the 8th December 1824, and therefore we have got the substance.

But this is how the matter stands.

Although the original of Mr. G. Canning's despatch to Mr. S. Canning, n° 1 of December 8th 1824, which appears on pp. 72-75 of Volume II of the Appendix to the British Case, was found in the archives of the Foreign Office, no trace could be discovered of the documents referred to as being enclosed therein, among which was the "Project" of the new Treaty with Russia. Two of these inclosures namely, the "Project" of Treaty sent to Sir C. Bagot in 1824—that is n° 1, p. 72—and the "Contre-projet" by the Russian Plenipotentiaries in the same year were forthcoming as inclosures in other Despatches, and are given at pp. 62 and 68 respectively of vol. II of the Appendix to the British Case.

The PRESIDENT.—You read part of those I believe?

Sir RICHARD WEBSTER.—Yes. I read them all or nearly all. The document, as I might remind the Tribunal, about which Mr. Justice Harlan asked me, was the third draft embodying the suggestions of this letter.

But the two remaining inclosures namely, the Despatch from Count Nesselrode accompanying the transmission of the "Contre-projet" to Count Lieven, and the "Project" of the new Treaty could not be found. It was considered of great importance that these documents should, if possible, be obtained in order to make the

correspondence complete, and, all efforts to trace them in the archives of the Foreign Office having failed, a telegram was sent by Lord Salisbury to Mr. Howard, the British chargé d'affaires at St-Petersburgh dated June 20th 1892, No. 23 [that was when we were preparing the case] of which the following extract is the only portion bearing on the point in question.—“We should be glad to have copy of the Despatch from Count Nesselrode to Count Lieven inclosed in Mr. Canning’s despatch to Mr. S. Canning, n° 1 of December 8th 1824, and of the new draft of Convention also enclosed in that despatch”. Mr. Howard replied by a telegram dated St. Petersburg June 22nd, 1892, n° 40, of which the following is the only material extract.—“None of Mr. Canning’s despatches to Mr. S. Canning can be found in archives”. All efforts therefore failed, both at London and St-Petersburgh, to trace the missing documents.

I am quite satisfied that the explanation will be satisfactory to the Tribunal. I may merely mention from my own knowledge that I know of the efforts made to find the document; but I also discovered from perusing these documents most carefully when the Case was framed, that this document that we should have liked to have had could not affect the question, because it was stated, in the letter, to be a document which simply embodied the alterations in the projet as they would stand according to the observation of the despatch.

The PRESIDENT.—The fourth document is the English draft.

Sir RICHARD WEBSTER.—That is the one I am referring to.

The PRESIDENT.—Mr. Justice Harlan asked for the Russian.

Sir RICHARD WEBSTER.—No, Mr. Justice Harlan asked for this particular document Mr. President—the English draft which Mr. George Canning sent to Mr. Stratford Canning, as it would stand according to the observation of this despatch.

The PRESIDENT.—The substance of it is in the despatch itself.

Sir RICHARD WEBSTER.—Yes.

Mr. Justice HARLAN.—Mr. Stratford Canning in his letter to Mr. George Canning, stating the signing of the Treaty, indicates that there was some alteration although he says it is in strict conformity with the spirit and substance of the contre-projet to Count Lieven, although there was a slight alteration which might have been made.

Sir RICHARD WEBSTER.—It is perfectly true that Mr. Stratford Canning on referring to the Treaty speaks of the Treaty as being in accordance with that of this draft although there was a slight alteration in some particular passage.

Mr. FOSTER.—I have here a paper which I propose to lay before the Tribunal:

The Government of the United States, in the event that the determination of the High Tribunal of certain questions described in the seventh article of the Treaty as the foregoing questions as to the exclusive jurisdiction of the United States should, as, mentioned in said seventh article, “leave the subject in such a condition that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea”, submits that the following Regulations are necessary and that the same should extend over the waters hereinafter in that behalf mentioned:

First. No citizen or subject of the United States or Great Britain shall in any manner kill, capture or pursue anywhere upon the seas within the limits and boundaries next hereinafter prescribed for the operation of this regulation, any of the animals commonly called fur-seals.

Second. The foregoing regulation shall apply to and extend over all those waters, outside the jurisdictional limits of the above-mentioned nations, of the North Pacific Ocean or Behring Sea which are north of the thirty-fifth parallel of North latitude, and east of the one-hundred and eightieth meridian of longitude West from Greenwich. Provided, however, that it shall not apply to such pursuit and capture of said seals as may be carried on by Indians dwelling on the coasts of the territory either of Great Britain or the United States for their own personal use with spears in open canoes or boats not transported by or used in connection with, other vessels, and propelled wholly by paddles, and manned by not more than two men each, in the way anciently practiced by such Indians.

Third. Any ship, vessel, boat or other craft (other than the canoes or boats mentioned and described in the last foregoing paragraph) belonging to the citizens or subjects of either of the nations aforesaid which may be found actually engaged in the killing, pursuit or capture of said seals, or prosecuting a voyage for that purpose, within the waters above bounded and described, may, with her tackle, apparel, furniture, provisions and any sealskins on board, be captured and made prize of by any public armed vessel of either of the nations aforesaid; and in case of any such capture may be taken into any port of the nation to which the capturing vessel belongs and be condemned by proceedings in any court of competent jurisdiction, which proceedings shall be conducted so far as may be, in accordance with the course and practice of courts of admiralty when sitting as prize courts.

June 8th, 1893.

I hand this to the Secretary, and furnish the gentlemen on the other side with a copy.

The PRESIDENT.—Those are the regulations you propose?

Mr. FOSTER.—That is the form of regulations proposed by the United States.

The PRESIDENT.—That is to be taken as an addition to the conclusions the American counsel had come to before?

Mr. CARTER.—It is putting them in form.

Mr. FOSTER.—I now desire to submit the substitute proposed by the Government of the United States for the findings of fact submitted by the Government of Great Britain.

Sir CHARLES RUSSELL.—It is a great pity you did not discuss both these questions with us. We had no notice of this at all.

Mr. PHELPS.—We will not discuss them now. These are only presented for your information.

Mr. FOSTER.—We are pursuing the same course as that adopted by counsel for the British Government in this matter.

Sir CHARLES RUSSELL.—Oh no.

Mr. PHELPS.—Mr. President. . .

Sir CHARLES RUSSELL.—I am not interposing, Mr. Phelps, except to say that it would have been more convenient to talk about these things outside.

The PRESIDENT.—Has the British counsel any objection to the Court receiving these documents?

Sir CHARLES RUSSELL.—No, Sir.

Mr. FOSTER.—(Reading).

“Substitute proposed by the Government of the United States for findings of facts submitted by the Government of Great Britain:”

Sir RICHARD WEBSTER.—Is this a copy of our document?

Mr. FOSTER.—We propose it as a substitute for yours.

Sir RICHARD WEBSTER.—These are the substituted ones; are they?

Mr. CARTER.—So far as they differ.

Mr. FOSTER.—They are as follows:

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the said Schedule, were made by the authority of the United States Government. Which and how many of the vessels mentioned in said schedule were in whole or in part the actual property of British subjects, and which and how many were in whole or in part the actual property of American subjects, is a fact not passed upon by this Tribunal. Nor is the value of said vessels or contents, or of either of them, determined.

2. That the seizures aforesaid were made upon the sea more than ten miles from any shore.

3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States instructions, a copy of one of which is annexed hereto, marked “A,” and that the others were, in all substantial respects, the same; that in all the instances in which proceedings were had in the District Courts of the United States

resulting in condemnation, such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked "B" and that the libels in the other proceedings were in all substantial respects the same; that the alleged acts or offences for which said several searches and seizures were made were in each case done or committed upon the seas more than ten miles from any shore; and that in each case in which sentence of condemnation was had, except in those cases when the vessel was released after condemnation, the capture was adopted by the Government of the United States. That the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed upon the seas more than ten miles from any shore.

4. That the several orders mentioned in said Schedule warning vessels to leave Behring Sea were made by public armed vessels of the United States, the commanders of which had, at the several times when they were given, like instructions as mentioned in finding 3, above proposed, and that the vessels so warned were engaged in sealing or prosecuting voyages for that purpose.

5. That the said several searches, seizures, condemnations, confiscations, fines, imprisonments and orders were not made, imposed or given under any claim or assertion of right or jurisdiction except such as is submitted to the decision of the Arbitrators in Article VI of the Treaty of Arbitration.

6. That the District Courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel as mentioned in the Schedule to the Case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of Courts of Admiralty, including the prize jurisdiction.

ANNEX "A."

[See British Counter Case, Appendix, Vol. I, p. 73.]

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, April 21, 1886.

SIR: Referring to Department letter of this date, directing you to proceed with the revenue-steamer "Bear," under your command, to the Seal Islands, etc., you are hereby clothed with full power to enforce the law contained in the provision of Section 1956 of the United States Revised Statutes, and directed to seize all vessels and arrest and deliver to the proper authorities any or all persons whom you may detect violating the law referred to, after due notice shall have been given.

You will also seize any liquors or fire-arms attempted to be introduced into the country without proper permit, and the provisions of Section 1955 of the Revised Statutes, and the Proclamation of the President dated 4th February, 1870.

Respectfully yours,

C. S. FAIRCHILD, *Acting Secretary.*

Captain M. A. HEALY,
Commanding Revenue-steamer "Bear," San Francisco, California.

ANNEX "B."

[See British Case, Appendix, Vol. III, U. S. N^o. 2, 1890, p. 65.]

In the District Court of the United States, for the District of Alaska.—August Special Term, 1886.

To the Honourable LAFAYETTE DAWSON,
Judge of said District Court:

The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in court in his proper person, in the name and on behalf of the said United States, against the schooner "Thornton," her tackle, apparel, boats, cargo, and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows;—

That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, herefore, to wit, on the 2d day of August, 1886, within the limits of Alaska territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel, commonly called a schooner, "Thornton," her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:—

furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:—

That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore-mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

Wherefore the said Attorney prays that the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

M. B. BALL,

United States District Attorney for the District of Alaska.

The PRESIDENT.—Those are the questions of fact which are submitted to us in virtue of Article VIII?

Mr. PHELPS.—Yes, Sir.

Mr. CARTER.—The Government of Great Britain submitted certain findings which they desired the Tribunal to make.

The PRESIDENT.—In virtue of this article.

Mr. CARTER.—This paper is submitted by way of substitution and amendment, in certain particulars agreeing with some of those proposed findings, inserting other new ones, and amending certain ones of them, or proposing amendments to them.

Senator MORGAN.—Allow me to inquire, when the two Governments agree as to a finding, is that considered as being obligatory upon this Tribunal?

Mr. CARTER.—The Tribunal must determine that for itself, I suppose.

The PRESIDENT.—I will ask when those new questions will be argued. I suppose they are to be taken into the general, final argument of Mr. Phelps.

Mr. PHELPS.—Oh yes. We submit them now, in order that they may be passed upon or considered by my learned friends, if they desire it. We will have something to say, or at least we may have something to say, in respect to them.

The PRESIDENT.—That would be a new argument on the English side, if they did that. The British counsel were expected to speak now on regulations, but perhaps they will take this matter into consideration in the argument on the question of regulations, so as not to make two new arguments. You understand what I mean, Sir Charles?

Sir CHARLES RUSSELL.—Perfectly, sir.

The PRESIDENT.—I mean to say, if you wish to add new observations on the new submission by the United States, you will be kind enough to embody these observations in the same argument that you are going to make upon regulations.

Sir CHARLES RUSSELL.—There will be no difficulty about that, sir. As I have said, these have been handed to us now for the first time; and of course we shall require to consider them.

The PRESIDENT.—Then perhaps you will argue them after your argument on Regulations. You are going to begin on regulations immediately I believe?

Sir CHARLES RUSSELL.—I shall be able to deal with them in the course of my argument upon Regulations.

The PRESIDENT.—I think that will be the better way.

Sir CHARLES RUSSELL.—Mr. Foster, will you kindly tell me where Annex "A" to the paper you last read is to be found.

Mr. FOSTER.—It is in the British Counter Case, Appendix, Volume I, page 72; and Annex "B" is in the British Case, Appendix, Volume III, U. S. No. 2, 1890, page 65.

The Tribunal here adjourned for a short time.



Bering Sea Tribunal of Arbitration

53D CONGRESS, }
2d Session. }

SENATE.

{ Ex. Doc. 177,
Part 14. }

Law
Internat
3511 pp

FUR SEAL ARBITRATION.

PROCEEDINGS

OF THE

TRIBUNAL OF ARBITRATION,

CONVENED AT PARIS

UNDER THE

TREATY BETWEEN THE UNITED STATES OF AMERICA AND GREAT
BRITAIN CONCLUDED AT WASHINGTON FEBRUARY 29, 1892,

FOR THE

DETERMINATION OF QUESTIONS BETWEEN THE TWO GOV-
ERNMENTS CONCERNING THE JURISDICTIONAL
RIGHTS OF THE UNITED STATES

IN THE

WATERS OF BERING SEA.

VOLUME XIV.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1895.



FUR-SEAL ARBITRATION.

ORAL ARGUMENT

ON

REGULATIONS

BY

SIR CHARLES RUSSELL, Q. C., M. P.,
HER BRITANNIC MAJESTY'S ATTORNEY-GENERAL.

B S, PT XIV—1

1



THIRTY-FIFTH DAY, JUNE 8TH, 1893.

SIR CHARLES RUSSELL.—Mr. President, it is with a sense of relief that I find myself approaching the concluding subject upon which it will be my duty to address this Tribunal. You, Sir, will have gathered from the arguments of my learned friends and myself that in our apprehension of the questions with which the Tribunal has to deal, this is the only one which deserves at the hands of this Tribunal serious consideration or which ought to give this Tribunal serious trouble. I wish, at the outset, to explain the position which my argument takes or proposes to take in the consideration of the general question. You, Sir, will have observed that in presenting the Case upon what has been called the questions of right, that I have had all along the most valuable and unstinted aid of my learned friend, Sir Richard Webster, and my other learned friends who are with me, and with the assistance which they were good enough to render to me, I took upon myself the main burthen of presenting fully and at length the case on the part of Great Britain relative to those questions of right. As regards the question of Regulations, I propose only to address the Tribunal upon some broad questions of principle which we submit ought to be borne in mind by the Tribunal in considering the question of Regulations and in deciding upon the plan which those Regulations should pursue. In that view you will perceive, Mr. President, that it becomes necessary at the very outset I should determine upon what hypothesis I am to consider the question of Regulations.

Am I to consider that question of Regulations as if the question of right were undetermined? Am I to consider the question of Regulations as if the United States were to be supposed to have legal rights such as are intended to be presented under the five questions of Article VI, or am I to approach the question of Regulations upon the supposition that those questions have been determined adversely to the contention of the United States? I need not tell you, Sir, what is the only hypothesis upon which we can argue, or pretend to argue, the question of Regulations at all. It is upon the hypothesis clearly and distinctly that this Tribunal has arrived or shall have arrived at the determination that, so far as legal right is concerned, the United States has none. I therefore shall argue the question as I conceive Article 7 of the Treaty contemplated that the Treaty should be argued, namely, upon the assumption that the United States has no legal property in the fur seal individually or collectively, and, in the next place upon the hypothesis that no right of the United States in regard to those industries so called upon the Islands is invaded by the pursuit of pelagic sealing. The 7th Article, as I conceive, suggests that that is the contingency contemplated by the Treaty itself it says:

“If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to the Behring Sea, the Arbitrators shall then determine what concurrent Regulations”, and so forth, “are necessary.”

That then, Sir, is the hypothesis upon which I proceed to consider the question of Regulations.

I cannot better express myself in this regard than is expressed at page 159 of the British Counter Case, and with the permission of the Tribunal I will read some passages from that Counter Case. It is necessary it is there said in chapter 9.

in approaching the consideration of the question of Regulations (if any are to be made) to recall its relation to the five points raised by the VIth Article of the Treaty, bearing in mind that it is only in the event of those five questions having been so determined as to render the concurrence of Great Britain necessary that the authority of the Arbitrators as to Regulations arises (Article VII).

What, then, does that determination involve? It involves the recognition of the proposition that Behring Sea is to be regarded as a sea open to the commerce and to the fishermen of the world, and that the United States have no exclusive right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary 3-mile limit.

It follows that the rights and interest of the United States in fur-seals frequenting such islands do not differ from the rights and interests of any other portion of mankind, except in so far as the territorial possession of those islands by the United States gives to their nationals the exclusive right of capture in territorial waters, and the advantages derived from the fact that the seals congregate in large numbers on those islands, thereby giving the opportunity for their slaughter.

I stop there for a moment.

Therefore, to begin with, the question is to be approached and only to be approached, as we conceive upon this basis of fact that the only peculiar or special right which the United States have is the right which they possess *ratione soli*—the right that they possess by reason of the possession of the islands which gives them facilities for the capture of these animals *feræ naturæ*, but gives them no other right of any different character than that possessed by all mankind. They have the right to take them *ratione soli* exclusively on the Islands. They have the right to exclude anybody else from trespassing on that domain. They have the right to take them exclusively within the three mile limit and to exclude others from that zone but outside that zone, and on the high sea, the rights of all are equal and the Nationals or lessees of the United States Islands have no other greater or different right than that possessed by the nationals of any other Country on the face of the globe whose opportunities and whose interests may suggest them pursuing pelagic sealing upon the open sea.

Now if that be so, and it is upon that basis and upon that basis alone, that I and my learned friends will argue this question at all, two questions will arise, first what are the rules which you may make or which you can make in other words what is the extent of your jurisdiction and authority, and the next question is, what are the rules which in fairness and equity you ought to make. As to each of those questions I propose to say a few words.

The questions are, what is the extent of your jurisdiction as to rules, and next to what extent, in what direction ought you to exercise that jurisdiction. In other words, what can you do is the first question, and what ought you to do is the second question.

Now it is obvious that the first question, namely, the extent of your jurisdiction, depends on the Treaty. You can only exercise the jurisdiction that the parties have given you. The discharge of your duty, which you have taken upon yourself, is confined to and defined by the terms of that document under which or from which your authority springs. I am only concerned, Mr. President, to deal with one point upon the question of the extent of your jurisdiction, and that point is this. I will convey it to your apprehension in a sentence, in a moment,

so that you may more easily follow it, whether your jurisdiction, in fact extends beyond what has been called the area of dispute between the United States and Great Britain; in other words, whether your jurisdiction extends beyond Behring Sea. When I talk of the Behring Sea you will understand that I deal with that part of the Behring Sea east of the boundary line—the portion of that part of Behring Sea, east of the boundary line, being claimed by the United States at one time, and in one branch of their argument, as practically part of their territory ceded to them by Russia.

Senator MORGAN.—You are not speaking of the North Pacific Ocean.

Sir CHARLES RUSSELL.—Well, Sir, I do not at this moment use the phrase “part of the North Pacific,” though Behring Sea is part of it. I speak of it as meaning the Behring Sea itself.

Now I wish before I deal with this question, and having made my point I do not intend to dwell upon it for reasons which will be apparent in a moment. I wish before I argue the point to meet the charge which my learned friend Mr. Carter felt himself warranted in making when dealing with the contention which is raised in the Counter Case and Argument on the part of Great Britain that the jurisdiction of this Tribunal was in fact limited to Behring Sea. My learned friend said (he did it with his usual courtesy, and he will understand that I am not making it a matter of complaint) that to so argue on the part of Great Britain was to convict Great Britain of insincerity in her desire to preserve the fur-seal species. My learned friend went on to say that the facts made it apparent that Regulations were needed outside Behring Sea and south of what has been called the Aleutian chain as much if not more than inside the area of Behring Sea itself. I meet my learned friend's charge of insincerity in the way in which it has been all along met. We have been (as correspondence, which I will not refer to in detail, has made apparent) from the first anxious so soon as the question of right was settled and out of the way to deal comprehensively with the question of Regulations in relation to the preservation of the fur-seal without limit as to any particular seas or parts of particular seas or islands. We were anxious to gain the co-operation of other great Powers who had an interest in this question. We were anxious that the scheme of Regulations should not be confined to the seas, but should extend to the breeding places of these islands where Regulations were at least as much needed as elsewhere, and given the conjunction of the Powers who were interested, and given authority to a Tribunal to deal comprehensively at sea and on land we have all along been willing, and we are now willing, to give the fullest authority to any Tribunal to deal with any question outside this Treaty. This is no new offer. It is to be traced in the correspondence of Lord Salisbury when he held the Office of Foreign Minister and from the consistent tone which he evinced there has been no departure by any successor in Office.

Senator MORGAN.—You said to deal with any question outside this Treaty. I suppose you meant outside the territorial limits—outside Behring Sea.

Sir CHARLES RUSSELL.—I did, Sir, I meant without any restriction at all there as to sea or land. I therefore meet my learned friends charge or suggestion of insincerity in this way, and indeed I might on my own part—not that I care much for the argument known as the *argumentum ad hominem*—retort upon the United States and their advisers, I do not doubt the personal sincerity of my learned friends at all, but if they were really representing the unselfish views which

those who instruct them profess in this matter, there would be, I take leave to say nothing derogatory to the position of the United States—nothing, at least, unworthy of its great position and authority in submitting as part of a great scheme the question of Regulations upon the Islands as well as the question of Regulations at sea.

Great Britain has not thought it unbecoming, the United States has not thought it unbecoming its importance and dignity to submit to this Tribunal the regulation of important rights in the open sea; and I could see, therefore, nothing derogatory to the United States in their submitting also to an impartial Tribunal an adjustment of this question which should embrace the Islands also. I admit, because I wish, at least, that my argument should be clear, that there is no authority under this Treaty in this Tribunal to enjoin, as authoritative relations, any scheme or system of management upon the Islands themselves as what I may call a directly enforceable act of this Tribunal. I shall presently, however, have to submit in another connection, while they have not that power directly, they have the power indirectly; and I shall submit reasons why that indirect power should be exercised.

Senator MORGAN.—I do not suppose that anybody contends that there is any self-executing power submitted to this Tribunal for establishment or decision? It must be done by the assistance of some Government?

Sir CHARLES RUSSELL.—Quite so; no doubt, that is a consideration I shall, of course, deal with when I come to the suggestion at a later stage.

With that preliminary statement, I come back to the question; Is the jurisdiction of this Tribunal as to Regulations restricted to the area in dispute, namely the eastern part of Behring Sea?

Now, Mr. President, you will recollect that, in my former argument upon the question of right, I respectfully insisted upon, in argument, the meaning which I conceived was to be given or ought to be given to Question 5 of Article VI. You will recollect that I then insisted that that was not only, as Article VII showed it to be, a question of exclusive jurisdiction claimed by the United States, but I endeavoured to show that it was a question of exclusive jurisdiction of the same character as was put forward in the preceding four Questions, namely a question of exclusive jurisdiction in the eastern waters of Behring Sea, founded upon the contention that those eastern waters were part of the territory ceded by Russia. I am not going to repeat that argument because it would be but a mere repetition of the argument that I then addressed, that would be equally applicable to the subject-matter that I am now speaking about; and I will content myself by asking the Members of the Tribunal to take a note of the fact that that argument is to be found beginning on page 945 and between that page and page 956 of the Print of the argument. That is my oral argument.

Now, there is no doubt in the world that Lord Salisbury, as I have already intimated, in some of his correspondence was contemplating and was, I may add, recognising the advisability of the consideration of Regulations outside Behring Sea; or, perhaps, to put it more correctly, not limited to the eastern waters of Behring Sea. I am not going, for the reasons I have given because I speak of the thing without going into minute details, to refer the Tribunal to the correspondence; that will be dwelt upon by minds coming freshly to the consideration of this question, my learned friends, Sir Richard Webster and Mr. Robinson. But I wish to say, though that is so, it will also be found that that was in connection with the subject-matter to which I have

already referred; namely, the contemplation of a scheme to which not only the United States and Great Britain should be parties, but to which, among others, Russia should be party, and to which it was hoped that Japan might be a party; and it was in that view, and that view only, that a comprehensive scheme embracing the whole subject-matter of nationals of all Powers as to whom it could probably be predicated they would or might embark in pelagic sealing, it was in that connection that that wider reference of his was made.

But, in justification of what I am submitting, there is one passage, and one passage only, to which I must refer. It is a short passage, but an important one. I will not refer to the original source from which the passage is taken, but I will read it from the place in which it appears in my Argument addressed to this question. It is at page 946-947; and it is the communication of Mr. Wharton. It is a letter of the 4th of June, 1891, and is to be found at page 306 of the United States Appendix, Volume I:

The fourth clause of the proposal of Her Majesty's Government, limiting the taking effect of the *modus vivendi* upon the assent of Russia, presents what seems to the President an insuperable difficulty, as adherence to that suggestion by Her Majesty's Government will, in his opinion, prevent the conclusion of any agreement, and will inevitably cause such a delay,

and then I observe that the object of Sir Julian Pauncefote was, by including Russia, to have an extension of the *modus vivendi* so as to prohibit the killing in other parts of the Behring Sea westward of the line of demarcation; and this is the way that suggestion is met by Mr. Wharton, and this is the passage in the letter:

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring's Sea eastward of the line of demarcation described in our Convention with Russia, to which reference has already been made, and that Russia has never asserted any rights in these waters affecting the subject-matter of this contention, and cannot, therefore, be a necessary party to these negotiations, if they are not now improperly expanded. Under the Statutes of the United States, the President is authorized to prohibit sealing in the Behring's Sea within the limits described in our Convention with Russia, and to restrict the killing of seals on the islands of the United States; but no authority is conferred upon him to prohibit or make penal the taking of seals in the waters of Behring's Sea westward of the line referred to or upon any of the shores or islands thereof.

Now, I beg your respectful attention to this concluding passage:

It was never supposed by any one representing the Government of the United States in this correspondence or by the President, that an agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective Governments.

I need not say that the subject of that correspondence was exclusively the eastern waters of Behring Sea. There is another passage in that letter, a little lower down, on the same page in the book in which the letter is set out *in extenso*, which runs thus:

This he would very much regret,
(that is to say, regret that the matter should go off)
and he confidently hopes that a reconsideration will enable Lord Salisbury to waive
(I repeat the word *wave*)

the suggestion of Russia's participation in the Agreement, and the inclusion of other waters than those to which the contention between the United States and Great Britain relates.

Senator MORGAN.—What is the date of that letter?

Sir CHARLES RUSSELL.—June the 4th, 1891; the Treaty itself being concluded in February, 1892,—the Treaty itself was signed on the 18th

of December, 1891, and the ratification signed at Washington February, 1892: and ratifications exchanged on the 7th of May, 1892.

General FOSTER.—The Agreement was signed in December.

Sir CHARLES RUSSELL.—I have just said so.

General FOSTER.—No; you used the word "Treaty", I think.

Sir CHARLES RUSSELL.—You mean they were put together, and not in one document before? That is quite right.

Now I seriously submit, Mr. President, that in view of that correspondence in June 1891, from which I submit there has been no departure up to the time of the Treaty, that the actual area in dispute—the only subject matter to which the contest and correspondence related, were the eastern waters of Behring Sea and the eastern waters of Behring Sea only. In the same argument to which I have already given you the reference I also pointed out how the *modus vivendi* in the April of the following year, 1892, supports this contention. I pointed out by article V the question of damage or claim for compensation by the United States on the one hand if its rights should be affirmed by Great Britain, and, on the other, if the United States rights should not be affirmed, was confined to the abstaining from the exercise of the right of taking seals in Behring Sea, and did not extend beyond Behring Sea, and in view of this conjunction of circumstances, I submit that up to this time—in the correspondence at least—it is demonstrable that both parties to these negotiations were *ad idem* as to what was the matter in contest between them, and that was Behring Sea and Behring Sea only. After this correspondence and when we get to March 1892—I think it is the only other reference that I shall have to make—there is a letter from Mr. Wharton to Sir Julian Pauncefote at page 350 of the first volume of the Appendix to the Case of the United States, in which he says:

I am directed by the President to say in response to your two notes of February 29th. and March 2nd, that he notices with the deepest regret the indisposition of Her Majesty's Government to agree upon an effective *modus* for the preservation of the seals in the Behring Sea, pending the settlement of the respective rights of that Government and of the Government of the United States in those waters and in the fur-seal fisheries therein.

Then follows this very explicit passage:

The United States claims an exclusive right to take seals in a portion of the Behring Sea, while Her Majesty's Government claims a common right to pursue and take the seals in those waters outside a three-mile limit. This serious and protracted controversy it has now been happily agreed shall be submitted to the determination of a Tribunal of Arbitration, and the Treaty only awaits the action of the American Senate.

Now leaving this to my learned friends, approaching this matter as they will do with completely fresh minds, because they have not discussed this as I did in discussing the true construction of question 5, I pass on with one or two observations, which indeed become more pointed now that we have heard the suggested scheme which I will not at this moment characterise, gravely presented by the Agent of the United States in the person of my friend General Foster, who proposes forsooth a scheme without limit as to time, not for the regulation of rights upon the high seas, but for the extinction of rights upon the high seas and without qualification, or without reservation going down as well as I followed it, for I have not yet read it to the 35° of latitude. So that the scheme is from the Arctic Ocean. My learned friend, Sir Richard Webster, will trace the line of demarcation.

[Sir Richard Webster did so]. So that while the area in dispute was Behring Sea and the question whether we were there outside the ordi-

nary territorial zone of three miles, and deprived of the general right of fishing which we claimed as belonging to all mankind without reservation—my learned friends upon the supposition that the concurrence of Great Britain is necessary in Regulations, and that therefore Great Britain has rights involved propose a scheme of Regulations which practically mean very much worse for British interests or the interests of Canadian sealers than if we had never entered into any contest or treaty at all upon the question of right.

Let me point out and assume that Great Britain had chosen to say, "Well, we will not trouble to contest whether Russia did or did not assert and exercise rights prior to the time of the cession of Alaska—we will not trouble to discuss whether those rights were recognized or conceded by Great Britain—we will not trouble to discuss whether the phrase "Behring Sea" was included in the Pacific Ocean—we will not trouble to discuss whether all the rights that Russia had did not pass unimpaired to you—we will not trouble to discuss if you had rights giving you property or protection in fur seals frequenting Behring Sea: let the whole thing go by the board; can any body doubt what the result would be? It would be simply and solely an assertion of the territorial jurisdiction in Behring Sea, not exceeding one inch outside the three-mile limit. Therefore the proposition is now advanced, as I understand from my hasty hearing of it—it is one which puts Great Britain and her colonists in an infinitely worse position than the one they would have been in if the question of right had not been raised at all.

Now, reserving to my learned friends the right to enforce by further arguments this important point, I pass now, and I assume, contrary to my submission which I hope will be seriously and gravely canvassed by the Members of the Tribunal—without admitting for the purpose of what I am about to say that the Tribunal has—only for the purpose of argument do I admit it—authority outside as well as inside Behring Sea—upon that hypothesis the question will then arise, which is the second question to which I adverted, what Regulations ought in fairness to be made and to what extent and in what manner, with what limitations, and on what conditions ought that jurisdiction of the Tribunal to be exercised both inside and outside Behring Sea.

Again I say that this question is to be approached as I suggested I was endeavoring to approach it upon the basis that except rights as territorial owners of the Islands the United States or its lessees or its nationals have no right differing in kind or degree from the rights of the nationals of Great Britain, in other words the Canadian Colonists or indeed the nationalists of any other Power. In that condition of things simply the sense and spirit of equity in each member of the Tribunal will go with me in saying that if that be the true and just basis upon which to regulate, the rules to be laid down must be just rules, marked by considerations of equity and must have regard to the fact that there are rights equal in degree and of the same character—rights of fishing in the open sea—possessed by the subjects of Great Britain, just as they are possessed by Citizens of the United States.

Now, Mr. President, when I come a little closer to the consideration of what the Regulations ought to be, I find myself under this difficulty. I find that such a cloud of prejudice has been sought to be raised upon this subject of pelagic sealing that it is very difficult for this Tribunal until it is sought at least to dispel some portion of that prejudice to approach the consideration of the question of Regulations with unprejudiced and impartial minds, and indeed apart altogether from any prejudice

that might be engendered by the string of vituperative epithets that has been hurled at the pelagic Sealers. It is important to arrive at some definite conclusion, if one can, as to what is in truth the part which pelagic sealing has played in what is called the depletion of the seals in and resorting to Behring Sea because of course until you have to some extent realized with some approximation at least to accuracy what is the true measure of any mischief to the race of fur-seals caused by pelagic sealing you will be without at least some of the data absolutely necessary to assist you in determining what rules regulating sealing ought to issue from this Tribunal.

Senator MORGAN.—As I understand, you insist that the Tribunal has no right to establish Regulations to operate outside the Behring Sea. It is scarcely worth while to argue a question of that kind.

Sir CHARLES RUSSELL.—If you, Mr. Senator, will tell me that you accept that view, I will proceed at once, but I cannot assume that you, much less the other Members of the Tribunal will do so.

Senator MORGAN.—Your insistence is that this Tribunal has no jurisdiction to make any regulations for pelagic hunting outside Behring Sea.

Sir CHARLES RUSSELL.—Yes, that is my first.

Senator MORGAN.—That is the attitude of the British Government.

Sir CHARLES RUSSELL.—That is my first proposition.

Senator MORGAN.—Is that the attitude of the British Government.

Sir CHARLES RUSSELL.—I do not quite know what that means, Sir. That is the argument. I submit.

Senator MORGAN.—As representing the Government.

Sir CHARLES RUSSELL.—I am here in the character in which I have all along appeared.

Senator MORGAN.—If it is denied that this Tribunal has any jurisdiction to establish Regulations for pelagic hunting outside Behring Sea, then another very important question would arise which, of course, we have to determine upon our own responsibility, whether we can enter upon that question.

Sir CHARLES RUSSELL.—Upon which question?

Senator MORGAN.—As to the power of this Tribunal to regulate pelagic hunting outside Behring Sea.

Sir CHARLES RUSSELL.—You have to consider that undoubtedly; you have to consider the extent of your authority. I submit one view to you which you may not accept. I do not at all—far from it—mean to suggest that the question is not free from very great difficulty.

Senator MORGAN.—It is a debatable question.

Sir CHARLES RUSSELL.—I do not suggest or mean to suggest the contrary; but the difficulty does not arise in my mind from the tone of the correspondence, but from the terms of the Treaty and the provisions in Article VII, with reference to what waters they shall extend over. I do not find any logical difficulty in reconciling the portions of the water in the Behring Sea over which they shall extend, but I have felt bound to argue the question on another branch of the case already, on the assumption that the Tribunal may not agree with the view I am submitting, because, of course, I only submit the view as Counsel to the judgment of the Tribunal which has the responsibility of determining and authoritatively determining them; and I must, of course approach the matter alternatively, and I was on the second branch of it, approaching it on the alternative that my contention was wrong, and not one that would be accepted by the Tribunal.

The question was, what regulations, in and outside of Behring Sea, they adjudged fit to make. That is the question to which I addressed

myself, and I was going to address myself first of all to the point that it was necessary for the two-fold object of removing prejudice and also of trying to get a measure, if I could, of the extent of mischief which was properly and truly to be attributed to pelagic sealing, and to examine briefly some of the leading facts in relation to that branch of the question.

As I pointed out, it is not possible for the Tribunal, without examining these facts and coming to some conclusion upon them, to comply with the condition set out in the Treaty, or to give effect to the provisions of the Treaty itself.

Now, let me, at this stage before I proceed because it may save a little time, proceed to some brief comments on the Treaty itself. The preliminary recital on page 1 states that, the two Governments.

Being desirous to provide for an amicable settlement of the questions which have arisen between their respective Governments concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters.

Then comes the operative part of the Treaty which provides that:

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters, shall be submitted to a Tribunal of Arbitration.

Then in Article VI are the questions of right.

Then in Article VII is that which deals in the question of Regulations:

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then—

that is to say in that event—

determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend,—

I need not read the rest of it.

Therefore, what the Tribunal have to consider, upon the hypothesis which I am now presenting, is, what regulations—what concurrent regulations—are necessary for the proper protection and preservation of the fur-seal?

It will be observed, therefore, and I might as well, as my attention has been drawn to it, make the observations in this connection, although I had intended to reserve them till a little later period—it will be observed, therefore, that it is not regulations for the protection of the fur-seal in the interests of the United States—it is not for the protection of the fur-seal so that the United States shall be entitled or in a position to kill the greatest possible number upon their islands—it is not even regulations that shall keep the fur-seal up to the highest normal condition of equilibrium which it might arrive at in a set of natural conditions where there was no artificial interference by man.

It is not that—it is the preservation of the fur-seal, and it is the preservation of the fur-seal for and in the interests of no one power, the subjects of no one power, or the citizens of no one power—it is the preservation of the fur-seal.

Now what part has pelagic sealing, in fact, played in this matter? The Tribunal will not have failed to observe that all through the written arguments, and all through the oral arguments, of my friends, that it is hardly an exaggeration to say that this has been their tone: not only, as my friend Mr. Robinson so clearly and pointedly mentioned to-day, that pelagic sealing is a moral wrong, and claimed that pelagic sealing is *hostes humani generis*, and the rest of it, but they have assumed that every seal, or almost every seal, that a pelagic sealer killed was a female seal; and they have assumed almost that every female seal that they killed was either a seal carrying its young (which it was about to deliver), or a female seal which had delivered its young which it was then engaged at the time of its slaughter in nurturing. It is hardly an exaggeration to describe that as the argument advanced by my friends.

Now let me point out some broad considerations. I do not stop to notice—for I have already in another connection referred to that—that whatever else may be said against pelagic sealing it has not yet, in the history of the world, been found guilty of extermination of the race of fur-seal in any part of the globe—that in no part of the globe where fur-seals were found formerly in great numbers and where they have now ceased to be, is there extinction attributable to pelagic sealing—indeed it is clear that if pelagic sealing and pelagic sealing alone were pursued, that there would be no need for Regulations at all, for the object of this Treaty, namely, the preservation of the fur-seal, because the past history of pelagic sealing has shown that in that which is its congenial element, the sea, nature has furnished the seal tribe with facilities to escape capture—it has enabled them to resist the attacks of man upon the high sea.

It is no exaggeration, to use the language of the British Commissioners rather ridiculed by my friend, Mr. Coudert when I say—and I adopt the language, for I think it is true—that pelagic sealing does give the seal what they call a “sporting chance” for its life, whereas, killing on the Island—knocking it on the head with a club, gives it no chance whatever. Therefore, we start with this, that it is not pelagic sealing that renders Regulations necessary at all for the preservation of the fur-seal. The fur-seal in the past has survived and in all human probability, as far as one can judge, will continue to survive and withstand the attacks of the pelagic sealer carried on as pelagic sealing necessarily is carried on in the native element or the more congenial element, at least, of the fur-seal. I do not stop to point out also the fact that it is admittedly the historical and most ancient form of the pursuit of the fur seal. I do not stop to dwell on the distinction that my friends seek to draw between what they call fur sealing where the comparatively untutored Indian with canoe and spear pursued the fur-seal, and compare it with the introduction of what my friend, Mr. Carter called the destructive agency of civilization in the shape of arms of precision and in the shape of schooners and appliances better adapted for success in that class of enterprise.

Well then, if we are right that pelagic sealing is not that which makes or calls for the necessity of Regulations standing alone, what is it that does call for the necessity of those Regulations? It is the killing on sea *plus* the killing on land; and, therefore, it does become important to consider what has been the relative effect of those two means of pursuit at sea and on land, and which had the most dire effect upon what has been called the depletion of the fur-seals in and frequenting Behring Sea?

Senator MORGAN.—That appears to be the question of indiscriminate killing, whether on land or sea.

Sir CHARLES RUSSELL.—In another connection as I have shown, and I shall have again to show, that although the United States claim was for discriminately to kill upon land, that is not a well-founded claim.

Senator MORGAN.—I am not speaking of the claim of the United States; I am speaking of the fact that it results in the destruction of the seal species; and the point is indiscriminate slaughter.

Sir CHARLES RUSSELL.—I do not care, Sir, whether it is indiscriminate or discriminate,—one need not dwell upon that. They are slaughtered. Whether you can call killing on the Islands discriminate or not, it has led to the depletion.

Senator MORGAN.—I am speaking of the killing of seals in the Southern Hemisphere as well as in the Northern. Has not the destruction of the seal species in the Southern Hemisphere resulted from indiscriminate slaughter?

Sir CHARLES RUSSELL.—On land, it has.

Senator MORGAN.—Or on the sea either.

Sir CHARLES RUSSELL.—No, on the contrary.

Senator MORGAN.—No matter where.

Sir CHARLES RUSSELL.—No. On the contrary there has been no instance whatever of any killing which it is even alleged had affected seal life in any of the southern portions of the globe or anywhere else, so far as I know attributed to pelagic sealing. No, Sir.

Senator MORGAN.—That may be the better method; but the question still recurs whether the loss of seal life in the Southern Hemisphere and in the north is not due to indiscriminate killing, whether on land or at sea.

Sir CHARLES RUSSELL.—At present I am dealing with pelagic sealing. I am endeavouring to see what are the crimes properly to be attributed to pelagic sealing; and in this connection dealing with this concrete case, what part pelagic sealing has played in the depletion of the heard of the seals frequenting or habitually resorting to the Behring Sea.

Now my learned friend Mr. Carter in dealing with this matter put forward this argument. It is to be found at page 81 of the United States argument in print I think, and also I think in my learned friend's argument—I have not the page at this moment—orally delivered. It was to this effect: a great part, said my learned friend—and said truly—of the seals killed by pelagic sealers, are females and thereupon he went on to say that being females that necessarily caused a diminution of the stock and a lowering of the birth-rate of the stock below the normal point which it would otherwise naturally reach. I want to point out, with great respect to my learned friend, that that is not correct; because it would assume that the female killed had produced no young at all, and would produce young if it had not been killed. Let me remind the Tribunal and remind him that according to the evidence it is stated that each female produces in the course of its normal life, assuming that it escapes the great dangers to which it is exposed from natural causes, from 11 to 14 pups. It is put as high as 14.

Senator MORGAN.—12 is an average?

Sir CHARLES RUSSELL.—Assume 12 to be an average by all means. My learned friend will see at once that if the particular female that has been killed is one that has produced even two pups, the killing of that

particular female does not reduce the stock at all, because she has more than replaced herself by the production of her two pups; and if the entire production in the course of her life is to be fixed, as you, Mr. Senator Morgan, suggest, at an average of 12 pups, the probability is, taking the same average, that when she meets her death at the hands of the sealer she has produced six pups, and therefore much more than replaces herself in the stock from which she is taken.

And indeed my learned friend will see that his own argument leads to this—I will say it, but say it respectfully to him, because it is the word that occurs to me—leads to this hopelessly absurd result. The killer whales who are one of the great agencies of destruction of the fur-seal have been going on, a natural enemy of the fur-seal ever since the fur-seals were, sparing neither age nor sex, not discriminating between female and male, killing therefore a large number of female seals. According to my learned friend's argument, if that argument were well founded, the killer whales must have long since exterminated the whole tribe of seals altogether. My learned friend's argument would only be good if he could establish that the females that were so killed were females that had not done something to replace themselves in the stock, to fill their own places in the stock, because it is only in that case in which they would have had any permanent effect upon the stock at all. Besides my learned friend loses sight of this fact which I think it is important to bear in mind, that the evidence now establishes—that after the breeding seals have got to the Pribilof Islands and after the time when according to my learned friend's views, the great family of the seals frequenting Behring Sea had got into the neighborhood of that Sea there are observed large masses of seals that never apparently go regularly to those islands if they go at all at long distances from the islands, at distances west and north of the islands and at distances south of the Aleutian chain and away from Behring Sea altogether, that at the very time that, according to their theory, the great family of seals were gathered around and upon the Pribilof Islands. What were these composed of? Many of them, we do not doubt, were composed of barren females who, not going to the islands, would go to waste—it is no exaggeration to say—but for the pelagic sealer. That class embraces others, for instance young males that are not led to go to the islands by any sexual instincts such as attracts them at a later period; females not attracted by any sexual instinct, which only affects them at a later period; and old seals which are considered unworthy of notice by those who kill the seals upon the islands because they have reached a stage at which their skins are not the most marketable, the best for the market being from three to four or five years of age. These are all classes of seals which may be dealt with without interfering so as to inflict any permanent injury upon the stock of the fur seal and which in large part, at least, would probably go to waste and be of no use for any human purpose whatever unless the pelagic sealer was allowed to deal with them.

Senator MORGAN.—Sir Charles, in that connection—I hope you will pardon me for calling your attention to it—the statements of a good many witnesses in this case would seem to indicate that every seal, a year old or any other age, is impelled by its natural necessities to resort to the land at some period of the summer during which its coat is changed; and that that necessity is just as imperious as any instinct of the animal in reference to its propagation. So that it is open to argument, to say the least of it, whether or not every seal does not every year resort, under the necessity of an instinct that it cannot avoid, to the land for the purpose of shedding its coat.

Sir CHARLES RUSSELL.—Well, Sir, I beg most distinctly, but respectfully to say there is no evidence which warrants any such conclusion; and I submit on the contrary so far from there being any evidence to warrant that conclusion that the evidence is the other way; because the evidence is that seals that do go to land become and are found stagey at a certain portion of their pelage in a certain period of the year, but at the very same period of the year seals are being taken by pelagic sealers, and on being taken pelagically are found not to be in that stagey condition at all. But further, as that has been mentioned, may I ask you, sir, to note—I did not intend even to give the reference—the evidence as to the scattering of large numbers of seals during the breeding season when, according to the contention of my friends, the whole family are in and about the islands, as set out in the second volume of the Appendix to the British Counter Case, page 27. There is set out there in summary a body of evidence of a great number of persons, speaking to different times and to different parts of that whole vast extent of ocean, showing that it is impossible to arrive at the conclusion which you have been good enough to suggest as one to be discussed, that the seals do go each year necessarily to land. Indeed, we have the admissions in the evidence of Mr. Bryant, who was I think a Treasury Agent on the Pribilof Islands, to the effect that when the female pup leaves the island it does not return to the island in its first year; that it comes to the island in the third year to deliver its first pup. As the question has been challenged I should just like to refer you to the passage where that appears.

In his Monograph of North American Pinnipeds, pages 401, 402, after speaking of the pups Mr. Bryant says:

“At this stage the female pups leave the island for the winter, and very few appear to return to the islands until they are three years old.”

There is other authority to the same effect; but I cite that as being a witness called on the part of the United States.

But we have means of getting much closer to this matter and of determining what is the true measure of responsibility to be cast upon the pelagic sealers what is the correct measure or the approximately correct measure at least, of the effect of pelagic sealers, upon the race of fur-seals in these parts.

Now, Mr. President, there are three distinct dates given in various places by witnesses called on the part of the United States as the date at which decrease was first noticed on the Pribilof Islands. Those three dates are 1887—some of them give—1879—but the United States argument fixes 1884 as the first date when any significant decrease was noticed; and that is what is now suggested as the date upon which they fix.

My learned friend, Mr. Coudert, on page 655 of the print of his oral argument, takes the latter date and gives the go-by to the statement of some of the witnesses, to which I shall incidentally hereafter refer, fixing the noticeable decrease as early as 1877 and 1879. On page 655 Mr. Coudert says this:

From 1870 to 1880 it was one of increase. Of course it is not absolutely and mathematically possible to establish when increase ceased and stagnation commenced and decrease took its place; but speaking of the question, with such information as we can get from persons who are able to express an opinion, that is the estimate that we submit to the court increase to 1880; stagnation from 1880 to about 1884; and subsequently to that the decrease which it is conceded on all sides exists and now threatens extermination.

I do not know that that last statement is to be taken as an admission; but so my learned friend puts it.

We have a means of assisting the Tribunal to what is the true measure of the injury done by pelagic sealing; and in order to explain it, I will take the liberty of presenting, or asking the Tribunal to take, one of these tables which has been prepared for the purpose of presenting this. I would remind the Tribunal of this; there are certain tables found in the United States volume, A, B, and C, I think they are. These three maps will be found at page 352 of the United States Case. I am not going to trouble you, Sir, with a detailed examination of this; but it is absolutely necessary that I should explain what it means. If you will take "male Seals, diagram", facing page 352, you will see, Sir, that that purports to set out what would be the natural condition and distribution of a collection—I will use the word "herd" for brevity—of male seals numbering 40,025; and you will observe that there are different colors there to indicate the different divisions of these animals.

The first column, which is colored green, and which is framed upon the basis of an annual number of ten thousand male pups being born. You will see the figure "I" at the bottom of that column. There is a series of figures, 1, 2, 3, 4, 5, 6, 7, 8. You see the numbers, Mr. President?

The PRESIDENT.—Yes.

Sir CHARLES RUSSELL.—Those figures at the bottom indicate the ages which the seals have attained; and you will see, therefore, that upon the assumption of 10,000 male pups born in one year, that of those 10,000.

The PRESIDENT.—Pups, not male pups.

Sir CHARLES RUSSELL.—This is entirely conversant with males, Sir. There is another dealing with females. That of 10,000 male pups born in the year, only 5,000 survive to the next year; because you get the number which survive to the next year by following the column at the base of which is the figure I until you find it crosses the line. You will see, therefore, it goes up to the point of 5,000. If you have appreciated what I have been endeavoring to describe, I will pass on.

What that shows, therefore, is this: assuming that their calculation is correct—probably approximately it is correct—that from natural causes one half of the pups born disappear, prey to accident, prey to the killer whale, prey to epidemic, prey to any cause you like; but to natural causes is to be attributed the fact that 50 per cent of the pups born in any one year disappear during that year, and only 50 per cent survive to be yearlings. That is the only fact I wish, in this connection, for the moment to beg you to carry in your mind.

That being so, we have prepared a table in which we have taken the total number of seals pelagically killed from 1871 to 1878, and then going on to 1879, 1880, 1881, 1882, 1883, 1884, 1885, and we have proceeded upon the principle which I am now about to explain to you. We have assumed that every seal pelagically killed was a female seal, was not a barren female seal, but was in fact a pregnant female seal. Now, let us see how the figures work out, even on that violent hypothesis; because it is admitted by my learned friends that a certain percentage of the pelagic catch are old seals, females that are barren, females that are past bearing, and male seals whose skins are of comparatively little value for market purposes if killed upon the islands.

From 1871 to 1878—although I do not seek to dwell upon that, because it is going too far back—the number periodically killed was 2,000. The figures upon which I base these observations are to be found set out in the report of the British Commissioners, figures

which my learned friends have themselves adopted as indeed being more favorable to their contention than the figures set out in their own volumes.

Mr. CARTER.—We do not concede the accuracy of those figures.

Sir CHARLES RUSSELL.—No, no; I am not saying you do. But you have referred to them, and you have recognized the fact, as it is the fact, that they are figures which are larger than the figures that you yourself put forward.

Mr. CARTER.—Only in some particulars.

Sir CHARLES RUSSELL.—They will be found at page 207 of the British Commissioners' Report. I quite admit—I wish not to be misunderstood on this relation, or in any relation—I quite admit that all this is subject to discount because until we come to comparatively recent years the figures are not a very reliable guide. I quite admit also that an addition, and a not inconsiderable addition, is to be made to these figures by reason of what has been called the loss of seal life at sea, namely, loss in respect to seals which are shot at, which may be mortally wounded, but which sink and which cannot be recovered. The figures therefore are open to these criticisms. But in reference to such criticism, I have to observe that there is a very wide divergence between the views put forward by the witnesses on the part of the United States and those put forward by the persons actually practically engaged in pelagic sealing, as to the amount of loss in that way occasioned—so wide a margin of difference, indeed, between the two, that one looked about for some explanation of it; and I think the explanation is to be found in this: that the witnesses called on the part of the United States appear to have assumed that when a charge of the gun was fired at a particular seal, and that seal was not caught, that that was to be treated as a seal that had been wounded and was lost. I may call attention to the evidence cited in Professor Elliott's report, in which he cites a great number of instances of that kind, for he is very strong against pelagic sealing; and when you come to examine the instances that he cites, he does not mention them as instances where there is any reason to suppose the seal lost was a seal that had been mortally wounded at all.

Now, taking these figures, Sir, and presenting them to you; taking a later year than 1878, the amount pelagically killed in 1880 was 4,800; in 1881, 6,000; in 1882, 12,000; and I stop at 1882.

Mr. FOSTER.—It is about half of what the American Commissioners report in their table.

Sir CHARLES RUSSELL.—I do not think that is ad rem to what I am now upon.

Mr. FOSTER.—You say we adopted your figures.

Sir CHARLES RUSSELL.—Will you give me the reference?

Mr. FOSTER.—Page 366, just following the maps that you are using.

Sir CHARLES RUSSELL.—Do they give any figures after that?

Mr. FOSTER.—Oh yes; each year.

Sir CHARLES RUSSELL.—I thought our figures were more favorable.

Mr. FOSTER.—On page 366 you will see that in 1879 it is 12,500.

Sir CHARLES RUSSELL.—I will just look at this. Yes; I see some of them are more favorable.

Mr. FOSTER.—Take, for instance, up to 1878.

Sir CHARLES RUSSELL.—I will examine these later; but for the present I will take the ones that I am upon. It will not materially interfere with the point I am submitting. I think it will not be found to materially interfere.

What I was going to show is this: I will take the year 1882, where the figure given by the British Commissioners is 12,000; and I stop at 1882 for this reason: the pup born in 1882 would be a yearling in 1883, would be a two-year-old in 1884 and would be a three-year-old in 1885. Therefore, indeed, I ought properly to stop in 1881. That is to say, no effect of the killing of females in 1881 could be felt upon the number of killable seals until the year 1884. That is to say, a pup in 1881 is a yearling in 1882, a two year old in 1883, a three-year-old in 1884, and is killable, in his prime, from 3 to 5 years of age. Therefore the effect of the killing of female seals could not tell upon the number of killable males, or either sex, for that matter, until 1884, or the third year afterwards.

I have assumed for this purpose the figure given in the case by the British Commissioners. They put the figure in 1881 at 6,000. The American Commissioners put it at double that. Therefore you may take it either one way or the other. It will not, I think, materially affect the matter. If it is 6,000, there are 6,000 pups born, which is a very violent assumption—6,000 gravid females, which, if not killed, would have born 6,000 pups, of which 3,000 alone, because the sexes are equal, would have been males, and therefore would, in the year 1884, if the mother had not been killed, have come into the class of killable males in 1884, and would have been in the class of killable males from 1884, when it was 3 years of age, up until it was 5, or later.

Now, of those 3,000 male pups supposed to have been lost because their mothers were killed in 1881, how many survived to reach two years of age? According to the figures given by the United States in the diagram to which I have referred, 960 only. How many would reach three years of age? 720 only. Double, treble, quadruple the amount of pelagic killing; and you get to a figure comparatively insignificant and wholly inadequate to account for or even go any substantial way to account for the decrease which it is said was so noticeable in the year 1884, according to Mr. Coudert's argument, and following the printed argument put forward on the part of the United States.

Therefore I say, take any set of figures you please, starting from 1881, and taking their contention to be that the decrease was markedly noticeable in 1884, that could not have been noticeable until the pups had got to the age when if they had been interfered with they would have been in the killable class, beginning with 3, and rising up to 5, 6 and 7 years of age.

We have other ways also of testing this matter. One specific accusation made against pelagic sealing is this; and they say that having found this specific accusation to be capable of support, in one particular set of years, that it may be equally true, and a cause of the death of the pups in previous years. That is to say, that in the year 1891 there was found to be upon the islands a large number of dead pups, dead, as they say, from examination after death, because they were starved, the starvation, as they allege, being attributable to the fact that their mothers were killed in Behring Sea and so they were deprived of their natural nutriment, causing the wholesale death of these pups, which was manifest upon the island.

The first observation one has to make in relation to that is this: that it will be found that the whole of those deaths of pups in any noticeable degree in 1891, were found on St. Paul's Island alone, not on St. George. I need not point out that if the death of those pups was attributable to the killing of their mothers by pelagic sealing, that you must have found corresponding indications of death of pups equal or proportionately upon both islands. I think that will not be disputed.

But not only that, but the evidence further establishes the fact that the death of pups was found to be confined to particular rookeries on that particular island of St. Paul, again showing that if the death of the pups in 1891 had been attributed to the killing by pelagic pursuit of the mother they would have been found to be distributed over both the islands and upon the rookeries of each of the islands, where as it was found confined to one island, and only to the rookeries on that island. But in the next place, and conclusively on this point, the evidence establishes, and I will read it to-morrow morning that the same thing was to be found existing and to the same extent in the year 1892, when there was no pelagic sealing at all in Behring Sea.

It follows from these facts which I have mentioned, and which I will make good tomorrow morning, that this charge of this enormous death which occurred in these two years to pup-life upon the Pribilof Islands, was due to pelagic sealing, will be found to be entirely without support.

Lastly, there is this extraordinary comment; they now get a number of witnesses, Aleuts and others, who make affidavits that they had noticed deaths of pups in previous years which they connected with pelagic sealing and with the killing of the mothers at sea, which they say began to be serious in 1884, and went on increasing in 1884, 1885, 1886, 1887, 1888 and 1889. And yet, wonderful, to relate, in no official Report is there any reference to that fact; and although Professor Elliott was there in 1890 for the purpose of examining and reporting upon the whole of the question, not one of the Witnesses upon the Island ever drew attention to this question of the death of pups in any way suggesting directly or indirectly that it had anything to do with pelagic sealing at all. The result is, his Report is entirely silent on the question.

Senator MORGAN.—You do not dispute the fact that the pups died?

Sir CHARLES RUSSELL.—No; on the contrary, the British Commissioners appear to have been the very first to call attention to the fact. There was a large number of dead pups in the neighbourhood of the Rookeries.

Senator MORGAN.—How do they account for the death?

Sir CHARLES RUSSELL.—I will read tomorrow morning what is said about it.

The PRESIDENT.—If You please.

(The Tribunal then adjourned till to-morrow morning at 11,30 o'clock.)

THIRTY-SIXTH DAY, JUNE 9TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, I was yesterday endeavouring to make clear what a very insignificant part pelagic sealing had played in the depletion of the seal stock at the date at which the United States have fixed, the year 1884, as the year when the marked decrease was observable in the young males. The argument is still stronger if one refers to the year 1879, or to the year 1877, at which dates other witnesses speak of large noticeable decreases; because in those earlier years pelagic sealing was less than in later years. For my purpose 1884 is sufficiently strong.

I referred yesterday to the figures of the British Commissioners which I was under the impression, as far as the number of seals killed, was more favourable to the case of the United States than those of their own Commissioners; but I find I was not correct in that. Mr. Foster was good enough to point out to me at the time that in earlier years it is not so; but for the purpose I was discussing the distinction is hardly worth entering upon. What I had in my mind was that in earlier years the number of vessels engaged in pelagic sealing was larger when given by the British Commissioners than that given by the United States Commissioners. That was the source of my error. I will not go into elaborate calculations of figures; but I wish the Tribunal to grasp one or two facts which are put forward by the United States and which we assume for the purpose of the illustration I am now upon.

According to the table of mortality to which I yesterday referred, it will be apparent that the United States treat the mortality in the first year of seal life as amounting to 50 per cent. That will not be disputed; the tables show that. They also show what is the mortality between the ages of one and two, and between two and three, and so on; and I wish, therefore, in a sentence to show how those figures would work out on the supposition that 1,000 male pups are born in one year. Of that 1,000 male pups, 500 disappear from natural causes. If there was no pelagic sealing at all, natural causes will occasion the disappearance of 50 per cent., or 500 out of that 1,000. So that of 1,000 male pups born on the Islands, 500 re-appear as yearlings; 320 re-appear as two years of age; and 240 only of three years.

Now bearing that fact in mind if you take the largest figure of the pelagic catch suggested by the United States Commissioners although those figures are (if I chose to stop to make it) subject to some discount and criticism, yet it will be apparent that to occasion the marked decrease which is said to have been manifest in 1884—if you multiplied—if you double or quadruple the pelagic sealing you cannot account for the depletion which it is alleged was then observed. Now they have sought to establish the gravity of the charge against pelagic sealing in another way, and it was to that point I was adverting when the Tribunal rose yesterday evening, namely, they say we are able to specify a particular year in which there was an abnormal number of deaths of young pups, not by the killer whale, but by some causes which operated

upon them on the islands, because their dead bodies were found upon the islands and from that fact they then proceed to argue and cite the opinions of a number of persons upon the islands all I think without exception Aleuts, or nearly all, and they say we attributed this enormous death of pups, for it was a very large death indeed, there being no cause to which to assign it, to the fact that the mothers of these pups were killed at sea—that the pups were left without their natural sustenance and so died.

Now if they could establish that it would undoubtedly be a very grave and important fact. But do they?

I refer in this connection to the British Counter Case, page 213, where the matter is gone into. On page 212 the fact is stated, and then there is the reference to the British Commissioners' Report which deals with this matter. It begins at the bottom of that page.

The Commissioners then show, by reference to dates in detail, that the excessive mortality, when first observed, had occurred at a time too early in the summer to be explained by the killing of mothers at sea; and point out that, although further deaths of young occurred at later dates, there appeared every reason to believe that the whole resulted from some one cause, which had extended from the original localities, and had become more general.

The Commissioners do not regard the available evidence as sufficient to enable them definitely to determine the cause of the mortality in 1891, but suggest the following as among probable causes:

a. Disturbances connected with the collection of "drives," in which nursing females were included, which animals, though eventually spared, did not succeed in rejoining their young.

b. Disease of an epidemic character.

c. Stampedes and over-running of the young.

d. Raids upon the rookeries specially affected.

I shall have a word to say about the raids on the rookeries a little later. Then they proceed to observe this which I submit is practically conclusive against the view suggested.

The circumstance that the mortality observed in 1891 was confined to St. Paul Island, and was not found on the neighbouring Island of St. George, is in itself sufficient to indicate that it cannot be attributed to the killing of seals at sea. All the witnesses cited in the United States Case in respect to the mortality in this year speak of its occurrence on St. Paul Island only.

Now surely, if I rested here, that would be an answer to the suggestion that it was caused by pelagic sealing, because it is impossible to suggest with any show of reason or of probability that the seals captured by pelagic sealing only came from St. Paul's Island and that a proportion of them did not also come from St. George's Island. But not only that—they go on to show that it was confined to particular rookeries even upon St. Paul's Island itself. So much for the year 1891. But we have got still further, and subject to the better opinion and the more dispassionate opinion of the members of the Tribunal, what I submit is a conclusive answer to the suggestion, namely, that in 1892, when there was practically no pelagic sealing in Behring sea, where there may have been 300 or 400 or 500, seals, killed at sea—when the *modus vivendi* was in full operation, we have the very same mortality occurring and manifesting the same features. Now it does, therefore, with great deference to my learned friends and those who put forward this argument, seem to me impossible to maintain that thesis in connexion with the death of pups in 1891 and 1892. That latter matter in 1892 is dealt with in the first volume of the Appendix to the British Counter Case, pages 145 to 148, and if my learned friend would be good enough to read it for me, I would ask him to do so.

Sir RICHARD WEBSTER.—The causes that led to the destruction of pups on the breeding islands are, so far as they have been noted by me—

(a.) The wandering away of the young seals from the vicinity of the breeding-grounds, and subsequent failure to find female seals from whom they can obtain milk. This seldom occurs where a harem is situated between a cliff and the water, or backed by rocky steeps, as at Lukannon rookery on St. Paul Island, and parts of North rookery on St. George Island. Pups can most easily lose themselves when on such rookeries as Polavina, Reef, or Upper Zapadnie on St. Paul Island, and Zapadnie on St. George Island. At these places they frequently wander a short distance to the rear of the occupied rookery-ground, and are soon lost, especially if boulders lie between them and the breeding-ground. A pup's confusion is naturally much greater at such places as Sea Lion Point or at Reef rookery, where, on going but a short distance inland, cries of seals can be heard from both sides of the point. Two or three pups so lost were seen by me every time I visited Reef rookery, and seldom with strength enough to move more than a few yards, if at all. These pups of course die, and are, with few if any exceptions, dragged away and eaten by foxes. While scattered dead pups were always to be seen on the open ground between the rookeries on Reef Point, none that had been dead more than a few days were ever noted, though partly-eaten carcasses were not infrequent, so that the number of carcasses seen at any one time includes but a small part of the whole number that have died.

During the months of July and August a great many females were watched as they came from the water, and although in a few cases they were seen to go to the extreme back of the occupied rookery-ground, none were seen to go beyond it.

(b.) Many pups lose their lives when stampedes occur, and many others when bulls dash among the breeding females and their young to prevent the escape of a female from the harem.

The scattered dead pups that are to be seen on all rookeries have been destroyed in either of these ways.

(c.) A few pups probably lose their lives in the surf, or by being dashed upon rocks, but the number must, under ordinary circumstances, be very small. As early as the 18th July, and on many occasions afterwards, pups were watched while in the water close to the shore, and though they were often thrown with great force against the rocks, no pup was ever seen to receive the slightest injury. These causes of death to young seals were noted by me, but are obviously insufficient to account for the great mortality among the pups on Polavina and Tolstoi rookeries.

While standing beside the camera at Polavina rookery on the 22nd July I counted 143 dead pups; they were of the same size as the living pups near them, and exhibited no sign of having died of hunger, nor did it appear that they had been crushed to death in a stampede, as those that could be seen were at or near the limit of the rookery-ground. No estimate could be made of the number of dead pups that were lying on this rookery, as the seals lay so closely together on its southern and eastern slopes that but a small part of the breeding-ground was visible. Professor Everman (a naturalist on United States Fish Commission steamer "Albatross"), who was with me at this time, and who counted 129 dead pups, thought, with me, that if so many were to be seen at the outer edge of the rookery-ground, the whole number must be very great, and about a month later (20th August) I had ample proof that this was the case. I revisited Polavina rookery on this date with a native, Neh-an Mandrigan. This man speaks and understands English very well, and was at this time on his way to Northeast Point to take charge of the guard-house there. A great many dead pups were lying at the south end of the rookery, nearly or quite as many as were to be seen on Tolstoi rookery. They were lying on a sandy slope between the water and the rocky ledge that separates the lower from the higher parts of this rookery-ground, and were rather more grouped together than at Tolstoi, from 10 to 100 lying quite close together, with spaces from 5 to 10 yards square between the groups. There were individual dead pups scattered everywhere over this rookery as on all others, but on that part of it referred to above the number was very great, and the ground on which they were lying was quite deserted by living seals. They extended as far as could be seen along the rookery, but as only the front sloping to the south could be seen, the number beyond the point to the northward could not be estimated. It was at the south end of this rookery that the British Commissioners report having seen a few hundred dead pups in 1891. Photographs taken the 5th August show this ground with the breeding seals still upon it, but many dead pups may also be seen. The native Neh-an Mandrigan was asked how he accounted for so many dead pups; he replied that he thought they had been killed when the old bulls were fighting, but a few minutes later said that he was mistaken, that their mothers must have been killed at sea, and the pups have died for want of food. He at this time told me that he had never seen so many dead pups on any rookery before. He had seen those on Tolstoi rookery in 1891, but had not visited that place in 1892.

Dead pups were first noticed by me on Tolstoi rookery the 19th August, though photographs taken by Mr. Maynard on the 8th August, while I was on St. George

Island, show that at that date there were nearly, if not quite, as many of them on this rookery as there were ten days later.

At the time I first noticed the dead pups I counted over 4,000, but they lay so closely together that it was impossible to judge what proportion of the whole number was seen. I was told by the Treasury Agents on the island, and have no reason for disbelieving their statements, that when this rookery was carefully examined late in 1891 as many or more dead pups were found among the rocks or other parts of the rookery as were on the open space, and seen and specially remarked upon by the British Commissioners in 1891. This being so, it is reasonable to assume that such would be the case again this year. The dead pups noticed by me were on the same ground on which those seen last year were lying, but were scattered over a larger area, and in much greater numbers.

I accompanied the British Commissioners when they inspected Tolstoi rookery in 1891, and the date of my visit to that rookery this year coincided with their visit to it last year. Depending upon my memory alone, I had no hesitation in deciding that there was a greater number of dead pups at that place in August this year than at the same date in 1891, and a comparison since my return from the islands of the photographs taken during the two seasons proves that this is undoubtedly the case.

The pups when I first saw them appeared to have been dead not more than two weeks, and nearly all seemed to have died about the same time. Very few were noted that were in a more advanced state of decomposition than those about them, and the dozen or so that were seen were probably pups that had died at an earlier date, and from some other cause than that to which this unusual mortality among the young seal, is to be attributed.

The photographs taken on the 8th August show that at that time there were several groups of seals hauled out on ground on which the dead pups lay, but on the 19th August it was almost entirely deserted by the older seals. This rookery was revisited on the 21st August, and at this time an estimate was again made of the number of dead pups. A large band of holluschickie on their way from the water to the hauling-ground at the back of Tolstoi rookery had stopped to rest on the ground on which the pups were lying and hid a part of them, so that on this occasion a few less than 3,800 were counted. On the 23rd August I again visited Tolstoi rookery in company with Assistant Treasury Agent Ainsworth, Mr. Maynard, the photographer, and Anton Melavedoff, who is the most intelligent native on St. Paul Island, and has charge of all the boats and store-houses belonging to the Company. This native acted as boat-steerer at the time the British Commissioners visited Tolstoi rookery in 1891, and that I might learn his opinion regarding the relative number of dead pups for the two years 1891-92. I asked him to accompany me on the occasion referred to above. When asked whether there were as many seals in 1892 as in 1891, he replied: "More; more than I ever saw before." I, at the time, asked Mr. Maynard to pay particular attention to what was said, and he has since made an affidavit to the above effect, which is appended to this Report.

Sir CHARLES RUSSELL.—Let that be realised, and see what the force of that is in 1892, when pelagic sealing was prohibited, when there was no pelagic sealing; and, in corroboration of the fact that there was very close vigilance, will you refer to the bottom of page 147 where Mr. Macoun goes on to state this.

Whites and natives on the island were unanimous in saying that the mother of the pups found dead on the rookeries had been killed at sea, and that their young had then starved.

That is a strong opinion against us they say that the mothers had been killed at sea and thereupon the pups starved; but what is the answer? Mr. Macoun goes on to say.

During the months of July, August, and September I had frequent opportunities of conversing with the officers of nearly all the ships stationed in Behring Sea, both those of the United States and of Great Britain.

You understand that ships of both nations, Sir, were policing the sea at that time.

And all agreed that it was not possible for a schooner to have been in and out of Behring Sea in 1892 without being captured (see statement in Appendix (C.) of Captain Parr, the Senior British Naval Officer stationed at Behring Sea).

Then Mr. Macoun proceeds.

The cruises of the various ships were carefully arranged by Captains Parr and Evans, and so planned that no part of Behring Sea to which sealing-vessels were likely to go was left unprotected. Her Majesty's Ships "Melpomene" and "Daphne",

and United States Ships "Mohican", "Yorktown", "Adams", "Ranger", "Rush", and "Corwin", were engaged in this work. No skins worth taking into account were found on the small vessels that were seized, and most of those they had on board were doubtless taken outside Behring Sea, so that to whatever cause the excessive mortality among these young seals is to be attributed, sealing at sea can have had nothing to do with it in 1892.

My learned friend reminds me that the United States number for that year is 560.

The PRESIDENT.—Do you exclude the effect of the catches out of Behring Sea, because there were very great catches out of Behring Sea?

Sir CHARLES RUSSELL.—Obviously one must because you recollect, Sir, the argument is, and, we think the well founded argument, that these pups are born on the Pribilof Islands. Their case is that during the period of nursing the pups, the mothers go some distance no doubt from the Pribilof Islands, as they suggest. We shall consider that at a later stage in another connection; but I find no suggestion of nursing mothers going outside Behring Sea. You will see that that is an answer, Sir.

The PRESIDENT.—Yes, that is an answer.

Sir CHARLES RUSSELL.—Now, lastly, I have to dismiss the subject with this observation; whether the decrease is stated to be in 1877, as some say, or in 1879 as others say, or in 1884 as the United States now say, I have to put this to the Tribunal; if this theory of mortality in the pups being caused by the death of the mothers at sea is well-founded, you would expect that opinion to have been expressed somewhere or other between 1879 and 1890, or 1891 or 1892—you would have expected to find that theory put forward somewhere or other by some official or other. Now, I will call upon the United States, when their time comes, through my learned friend, Mr. Phelps, to show any report suggesting that as a cause till the later period when the matter is practically, so to say, in litigation between the parties.

Now more, in 1890, when Mr. Elliott is sent to the island for the purpose of reporting upon the whole condition of the islands, and of the seal race, is it conceivable that if this had been in the minds of responsible persons on the islands during his visit in 1890, that depletion was largely caused by the death of pups, and the death of pups was caused by pelagic sealing, that that would not have been stated to him, that he would not have tried to find out the cause for himself, and yet we have the fact that from the beginning to the end of this most careful and elaborate report of his, there is not a suggestion of the kind. What makes that the more remarkable is, it is not merely a kind of official report, but he has appended to his report the observations which, from day to day, and from place to place, he records in his diary, and reproduces that as an appendix to this report of his, yet there is an entire absence of any suggestion as is now put forward. I submit, therefore, without any hesitation, Mr. President, that it is demonstrable that pelagic sealing could not have accounted for the sudden and great and marked depletion of the seal race which is said to have existed.

Now what have we against all this argument? Absolutely nothing except the affidavits or depositions or statements of certain Aleut witnesses, natives on the islands and others, made in 1892, I think—either 1891 or 1892, but I think in 1892, and if the opinion had been present to the minds of these persons at that time, it is inconceivable that they would not have made those statements to some of the official representatives of the company or of the United States. I am speaking of witnesses on the spot. I am not shutting my eyes to the fact that

there are numerous statements of persons who express as a matter of opinion that the deaths are caused in this way and that way, but these are persons who simply find themselves unable to find any definite cause for this marked mortality.

I therefore, come to the next point, if pelagic sealing is shown to be utterly inadequate to account for this depletion for this attack upon the sealeries we must look for the causes of that depletion and the results of that attack in other directions. In what other direction? Well, I say we find the case carefully and elaborately explained in the report of Mr. Elliott. I do not forget that my learned friends have made some efforts to discount the value of Mr. Elliott's testimony. I am sure the Tribunal will judge by the value of that report, by its intrinsic merits, and by the view that they take of the contents of that report, whether or not they are hasty opinions, or whether or not they are not careful results of a conscientious man trying to accumulate all the information that he can on this subject. So far as that report is a matter of Mr. Elliott's opinions let my learned friends criticise it as they please; but they will not be heard, and they cannot be heard when he is recording facts. They cannot suggest that their own official, a highly trusted official, and frequently employed, is coming to invent statements against the interests of the country to which he belongs and against the United States Executive Government which employs him. It is the case, as I said to-day, of a witness called for the plaintiff, who turns out to be a most valuable witness in the suit for the defendant. They are now saying to him as Balak said to Balaam,

I called thee to curse mine enemies, and thou hast altogether blessed them.

It is not correct to say he has altogether blessed them, because it is one of the facts which goes to show the *bona fides* of this gentleman that he is as strong against pelagic sealing as anyone can be in the interests of the United States, but having gone to the islands with the preconceived idea that pelagic sealing was the root of the mischief, he is met by circumstances and by facts which compel his judgment to the conclusion that it is not pelagic sealing mainly or principally, but that the causes have been the wasteful, improvident, uneconomic manner in which the islands have been administered. I have told you who Mr. Elliott was, and where he was employed already, and I find that he is the author of a number of works upon this subject.

He may then well be described, as he was described by Mr. Goff the Treasury Agent, and by Mr. Blaine in effect. Mr. Goff whose testimony is the more important, because he was with Mr. Elliott on the islands in 1890, and he makes no report, and makes no affidavit which is forthcoming to countervail the report of Mr. Elliott. I find on page 148 of our printed argument, and I will not trouble you to do more than take a note of it, a list of the works published on this subject by Mr. Elliott. They are nearly all, or a great many of them, published by the Washington Government.

N^o 1. Report on the Pribilof group or Seal Islands of Alaska in 1873. (Washington Government Printing Office.)

N^o 2. Report of the Secretary of the Treasury concerning the waste of seal oil, and the "natives" of the Pribilof Islands, and the brewing of quass. (H. R. 44th Congress, first session. Ex: Doc: n^o 83 pp. 103 and 104.)

N^o 3. Report upon the condition of affairs in the Territory of Alaska. (Washington Government Printing Office, 1875.)

N^o 4. Ten years' acquaintance with Alaska, 1867 to 1877. (New York. Harper Brothers.)

N^o 5. The Seal Islands of Alaska. (Washington Government Printing Office, 1881.)

N^o 6. Report on the Seal Islands of Alaska. (Washington Government Printing Office, 1884.)

N^o 7. Our Arctic Province.

This Gentleman has a right, I think, to be heard, and to be treated with respect when heard.

Now I have this volume before me, and before I call attention in a very cursory way to it, because I endeavour to follow the lines I have laid down for myself at the beginning, namely, to treat this question in the broad outline, putting upon my learned friends the responsibility of dealing with it, as it must be dealt with in detail—before I call attention to that report there are one or two dates in connection with it which I think it is exceedingly important you should have in your minds. You will recollect that Mr. Elliott was appointed by a Statute of Congress for the purpose of making the report which is before you. He makes that report in Washington on the 17th November, 1890. It lies in the Government Office. It is not published. It is not printed. One does not need to conjecture the reason.

The reason is obvious: it did not suit the purposes of the United States in the contention in which they were engaged; but on the 4th of May 1891 there appeared an extract from this Report in the *Cleveland Leader*. It is so long ago since we had the discussion about the admissibility of this Report, that you, Sir, will no doubt have forgotten these facts though they were then mentioned, but the dates are very significant. On the 4th May 1891 the extract appeared in the public press. If it had not appeared in the public press, it would have lain perdue, and we would have known no more about it.

At that time a respectable gentleman, Mr. Stanley-Brown, was at Washington, and on that very 4th of May Mr. Stanley Brown goes to San Francisco and later in the month of May leaves for the Islands. In fact he leaves for the Islands on the 27th May and arrives at St. George's on the 9th June. He left on his return on the 27th September 1891 and reached San Francisco on the 2nd October 1891. I pause for a moment. We have him back safe and sound in San Francisco on the 2nd October 1891. First of all is it an unfair assumption that Mr. Stanley-Brown had Mr. Elliott's report, was told of it, if not furnished with a copy of it, was told its purport, was sent out with the view if he honestly could of counteracting its effect, and, if he honestly could, of arriving at different results from those arrived at by Mr. Elliott. He gets back on the 2nd October 1891, but from that day to this we have no report from Mr. Stanley-Brown—none whatever. We have indeed two affidavits, one dated the 28th March 1892, and the second the 16th December 1892. I will not go into those two affidavits, but I will ask you when my learned friend is dealing with the precise definite clear statement of fact advanced by Mr. Elliott to ask yourselves, if I may respectfully so suggest, as you go along whether Mr. Stanley-Brown, as he indulges in a good deal, I admit, of opinion which points in a direction different from that of Mr. Elliott,—whether he challenges any of Mr. Elliott's facts, and gives any circumstances or particulars to support him in contradiction to the views of fact advanced by Mr. Elliott.

Now bearing in mind, Sir, that though we are now told there was a marked decrease observed in 1884, some as I have said say earlier, in 1877 and 1879, yet that up till the year 1889, the reports from the islands had been of the most glowing character. I will not stop to refer to them. As late as 1889 there is a report of Mr. Tingle giving a most

glowing description of the way in which the seal race has flourished on and in the neighbourhood of the Pribilof Islands.

It is with these statements before him, and the further statement that pelagic sealing is beginning to make a formidable play or show in the neighbourhood of Behring Sea, that Mr. Elliott goes to the Islands. Now I have said I am not going to read this report, because it would take me a long time to go through it, and to go through it thoroughly, as it must be gone through thoroughly, but I will epitomize the points to which he refers. He recognizes pelagic sealing as a contributory cause of the mischief, but he does not stigmatize it as the main cause of the mischief. He attributes the depletion which he observes to the excessive killing of males, to the injurious system of driving, to the still more dangerous system of redriving again and again the same seal, and he arrives at the conclusion that the drives should be so managed that the seals actually driven are killed. He points out that whereas under the older state of things when he was visiting the islands in 1873 and 1874 it was not necessary ordinarily speaking to turn back as it was called more than 10 to 15 per cent of the entire number sought to be driven—that so reduced was the condition of things that they had to be driven and driven again and redriven and turned away from these drives as much on some occasions as 85 % of the entire number—I believe I am understating it now—it was as much as 90 per cent as my learned friend reminds me in some cases. He points out what the result of this is. He points out that the result of that driving is to cause the death—I think the expression is—“of countless thousands”—he points out the further result is, as regards those surviving, that in consequence of the cruelty to which they were subjected, so far as they were males, it was permanently to injure if not destroy the use of those males for the purpose of procreation.

Now these are the results at which he arrives, clear and distinct—not vague opinions, but perfectly justified, as I submit the Tribunal will see when they come to examine his report by facts and circumstances which he vouches.

I wish to say a little more about this. The system pursued now and which is claimed to be the only proper system is, as the Tribunal will recollect, the killing of males only. We submit that that, as it has been carried on, is not a sound principle and how my learned friends, with that marked devotion which they profess for the law of nature, could have found it in their hearts to justify it I do not understand. This is an admitted fact that nature in its arrangements produces an equal number of males and females—that is the law of nature. Is it to be said that that law exists for no purpose whatever. So is it to be said that there was not some wise purpose in dealing with animals *feræ naturæ* in these balances of the two sexes—I speak of animals *feræ naturæ* only.—If you are dealing with animals domesticated or tamed, so that you can make judicious selection of the best specimen for the purpose of reproduction in dealing with such animals we are able from long experience and observation to arrive at definite and safe conclusions as to the productive capacity of the female or as to the duration of the virile power of the male, and we may, by a system of artificial rules, improve the breed, but where you are dealing with a race admittedly *feræ naturæ* incapable of improvement in the breed by the art of man, dealing with a class where you cannot select the best specimens of males and females for the purpose of reproduction, where you are practically in ignorance, for that is one of the appalling facts in this case—the amount of ignorance, and very little is known about

seal life even to-day—entire ignorance of even the length of the life of a seal—entire ignorance, in any accurate way at least, of the length of reproductive power of the female—ignorance of how long the virile power of the male for reproductive purposes will continue, yet they have been going on disturbing that balance which nature had fixed between these sexes and defending that as the only possible way in which the seal race is to be dealt with.

Now in this connexion I wish to call attention again to those tables very briefly. It is the only reference to diagrams which I shall trouble you to make, but I must ask you to refer again to two of the diagrams which are to be found at page 352 of the United States Case, which will be found very useful, and if you will be good enough to favour me by opening, so as to have them for easy reference table A and table C, those are the tables which relate to males. I may assume that each member of the Tribunal appreciates these diagrams. I do not stop to try to explain them.—I did yesterday try to explain them. This table A is dealing with the normal conditions, apart from killing, of a herd when it has got to a point of what I suppose may be called natural equilibrium—that is to say, has got to the point which, looking to the natural causes and natural enemies to which it is exposed, and the supplies of food, and so on, is the point beyond which it would not reach and to which it would not attain unless it were by the act of man, or otherwise artificially interfered with. That is principle of the diagram. They are in the coloured part and distributed as they would be in such a herd. The green shows the yearlings to the left of the first line. The green, so far as it is to the left of the figure 2, going up the column, shows the two year olds; the pink to the left of the column at the bottom of which is the figure 3, the three-year olds; then the four-year olds, then the five-year olds; and the yellow, from 8 to 19 or 20 years of age: and each of those small squares represents 100; and the sum total of the squares so coloured is 40,025 or say 40,000 odd.

Now you observe there that in the columns from 3 to 7 which represent the class of males which is to supply the future stock of bulls for the purpose of reproduction, there is a very considerable number. What the number is I will tell you, because it has been worked out very carefully. Will you turn to diagram C? You will observe there that the yearling and two-year-old columns, the green on the extreme left, are the same as in diagram A. But in succeeding columns it shows the condition of the same herd or stock of 40,000 under conditions described as “properly regulated killing.” And again, you will see the manner in which the entire number is made up and how it is reduced. The numbers are not shown on the face of that diagram, but the means of computing the numbers are shown and it is easy to determine how many seals are included under each class, or colour, of the diagram. Now these figures have been worked out and they are very remarkable. In the normal condition of natural equilibrium and apart from killing, there would be, according to the figures there shown, 3,500 young bulls at any one moment.—It is one of the assumptions in all these diagrams that the seals have obtained their natural maximum number, no increase being possible beyond this, and the same number dying each year that is born in each year.—In the normal condition, therefore, we have 3,500 young bulls from 5 to 7 years of age, the breeding bulls in the same normal condition 13,620. That is the normal condition of things. Now what is the condition of things under the system which is called normal “under properly regulated killing?” Why it is this:

Instead of there being 3,500 young bulls to supply the place of those that become incapable, there are 560 only and in the place of 13,620 breeding bulls which the normal condition shows, there are 1,980 only. There is a reduction therefore of the stock from which the future bulls will come from 3,500 to 560, and a reduction of the breeding bulls themselves from 13,620 to 1,980. These are the figures upon the face of the diagrams themselves. Can anybody doubt that that interference with the natural condition of things, that destruction of the young male stock, that interfering with the proportion of the sexes, must have, as Professor Elliott shows it must have had, a most serious and detrimental effect. The consideration of how that is made out by him, would lead me much wider and into more detail than I at all propose myself to go. That my learned friends will deal with. Suffice it to say that, whereas he insists that the proper condition is one in which the bulls, taking their place upon the rookeries and awaiting the arrival of the cows, have to fight for their harems, have to assert their rights by sheer force, and so the principle of natural selection and survival of the fittest is worked out: that in later years that state of things has entirely changed and that the harems have grown proportionately to the bulls quite in excess of what they ought to be—page after passage and page after page of this Report is filled with records to that effect.

I have merely to contrast the state of things which he describes as existing in 1874, and which other witnesses describe as well, where the male seals were fighting and one endeavouring to assert its supremacy over the other; and he describes the condition of things as entirely and absolutely changed. This condition of things was one in which the bull formed his harem, fought for his wives, and secured as many as he could on the principle of natural selection. What is the condition of things as it is now?

I will read one passage, and one passage only because it is so expressive, from one of the affidavits of Mr. Stanley-Brown. It is the affidavit set out in the American Counter Case, at page 385. I may observe incidentally that, though Mr. Stanley-Brown does not say so, his affidavit clearly shows he was fully aware of the conclusions that Mr. Elliott had arrived at; because you will find that, though he does not put forward his opinions as distinctly traversing the opinion of Mr. Elliott, he does refer to them as statements made which he thinks are not well founded. This is an illustration, the last statement but one on page 385.

Any statement to the effect that the occasional occurrence of large harems indicates a decrease in the available number of virile males and hence deterioration of the rookeries, should be received with great caution, if not entirely ignored.

That is a statement which Professor Elliott undoubtedly put forward. This is reversing the order of nature as we generally understand it.

The bulls play only a secondary part in the formation of harems. It is the cow which takes the initiative. She is in the water beyond the reach or control of the male and can select her own point of landing. Her manner on coming ashore is readily distinguished from that of the young males which continuously play along the sea margin of the breeding grounds. She comes out of the water, carefully noses or smells the rocks here or there like a dog, and then makes her way to the bull of her own selecting.

It seems to be "Leap Year" all the year round on the Seal Islands! And in the order of nature, that law which is so much respected by my learned friends, the advances are supposed generally to come from the males; but here is the ingenuous and perfectly honest Mr. Stanley-Brown giving as a picture that which is the strongest corroboration of the utterly demoralized and unnatural condition to which, under the man-

agement of the United States lessees, because I do not suppose the Executive of the United States knew very much about it, the Islands had reached. It would be impossible, I submit, to select a stronger passage in confirmation of the general results at which Mr. Elliott has arrived than that passage which I have just read. My learned friend is good enough in this connection to refer me to the monograph of Mr. Allen, published in the Washington Government Printing Office in 1880, where he gives the picture of things as he found it in 1869 at page 385, and what is the contrast between the two statements? You have heard Mr. Stanley-Brown's ingenuous description, and this is what Mr. Allen says.

General FOSTER.—I think you will find that is quoting Mr. Bryant.

Sir CHARLES RUSSELL.—I am obliged; I see it is in inverted commas.

General FOSTER.—Mr. Allen was never there.

Sir CHARLES RUSSELL.—No doubt, it was Mr. Bryant who was on the Islands, I forget for how long.

General FOSTER.—For a good many years.

Sir CHARLES RUSSELL.—Yes; and perhaps that makes it more valuable than the opinion of Mr. Allen, if Mr. Allen was not, as my friend says, on the Island.

I begin at the bottom of page 382.

The male fur-seal attains its full growth and strength at the age of six or seven years, when it weighs, at the time of landing, from three hundred and fifty pounds to four hundred; in exceptional cases a weight of four hundred and fifty pounds is attained. The males acquire the power of procreation in the fourth year, and at five years share largely in the duty of reproduction. The females bring forth young in their fourth year.

That differs from the opinion of others, who say that it is in the third year. Then he goes on to describe the arrival on page 384 at the bottom of the page.

By the middle of June,

And this date is not unimportant with reference to another matter which I shall have to describe, he says:

all the males, except the great body of the yearlings have arrived.

I think I ought to read a little higher up, to explain how the bulls proceed. At the top of page 384 he says this, which perhaps I ought to read.

On their arrival at the island the full grown seals separate from the younger, the former hauling up on the shore singly or in groups of two or three, separated by quite wide intervals.

Then a little lower down he says:

It is only the "beachmasters", or breeding bulls, on the rookery that remain continuously in their places, for if they were to leave them they would be immediately occupied by some other beachmaster, and they could regain possession only by a victory over the trespasser. The struggle among the old bulls goes on until the breeding grounds are fully occupied, averaging one old male to each square rod of space, while the younger, meantime, find their way to the upland. During the latter portion of the landing time there is a large excess of old males that cannot find room on the breeding places; these pass up with the younger seals and congregate along the upper edge of the rookery, and watch for a chance to charge down and fill any vacancies that may occur. These, to distinguish them from the beachmasters, are called the "reserves", while those younger than five years are denominated by the natives "holluschucke", a term denoting bachelors or unmarried seals. It is from these latter that the seals are selected to kill for their skins.

By the middle of June all the males, except the great body of the yearlings, have arrived; the rookery is filled with the beachmasters; the reserves all occupy the most advantageous position for seizing, upon any vacancies, and the bachelors spread over the adjoining uplands. At this time the first females make their appearance.

They are not observed in the water in any numbers until they appear on the shore. Immediately on landing they are taken possession of by the nearest males who compel them to lie down in the spaces they have reserved for their families. For a few days the females arrive slowly, but by the 25th of the month thousands land daily. As soon as the males in the line nearest to the shore get each seven or eight females in their possession, those higher up watch their opportunity and steal them from them. This they accomplish by seizing the females by the neck as a cat takes her kitten. Those still higher up pursue the same method until the entire breeding space is filled.

And then he goes on to describe the fighting among them for the possession. Will you contrast those two pictures?

Again, in 1874, Mr. Elliott, in his book which I have already referred to on the seal Islands—the book published in 1881 at the Government Press Printing Office says on page 35:

Between the 12th and 14th of June, the first of the cow-seals, as a rule, come up from the sea; then the long agony of the waiting bulls is over, and they signalize it by a period of universal, spasmodic, desperate fighting among themselves. Though they have quarreled all the time from the moment they first landed, and continue to do so until the end of the season, in August, yet that fighting which takes place at this date is the bloodiest and most vindictive known to the seal. I presume that the heaviest percentage of mutilation and death among the old males from these brawls, occur in this week of the earliest appearance of the females.

Then he, like Mr. Bryant, describes the organization of the seraglios, at page 36. He says:

They are noticed and received—

that is the females are—

by the males on the waterline stations with attention; they are alternately coaxed and urged up on the rocks, as far as these beach-masters can do so, by chuckling, whistling, and roaring, and then they are immediately under the most jealous supervision; but, owing to the covetous and ambitious nature of the bulls which occupy these stations to the rear of the waterline and way back, the little cows have a rough-and-tumble time of it when they begin to arrive in small numbers at first; for no sooner is the pretty animal fairly established on the station of male number one, who has welcomed her there, than he, perhaps, sees another one of her style in the water from whence she has come, and, in obedience to his polygamous feeling, devotes himself anew to coaxing the later arrival, by that same winning manner so successful in the first case; then when bull number two, just back, observes bull number one off guard, he reaches out with his long strong neck and picks up the unhappy but passive cow by the scruff of her's, just as a cat does a kitten, and deposits her upon his seraglio ground; then bulls number three and four, and so on, in the vicinity, seeing this high-handed operation, all assail one another, especially number two, and for a moment have a tremendous fight—

and so forth.

If I were to enlarge upon this I should be led away from the line which I have endeavoured so far to follow. One other cause, and not an unimportant cause, Mr. Elliott mentions. But just see what is the obvious result of this state of things which he describes—that unnatural reduction of the young bull stock to one-seventh of its number in a normal condition—that unnatural reduction of the breeding bulls to something like the same—between one-sixth and one-seventh of its normal number in its natural condition. One expects to find the results which are pointed out and which will be pointed out in detail, of the evidence of useless bulls—bulls not having lost their sexual instinct, but, having by driving and re-driving lost their power of reproduction, have become *incapaces res*; and the increase which the evidence points to of the enormous number of barren females, and so the birth-rate of the whole race of seals is seriously injured.

The other cause to which I was about to refer is raiding, but upon that I only wish to say a word or two. With all their anxiety and their care to cherish the seals, certainly if I am to rely upon the statement

of their own representatives and agents, the United States Government has not afforded efficient protection against raiding.

I will not stop to read these authorities, but I would ask the Tribunal to take note of them. They are at pages 290 and 291 of the British Counter Case. Mr. Taylor in 1881; Mr. Kimmel in 1882—both agents on the islands. Mr. Glidden from 1882 to 1885; Mr. Wardman in 1883; Mr. Ryan from 1885 to 1887, and so forth. A note of their evidence is to be found on the pages I have already given. Then, Mr. President, I submit I am now justified in saying that I have, so far, established two things: That although I do not deny at all (and we never have denied) that pelagic sealing has some operation—is a factor in the question of reduction of seal life—that it is not the case with which we are dealing. The main factor—the principal cause—is the mode in which the management has been carried on upon the islands, and the fact that regardless of warning the United States lessees have, over a series of years gone on further and still further and yet further depleting the herd. It is I think an expressive thing—a very significant thing—to look at the figures of the killing upon the Pribilof Islands as they were pursued under the Russian *régime*, with the system as pursued under the United States *régime*. Those figures are to be found in a convenient tabular form, at page 132 of the Report of the British Commissioners; and whereas during the Russian period beginning from 1817 down to 1867 the year of the cession—I have not got the numbers averaged—anyhow the average is considerably less than 40,000. Considerably less than 40,000 were killed when the Russian Government possessed these Pribilof Islands. The highest year but one is the earliest year of which we have actual record. In that year, 1817, it was 60,000 odd. In 1867 it was 75,000, but in the intervening years the number was 40,000; 150,000; 16,000; 6,000; 8,000; 10,000; 11,000; 26,000; 21,000; 34,000; 40,000; and so forth—an average far less than during the American period.

Now let me pause here for one instant. It being clear that man can do nothing to increase the breeding of the seals—nothing I mean in a positive way. He can by leaving them undisturbed; he can by abstaining from killing them—but I mean except by negations he can positively do nothing to advance them. We admit therefore that when the Russians had this management (and they had considerable experience in it), that they were taking as much on an average as they thought right; but what is more noticeable in these figures is this—that they have observed the necessity for varying the number taken, not treating it on a uniform system as if you were calculating upon a crop of hay which you mowed every year, and from which you expect to get the same result per acre—they regarded it as a period during which it required absolute rest; so that you will find in the years 1835, 1836, 1837, 1838, 1839, 1840, and 1841, the lowest number taken was 6,000; the highest 8,000. Again, in 1850, 1851, 1852, the highest number is between 6,000 and 7,000; in 1855, 8,000, and so forth through the whole period of their management. Then we come down to 1867, and in the years succeeding the cession, we have that admitted serious attack upon this race amounting to 242,000 in 1868.

In 1869 the killing amounted to 87,000; in 1870 to 23,000; in 1871 to 97,000; in 1872 to 101,000; in 1873 to 101,000; in 1874 to 107,000; in 1875 to 101,000; in 1876 to 89,000; in 1877 to 77,000; and so on, right down to 1889, with the single exception of 1883, when 77,000 odd were killed an excess over 100,000 per year. And let me observe this: that whereas the Russian figures include the number of pups killed for the

purposes of the islanders during the years from 1817 to 1837, that the United States figures exclude the number of pups killed upon the island for the purposes of native food; and the average annual killing of pups upon the island—I wish the Tribunal to realize this fact—amounts to, as there stated, 4,600 pups annually. It does seem to me a curiously uneconomic condition of things if the seals were worth preserving that the lessees were not made, as part of the conditions of their bargain, to supply adequate food which would dispense with this sacrifice of seal life which they profess to be so valuable.

Lord HANNEN.—Does it appear what proportion of the 4,600 pups are male, and what proportion are female, or is it indiscriminate?

Sir CHARLES RUSSELL.—They are indiscriminate so far as we know I think.

Sir RICHARD WEBSTER.—They are male.

General FOSTER.—They are males of course—they are all young males.

Sir CHARLES RUSSELL.—That may be taken to be so.

General FOSTER.—I think Sir Charles is not aware of the fact that we dispute this table of figures on this question.

Sir CHARLES RUSSELL.—I think, General Foster, I may, quite respectfully and courteously, say that I assume that everything that tells against your argument, and your position, you do dispute; I am not at all relying upon your assent to these figures.

Lord HANNEN.—It is an addition, then, to the number of male pups.

Sir CHARLES RUSSELL.—It is an addition to the number of male pups killed. I thought they did not discriminate the pups. I take the fact to be that the instructions and injunctions are that they shall kill only male pups; but whether those are accurately carried out, is another matter, because we cannot lose sight of the fact that the evidence of the fur dealers which has not been questioned as has been apparent, shews, although it is against the policy and orders of the United States officials, that a considerable percentage of female seals are killed on the Pribylof Islands.

General FOSTER.—The pup-skins never go to market.

Sir CHARLES RUSSELL.—I am not, in this connection, talking of pups at all—I am going to shew that even if the directions are given, it does not follow that the directions are carried out, because as I said from the Furriers evidence, which I read I am sorry to say a great many days ago, it is shewn that of late years there was an appreciable percentage—stated in the evidence of some of them I think to be from 10 to 15 per cent—I think one of them says 25 per cent—but up to 15 per cent at all events, of female skins in the Pribylof consignments.

Now, Mr. President, as my friend Mr. Foster has thought right to interpose to say that they dispute these figures, I must call attention to the fact that from the year 1871 down to the year 1889, the figures are taken from the document which I am now about to describe. On page 134 the British Commissioners say this:

The figures for these years—that is 1871 to 1889—were taken from Correspondence relating to Behring Sea, Seal Fisheries, Parliamentary Paper [C. 6368], pp. 44–47, and include all seals, other than pups, killed for any purpose. From 1870 to 1889 (both inclusive), 92,864 pups were killed for food, an average annual killing of 4,643.

There is the authority for it which Mr. Foster can examine for himself. That, Sir, is at page 134 of the British Commissioners Report, so that the authority for the statement is vouched. And if it be the fact that the instructions have been literally carried out which enjoin the killing of males, and the killing of males only, then this is an addition to the annual depletion of the male life of the seals.

I was proceeding, Mr. President to say that I have now got to a point at which I am entitled to ask the Tribunal to say that pelagic sealing is not—is shewn not to have been—the main cause of the injury which the Commissioners both of the United States and Great Britain agree has taken place in relation to seal life. The main causes are to be found in the facts stated to which I have already briefly adverted, in that Report of Mr. Elliott; and now I think that these circumstances ought to have, as I am sure they will have, a very important influence on the mind of the Tribunal in considering the Regulations which have, in justice, in fairness, and in equity, to be applied in the circumstances which I have mentioned. I took the opportunity earlier, of saying that the Treaty does not contemplate Regulations for the aggrandisement either of the United States or of the lessees of the United States—that is not the object of the Treaty. The object of the Treaty is declared to be the preservation of the fur seal species. That is the object to which the Regulations are to be addressed. To be preserved for whom? Here, Mr. President, I cannot but feel that the view which we urged on this Tribunal at a very early part of this inquiry was one which, if the Tribunal had seen its way to act upon it, would at all events have simplified the discussion upon which we are now engaged. We thought, and think, that the question of Regulations was not to be broached or considered until the questions of right had been determined, and is there anyone who has heard the course of this case and who having heard this case—heard the proposition which my friend Mr. Foster, as Agent of the United States, put forward on the subject of regulations, who believes that if this question of right had been determined, as we submit it must be determined—could any such suggestion as is to be found in the precious paper read yesterday for one moment have been put forward? We submit that there is not a shred of a case left to the United States on the questions of right at all. I am arguing, Sir, as you know, upon the principle—upon the basis—that we have negatived, and that your determination will negative the existence of any legal right in the United States except the legal rights which they possess, *ratione soli*—as owners of the islands, and owners of the islands alone.

Now I wish to say a word or two (before I come a little more closely to the question of Regulations) about the British Commissioners Report. I adverted to this subject before. I do not intend to make any lengthened reference to it now, but I will say this: that when my friend Mr. Carter thought it right to make an attack upon these Commissioners and to make an attack even, in one or two passages, upon their good faith, I think he had not read the mandate under which they were acting, and I even doubt whether he had had leisure thoroughly to master their Report itself. If he had read their mandate he would have seen that they were called upon by that mandate to inquire into any fact or circumstance touching seal life: that by their instruction of June 1891 they were directed to ascertain:

1. The actual facts as regards the alleged serious diminution of seal life on the Pribilof Islands, the date at which such diminution began, the rate of its progress, and any previous instance of a similar occurrence.

2. The causes of such diminution; whether, and to what extent, it is attributable.

(a.) To a migration of the seals to other rookeries.

(b.) To the method of killing pursued on the islands themselves.

(c.) To the increase of sealing upon the high seas, and the manner in which it is pursued.

And, finally, in January of 1892 they are enjoined to consider in their Report what Regulations may seem advisable, whether *within* the jurisdictional limits of the United States and Canada, or *outside* those limits.

I content myself with saying therefore, that as regards the area covered by their Report they would have failed in their duty if they had not dealt with all the subjects that are dealt with in their Report, and when an attack is made upon them because forsooth they do not "run-a-muck", if I may use that vulgarity, against pelagic sealing—abused because they suggest that a combined system of zone and close time and licence will answer all reasonable purposes of protection of the seal species—my friend forgets that Mr. Blaine thought that a 60 mile zone round the islands without any close time would have been an adequate protection of the interests that were at stake; and that my friend Mr. Phelps, whether intentionally or accidentally, I do not know, in his printed argument states that the claim which the United States is advancing is this. Having argued the question of protection, interest, and property, at page 139 my friend says:

The inevitable conclusion from these facts is, that there is an absolute necessity for the repression of killing seals in the water in the seas near the Pribilof Islands, if the herd is to be preserved from extinction. No middle course is practicable consistently with its preservation.

Therefore if no middle course is possible, the extreme course that my learned friend suggests is that there is an absolute necessity to prevent the killing of seals in the waters near the Pribilof Islands if the herd is to be preserved from extinction. I therefore think that the attack upon the learned commissioners is not merited, not justified; and I can say in relation to Mr. Elliott's report, that it is not possible to read that report, as I have read it, and as I have read Mr. Elliott's—every line of them—without seeing that there is a painfully conscientious effort upon the part of Sir George Baden-Powell, and Dr. Dawson to put the *pros* and *cons*, the considerations in favor of, and considerations against particular views impartially and fully before the Tribunal by whom it is to be used.

Now, I may have to come back to that again for one moment, but I proceed to the consideration of the general conditions which I submit ought to be observed in relation to regulations. Mr. President, I begin by admitting that according to the terms of the treaty there is no authority in this Tribunal to enjoin rules to be observed upon the islands; that is to say, this Tribunal has no legislative authority, if I may use that word, to legislate directly for the islands; because I must admit that the Article VII which deals with regulations, limits the question of regulations for your arbitrament to regulations outside the territorial limits of the respective governments. But while I admit that, I am as far as possible from admitting that it thereby follows that you cannot make regulations which shall be conditional upon the observance of certain rules upon the islands, which is a very different thing; and I hope to make it apparent that not only can you do so, but that you would be failing in giving effect to the prime object of the treaty itself if you did not do so.

Let me illustrate it at once. Mr. Elliott says in his report that a period of absolute rest is necessary—not of pelagic sealing merely, but a period of absolute rest on the islands. He says that without that rest the seal race may not be saved from extermination. Your rules are to be aimed at that preservation; and let me ask you—because it is an absolute test of the soundness of the proposition I am advancing; I do not say whether Prof. Elliott is right or wrong in that—but assuming you should be of opinion that he is right, and that absolute cessation of killing on the islands is a condition of the preservation of the fur-seal species, am I to be told that you could make no condition in your regu-

lations as to pelagic sealing? You are to make rules that are necessary. A rule is not necessary if it is utterly ineffective and utterly useless and utterly insufficient; and therefore if the state of the case be—I know not what your opinion about it is—but if the state of the case in fact be that if you prohibited pelagic sealing tomorrow, but killing was to go on on the islands, your pelagic sealing rules would not be worth the paper they were written upon for the preservation of the seal species, am I to be told that you have only the right to prohibit pelagic sealing? But we believe it is a necessary condition also for the preservation of the seal life that there shall be a cessation for a definite period of killing upon the islands too.

It seems to me it would put this Tribunal into a most ludicrous and false position to suggest that that argument is not perfectly and absolutely sound.

If, then, I have illustrated—and I do not know any answer to it—a case in which it would be idle for you to make regulations which would be ineffective and useless for the object in view without annexing conditions, then I say it follows that you have the authority to annex those conditions, and that if you believe, honestly and impartially and decide as every one of you will, I doubt not, fairly between the conflicting interests which are concerned, arrive at the conclusion that as a condition of any restriction upon the rights of the nationals of any country upon the high seas, there ought to be an accompanying restriction with a view to the preservation of seal life by definite regulations upon the islands, that you have a perfect right to say, “our regulations are conditional upon the observance of such regulations upon the islands”.

There is a further question which I think ought to be considered, namely, as to whether or not it is in your power, and if in your power whether in the exercises of your discretion you ought, to make your rules permanent or temporary. I do not dispute that you have the power to lay down rules, inflexible as the laws of the Medes and Persians. I do not dispute that you have the power to do so.

Senator MORGAN.—Still, Sir Charles, you would say, I suppose, after this award had been made that the two Governments could dispense with them if they chose to do so by agreement. We are not establishing a principle of international law, as I understand it.

Sir CHARLES RUSSELL.—No, Sir; I quite agree with you.

Senator MORGAN.—It is bound to be temporary in the sense that the two Governments, by agreement hereafter, could dispense entirely with them.

Sir CHARLES RUSSELL.—I have no doubt they could, Sir, but one can conceive a case in which the United States might take one view and in which Great Britain might take a different view. I quite admit, Sir, what you say, that of course the parties to an agreement, can, by mutual consent, put an end to the agreement.

Senator MORGAN.—But still these two governments could not abolish any principle of international law by themselves.

Sir CHARLES RUSSELL.—No; Except as between themselves certainly not. We are not now upon principles of international law. Of course you understand we are now upon the question of expediency.

Senator MORGAN.—I spoke of that as an illustration, that is all.

Sir CHARLES RUSSELL.—Oh yes; I know. I think this point is not unimportant, Sir. I think it is very important, from whatever point of view it is looked at. I do not think this question of whether the regulations ought to be temporary or permanent is a question which can be said to be in the interest of the United States more than in the interest

of Great Britain, or *vice versa*. It is a serious thing to interfere with the unrestricted freedom of the nationals of any power upon the high sea. The tribunal will therefore be very slow, unless they are clearly convinced of the necessity of doing it, of putting such restrictions and if they think such restrictions should be put, they will naturally be anxious to make these restrictions as light and as little harassing to the nationals of other powers and to the commerce, I may say, of the world, as they possibly can. And therefore, either way, it is not a matter which can be said to be exclusively in the interest of Great Britain or exclusively in the interest of the United States. The rules may be found to be too stringent, and therefore require relaxation. They may be found to be too lax, and therefore require further stringency. But the point I was first upon is whether it is open to you to make temporary rules. If the Tribunal was clear about it, of course I should not proceed to argue it; but I do not know what views my learned friends take upon the point; and therefore I must submit very briefly the views which we entertain. You are to make regulations for the proper protection and preservation of the fur seal in or habitually resorting to the Behring Sea and you are to say over what waters such regulations shall extend; and finally, the only other part of the treaty which bears upon the matter is the provision which is to be found in Article XIV, that

The High Contracting parties engage to consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect and final settlement of all the questions referred to the Arbitrators.

Lord HANNEN.—Will you allow me to ask you a question? You have said that there is general ignorance at the present time on this subject. How could we fix upon any number of years which would be sufficient? It is not for the preservation of the seals for say ten years but generally for that preservation. Would it not be better that we should make regulations under which information would be collected, and which might form the basis of negotiations hereafter between the two countries for the modification of any rules we may lay down?

Sir CHARLES RUSSELL.—I have a note of, and intend to make, Lord Hannen, that suggestion in connection with the question of regulations. I have a note to that purpose. I quite agree that that would be a most important thing; but I was for the moment, if you will allow me, dwelling upon the question whether there was power to make temporary regulations. I will say a word about the expediency of making them in a moment. I was meeting the argument which might be based upon Article XIV, although I do not know that my learned friends would feel themselves interested one way or the other upon this question. I would only say—it is a short and a small point—that although article XIV contemplates that the result of the arbitration is to be a full and final settlement of the questions, it does not at all follow that temporary regulations would not completely answer that purpose. Regulations even to five, ten, or what ever period of years should be adjudged to be proper, would not be the less a final ending of the present dispute, because that final ending is arrived at by the adoption of a set of rules temporary in their organization, and not permanent in their character.

That is really all I have to say about it. As regards the explanation of it I quite agree with what Lord Hannen says; but it occurs to me, with great deference, to submit to the gentlemen of this Tribunal that that very ignorance that prevails, upon which I propose to say only a word or two, points in the direction which can hardly be doubted, of

extreme caution in the imposition of rules, in view of the lack of definite information, the result of which it is impossible to predict, with anything approaching certainty by any person applying himself to the consideration of this question. What do we find here? A number of questions in debate of the most elementary kind about these fur-seals. One is struck by the reading of this voluminous literature with the fact that although fur-sealing pelagically and on land, has been carried on—pelagically certainly probably from the earliest time—on land also for more than a hundred years—that absolutely until the year 1891–92 no one appears to have had any knowledge whatever as to what was the migratory route of the seals. It appears to have been the result of the discovery of the Commissioners from both countries sent out for that purpose, who have traced in a rough way, but not marked out with that precision and that accuracy, which if it were possible at all, could only be arrived at by prolonged, anxious and repeated observations, extending over a great number of years.

Take another question. We have a general idea of the period of gestation of the female—that it is between 11 and 12 months. Where are the figures; where are the instances? Still less have we any accurate account of the breeding life of the female.

Again as to the bull—either as to the duration of his life or as to the duration of his powers. None.

Again we have the fact which in another connection I must refer to, of the extraordinary abstention from food for long periods of time. It is admitted that that does take place—admitted by my learned friends and by us; it is common ground between us. It is admitted that the bulls do not feed from the moment of their arriving upon the breeding grounds in May or June, until their breeding functions on the rookeries are at an end, when in July or August they leave the islands—an amazing fact, a fact which also occurs in the case of other wild animals, the walrus, the sea otter and I think some other species of the seal. But how about the females in nourishing their young? Upon this point, which is in connection with a zone as to regulations, a very important one, there the most flat contradiction between the views taken by those arguing for the United States or supporting their contention and the views taken by those who are representing the views or supporting the views of the Government of Great Britain. When does the female seal first take food, if it takes it at all; at what period in the life of the pup? When is the pup self-sustaining? All these are questions as to which absolutely the Tribunal is in a state of comparative ignorance.

MR. GRAM.—Will you allow me. Is there anything which shows that the number of male seals born each year is the same as the number of female seals?

SIR CHARLES RUSSELL.—Yes, Sir. I will refer you to that. The evidence is that they are born in equal numbers, male and female—taking an average, of course, of years.

THE PRESIDENT.—That is not contradicted on either side?

SIR CHARLES RUSSELL.—No Sir. It is common ground between us.

MR. CARTER.—It is assumed rather than proved.

MR. PHELPS.—We suppose it to be true.

SIR CHARLES RUSSELL.—My friend Mr. Carter argued the case on that basis and assumed it; and we have both assumed it, and there is no evidence to the contrary.

SIR RICHARD WEBSTER.—The United States counsel take that view.

THE PRESIDENT.—Perhaps counsel on both sides will explain for us a point in natural history, whether notoriously polygamous animals are also born in equal proportions, male and female?

Sir CHARLES RUSSELL.—Deer for instance.

The PRESIDENT.—And yet we know they are polygamous.

Sir CHARLES RUSSELL.—In every instance, so far as we know. In answer to Mr. Gram I refer to page 451 Case of the United States, in which the report of their Commissioners is set out. On that page they say:

If a herd of seals be taken in its natural condition, that is as not interfered with by man, males and females will be found practically equal in number, as the number of births in a year of both sexes is the same, and we have no reason to believe there is any great difference in the natural mortality of the sexes.

Mr. FOSTER.—That is a hypothetical case, in which you state the fact.

Sir CHARLES RUSSELL.—It stands thus: that so far as I know—I do not of course speak myself as an authority at all—but so far as we know of the case of animals which may be said in any degree to be analogous, or indeed in any class of wild animals, the proportions of males and females are equal.

The PRESIDENT.—And yet there are a certain number of animals which are notoriously polygamous and consequently each male supports or defends a certain number of females collected around him.

Sir CHARLES RUSSELL.—As for instance deer.

The PRESIDENT.—What becomes of the superfluous male?

Sir CHARLES RUSSELL.—He is killed off, I suppose, just as the superfluous female is killed off. A certain proportion is observed. It is the principle of natural selection, the principle of the survival of the fittest.

The PRESIDENT.—That may be by natural means, or artificially. I merely point out that question as one that may be of interest.

Sir CHARLES RUSSELL.—I am afraid that I perhaps did not convey my views clearly in relation to that.

I admitted that if you have got a race of animals naturally wild and can tame them, so that you can substitute for the rude rules, if you please, of nature, a principle of artificial selection of the best looking females and the best looking males, and so improve the breed, and by observation, artificially conducted, ascertain what the relative breeding capacities of male and female are, then you may in the case those animals improve the breed then alter the relation of numbers; but in state of nature you cannot interfere with those rules of nature unless you are prepared to introduce an artificial system by which you can work out the results on a certain basis.

But apart from the question of improving the species, which is another question from that of preserving it, the question is whether in the case of polygamous animals man disturbs the order of nature when he brings about the destruction of superfluous males by his own means instead of leaving it to the animals to fight it out.

Lord HANNEN.—But then he adds his destruction to that of nature.

Sir CHARLES RUSSELL.—I am afraid, Lord Hannen, that I interrupted you.

Lord HANNEN.—It is past now. I was only going to express the same idea which you expressed.

(The Tribunal here adjourned for a short time.)

Sir CHARLES RUSSELL.—I have still a few words to say, Sir, upon the question of the general application of the character of the Regulations before I come to any definite suggestion. And I was upon the question whether there was authority in the Tribunal to make temporary Regulations as to which I submitted there was, and I was then considering the question of the expediency of exercising the authority

so to make them. I have not the book here, but I have sent for it, and if it is not, as it probably is, in the library of the learned President, I would ask him to peruse upon the subject of natural selection and on the doctrine of the survival of the fittest, a book with which I have no doubt he is generally familiar—I mean Darwin, and he supplies from actual observation as well as from argument an admirable answer, if I may respectfully say so, to the doubts which the learned President was suggesting. I am told that the book has arrived, but I have not had the opportunity of refreshing my recollection with reference to the passages by to it, so I will not stop, but will leave it to my learned friend if he should think fit to refer to it.

Then there are other matters also to be taken into consideration, besides the absence of anything like accurate information upon some of the important conditions of seal life, pointing, as I submit, in the direction of temporary rather than permanent Regulations, and, fairly considered, this is not an argument that would not be equally to the interests of the United States for the reason I have already mentioned. Further consideration in a possible change of circumstances which is not at all an unlikely thing to happen may become necessary. Fashions may change. In the case there are mentioned the elaborate efforts which are ingenious and cost money, which the representatives of the lessees made in order to create a fashion in seal skins, and I do not know whether I have mentioned it before, but it is a fact stated to be historically true, that when the Hudson's Bay Company were anxious to get their furs into popularity in London—I am not sure that I have not mentioned this before—they invited the co-operation of a celebrated dandy of that day—no less a person than Beau Brummell, and Beau Brummell was induced to accept the gift of a coat made of the skins of martens, and he was able to induce his friend, the Prince Regent to do the same thing, with the result that the particular skins in question became very popular. We know the shifting of these fashions. Take the case again of the beaver hat. It was once supposed to be a necessity of civilization, but who wears a beaver hat now? Why do not they wear them? Because they have an artificial substitute, so that one cannot predicate with any kind of certainty what the circumstances may be at any future time. Or again, the fact that the seal may leave the place, because of some change of food supply in the broader ocean—which may drive them closer to land and might interfere with some of the great industries carried on in the United States as well as British Columbia.

My learned friend, Mr. Robinson, was perfectly right, that if there were ten thousand Regulations forbidding the destruction of the fur-seals, if they were found to conflict with any of those industries, the fur-seal is inevitably doomed to go. All these considerations, as it seems to me, point to the expediency of making not permanent hard and fast rules which purport to operate forever but to the making of regulations which would exist for a time sufficiently long to allow experience to be matured, so that the future consideration of the problem, if it still exists to be considered, should be approached in the light of fuller and ampler and more detailed information than can now be presented to this Tribunal. It might possibly be suggested as an alternative that while you make your Regulations apparently perpetual in their character, there might be reserved to either of the Powers to denounce the Regulations after the expiry of a definite number of years, the effect of which would be to remit the parties respectively to their original position and therefore their original rights, whatever those rights were,

with the certainty that they would approach the consideration of the position in which they then stood in the light of fuller and more accurate and a juster appreciation of what the relevant facts are. I pass from that general consideration. The Tribunal will recollect that in the correspondence previous to the Treaty and after indeed it had been to a large extent reduced to the form which it ultimately took, that Lord Salisbury desired to introduce a stipulation that the rules of the Tribunal should be conditional upon the concurrence of other Powers, and you will recollect also that the United States objected to that suggestion and would not concede it, that Lord Salisbury did not insist upon it as a condition of the Treaty, but reserved to himself the right to represent the matter to the Tribunal. Now I wish to be distinct in reference to that matter. I am not here at all asserting that the concurrence of other Powers ought to be a condition of the application of your Regulations. I have only to say in that connexion, however, this, which I hope will be considered a just and prudent observation, namely, that the Regulations ought to be of a character which will not repel, but which will rather invite the assent and cooperation of other Powers.

Let me remind you, Mr. President, that the Treaty has an express stipulation upon this point. It is the concluding sentence of Article VII.

The High Contracting Parties furthermore agree to co-operate in securing the adherence of other Powers to such Regulations.

I think you have followed the position I take. I do not suggest that the concurrence ought to be a condition precedent to your Regulations or to the enforcement of your Regulations, but I do suggest the regulations themselves ought to be such as will probably, from their reasonableness, secure the assent and co-operation of other powers.

I will not dwell upon the point further beyond saying that, of course, it is obvious that if you make a set of Regulations of a character which would give a monopoly to the United States and exclude the nationals of Great Britain from any share in the pursuit of the fur-seal that you would be doing the very thing which not only would not invite the cooperation of other Powers, but which would suggest to the nationals of other Powers whether, this being a fair field for adventure and enterprise, they may not embark in it, and so the Executive Authority of those particular nationals would have an interest not to co-operate, but an interest to dissent from the observance of these rules.

I do not need again, of course, to point out that the rules which are made within the limits of their authority by this Tribunal are rules to which the Government of the United States and Great Britain must pay honest, *bona fide* deference and respect, and must seek to have effect given to them by legislation, which is a necessary means of giving effect to them; but and when all that is done, when your Regulations are framed, and when legislation in the respective countries has been accomplished for the purpose of giving effect to them, neither your rules nor the legislation of the United States or of Great Britain affects any other Power in the world, or the nationals of any other Power in the world. If they are reasonable Regulations, if they are Regulations which, in the circumstances of the case, commend themselves to the good sense and spirit of equity of other Powers, they will concur in them, and will co-operate in giving effect to them; otherwise not.

Of course, the great argument of force might be replied to me in this connection. It might be said, and with a great show of reason, that, if Great Britain and the United States were standing side by side in a dispute of this kind, it would be very difficult for any other Power to resist or gainsay their will in this particular matter. Quite true; so it would, as a matter of force, but as a matter of reason (which is the domain to which I am now addressing myself), it is obviously a part, if I may respectfully so put it, of the duty of the Tribunal to frame Regulations which shall be reasonable in themselves and which shall recommend themselves for acceptance by other Powers.

I need not say that it is the *alpha* and *omega* of my argument that there is no right to exclude the nationals of other Powers from pelagic sealing; that it is the right which I have been claiming not for Great Britain or the nationals of Great Britain, or the nationals of the United States, but for mankind, without any exception, of any Power, great or small.

Lastly, and this is a very general observation, a general condition touched upon early in my observations, that the Regulations must be marked, putting it respectfully, with a spirit of fair adjustment of rights which expediency suggests in the circumstances of the case; and, for the preservation of the fur-seal species, should be subject to certain limitations and restrictions.

Now, Sir, I have said all that I desire to say on the subject of general considerations, in the light of which the question of Regulations is to be approached.

Now for a few moments I will ask the Tribunal to turn to the British Commissioners' report. I am not going to dwell at any very great length upon this report, but I think so far as I shall have of course to criticise the suggestion of the American Commissioners, and particularly the suggested scheme if scheme it can be called, put forward yesterday evening. I wish first of all to see how the matter has been dealt with and approached by the British Commissioners. First let me make this clear, that these Commissioners, in the suggestion that they are making are dealing with a scheme which shall be general in its application. They are not dealing with a scheme under the treaty or with reference to the treaty. They are asked to report upon the condition of seal life in and in connection with the Pribilof Islands. They are asked to report upon the cause of the injury which that seal life is said to be suffering from, and they are asked to suggest what are the steps which in their judgment ought to be taken to remedy the state of things supposed to exist.

Senator MORGAN.—All that was done, Sir Charles, if I remember rightly before the treaty really was signed.

Sir CHARLES RUSSELL.—Quite true, Sir, but no doubt in view of it.

Senator MORGAN.—Of course.

Sir CHARLES RUSSELL.—Quite so and what I want to guard against is this, that you find they make suggestions which would have no application outside Behring Sea, for instance they will be found to have made suggestions, and important suggestions, with regard to the Pribilof Islands. I mention those subjects to show they had not the treaty before them upon which they were placing any particular construction and dealing with regulations pointed distinctly to the provisions of that treaty, but they are dealing with the matter upon the supposition—and not an unnatural one as I conceive—that the United States would have been willing to concur with Great Britain in submitting the whole area on and off the Islands to Rules or at least the consideration of Rules

which should be, as far as was necessary, applicable both to the Islands and the sea.

Now their report begins substantially at page 6 where they deal with the general conditions of seal life and on page 7 under the head *b.* killing on the breeding Islands; they deal with the state of things which they have found and they enter into a historical review, at the bottom of page 7 and on page 8, as to the measure of slaughter during the Russian, and during the period of the United States, control. I have already given the figures and I do not stop to refer to them, but I may observe in passing as regards killing upon the Islands which is claimed as being discriminating, there is this to be said about it, it cannot escape from this charge—I am not now going back upon the consideration of whether it can be truly called discriminating—that I have already dealt with as far as I propose to deal with it—but there is this charge to be made against it and from which it cannot escape, namely, that it is a killing carried on at the time at which in the case of rules for the preservation of other wild animals those rules exempt those wild animals from all interference, namely, during the breeding season.

That is the peculiarity of this beautiful system pursued upon the Islands, namely, that at the very period when the race is engaged in the work of reproduction, that is the very time at which the scientific killing, which is open to no objection whatever, takes place upon the islands, a system which in those conditions the British Commissioners, I suppose in order to show how partizan and unfair they were, describe as a system “transcendentally perfect”, whatever that means. But there it is. The killing is carried on at the very period when the system of law in all countries in the world,—municipal law I am talking of—leaves the principal race or races of wild animals or birds wholly unmolested, namely the breeding season. That entails the consequences to which Professor Elliott in part refers to, of which we have abundant evidence scattered throughout the whole of the case, of the disturbance of the harems, of the mixing up of the young and the old, the stampedes of the old involving the death of the young, the driving and re-driving from their getting mixed up in the way described. But so it is.

The PRESIDENT.—Is it shown that the fur is of lesser quality during the breeding period—that the hair falls off, for instance?

Sir CHARLES RUSSELL.—That is the “stagey” time, undoubtedly. What I call the breeding time is later. The evidence appears to stand in this way. The females have practically all arrived by about the middle of June,—between the middle and the end of June; the great bulk of them, I think it may be said, by the middle of June.

They very early after their arrival produce their young. I think the evidence points to the conclusion, in point of fact, they do not seek voluntarily the land until the suggestion of nature comes to them; and they are, very speedily after their arrival, delivered of their young and then, after a comparatively short time, impregnation is supposed to follow—within a very short time after the delivery of the young. The stagey condition is at a later period, July and August, but what I called the breeding-time, and it was in that sense I was using it, was this—I was referring to the whole period from the time of the pup being born, till the time when the pup may be said, in some sense, at least, to be self-sustaining—that is to say, taking to the water on its own account, which generally happens within six weeks to two months after its birth.

The PRESIDENT—In fact, the killing goes on during the stagey time.

Sir CHARLES RUSSELL—Yes to a slight amount.

Senator MORGAN.—Not of the animals engaged in reproduction.

Sir CHARLES RUSSELL.—Not as far as it can be avoided.

Senator MORGAN.—But they are divided geographically from each other by an instinct of nature.

Sir CHARLES RUSSELL.—I assure You, Sir, I would not rely too much upon that, because the lines are not so very sharply drawn as all that. There is a picture, if you turn to the diagram which faces page 22 of this report, which is a very expressive one, and I think, while, of course, it does not profess to be strictly accurate, it gives a very great idea of it.

The PRESIDENT.—You mean the killing in June and July.

Sir CHARLES RUSSELL.—Yes, the great killing is in the months of June and July. The earlier history, going back a good many years, shows they used to get the killing all practically done, certainly, before the end of July.

The PRESIDENT.—Before the stagey period.

Sir CHARLES RUSSELL.—But undoubtedly of later years, from the constant necessity of redriving, the period of killing has been extended, but it is as substantially shown on page 22.

It is true, as Senator Morgan, said—I have not suggested anything to the contrary,—that there are certain more or less clearly marked lines of demarcation, if I may use that word, between the young killable males and the others; but that is not very sharply defined, and the evidence undoubtedly shows that a number get mixed up in the herd, which have to be separated from the rest and driven back. You will remember that when I was dealing with the question of the alleged incapacity of domesticity of the fur-seal, that I cited the case of a pup called “Jimmie”, which had been got hold of by a gentleman there, and he described it as a pup which the cow had dropped while being driven. So that they do get to a greater or less degree mixed up, although of course the object is to prevent that mixing.

On page 10 of the Report, they dwell on the misproportion—the alteration, I will say, of the proportion of males and females—very much as Professor Elliott does, and citing Professor Elliott—they dwell upon the large and increasing number of barren females; and in paragraph 56 of that Report, they mention that percentage of driving back, which shows the condition to which the race had then been reduced. They say in relation to these drives, the last sentence in this paragraph:

The proportion thus turned away, according to the report of the special Treasury Agent in 1890, actually rose to ninety per cent of the whole number driven.

Now, it is a plain matter of arithmetic, if you drive 100 and only kill 10 of that hundred, that the other 90 are doomed to be driven and re-driven; and nobody can tell exactly how often, but at all events several times, before they meet their ultimate fate.

Then at page 11, they proceed to deal with the sealing at sea. They note the fact—in a marginal note, and it is not necessary, I think, for my purpose, to read the paragraph—that pelagic sealing is a further draft upon seal life. They give its history and development, beginning with independent native hunting, its growth, and then they mention the fact, which is not unimportant in connection with what has been said about 1884 and the marked decrease that was seen in 1884, that the first vessel which entered Behring Sea for the purpose of sealing was the “Mary Ellen”, in 1884. That, I think, was an American vessel. I should have said that was the first of the Columbian vessels. Then they deal with the decrease observed on the Pribilof Islands, and the measures practiced to obtain a quota; and in paragraph 72 there is a

convenient reference to what I had intended to refer to except that I did not desire to be longer than I could avoid, as showing the straits to which they had then come, namely, that there was no curtailment in the number killed. They kept up the 100,000. They say:

72. No such curtailment, however, occurred. The Company holding the lease of these islands on fixed terms were not interfered with, but continued to take their full legal quota of skins without regard to the risk to seal life as a whole. Not only so, but instead of reducing the catch, the standard of weight of skins taken on the islands was steadily lowered so as to include a younger class of seals under the designation of "killables". Instead of skins weighing 7 or 8 lbs., those of 5 lbs. and (as we have ascertained on excellent authority) even of 4 lbs. and of 3½ lbs. have been taken and were accepted by the Company as early as 1889.

The further evidence that has since been obtained shows that the standard of weight was lowered at a considerably earlier period; and of course we say upon that that if the interest of the lessees had been the preservation of the fur-seal species and not to make a profit for themselves as against the rent which they had to pay the United States, and if it had been a question of regarding the interests of the race, that ought to have been a very clear and distinct warning which would have suggested that which Russian wisdom again and again suggested, as I have shown from the figures of killing during the Russian control, namely, periods of comparative rest; because it is a very startling and remarkable fact that whereas over the whole Russian period the average was considerably less—I will not pledge myself to the exact figure—than forty thousand a year, the average from 1867 down to 1889 works out somewhere very close to the point of one hundred thousand. And indeed if you take the exceptional slaughter, as I admit it to be, of 240,000 in 1868, the full one hundred thousand would be in fact, I think, maintained.

They then at the bottom of that page, in paragraph 74, summarize the causes of waste of seal life in the methods actually practiced upon the Pribilof Islands. I will not read them. And then they proceed to consider the allegations against pelagic sealing. We will see whether they deal with this matter fairly or not. They say in paragraph 77 on page 13:

77. Against the methods of pelagic sealing two principal lines of criticism and of attack have been developed, and both have been so persistently urged in various ways, that they appear to have achieved a degree of recognition by the uninformed altogether unwarranted by the facts, in so far as we have been able to ascertain them, though in both there is an underlying measure of truth. It is stated (1) that almost the entire pelagic catch consists of females; (2) that a very large proportion of the seals actually killed at sea are lost.

They then proceed:

78. It is undoubtedly true that a considerable proportion of the seals taken at sea are females, as all seals of suitable size are killed without discrimination of sex. This is, in part, however, a direct corollary of the extent and methods of killing upon the breeding islands, where, practically, in late years, all males reaching the shore have been legally killable, and where, as a matter of fact, nearly all the young males which land have been persistently killed for some years, with the necessary result of leaving fewer killable males in proportion to females to be taken at sea.

79. The precise bearings on the industry as a whole of the character and composition of the pelagic catch made along various parts of the coast and in Behring Sea are discussed at greater length elsewhere (§ 633 *et seq.*), but it may be here noted that the great surplus of females, resulting from the practice just alluded to, has certainly rendered the killing of considerable numbers of these at sea less harmful in its effect than it might otherwise have been.

"Less harmful than otherwise would have been" I may say means: not only that it tended to restore the balance but also that a considerable number of the females so killed were barren females. They then

proceed. My learned friend Mr. Robinson, I think, entered upon this yesterday, but I should like to read this passage:

80. To assume that the killing of animals of the female sex is in itself reprehensible or inhuman, is to make an assumption affecting all cases where animals are preserved or domesticated by man. Most civilized nations, in accordance with the dictates of humanity as well as those of self-interest, make legislative provision for the protection of wild animals during the necessary periods of bringing forth and of rearing their young; but the killing of females is universally recognized as permissible if only to preserve the normal proportion of the sexes. This is the case in all instances of game preservation and stock raising, and in the particular example of the fur-seal, it is numerically demonstrable that, in maintaining a constant total of seals, a certain proportion of females should be annually available for killing. The killing of gravid females must, however, be deprecated as specifically injurious, and in any measures proposed for the regulation of seal hunting should receive special attention.

Then they proceed to deal with the allegation of the percentage of seals lost at sea; and in paragraph 82—I read this yesterday and I therefore will merely summarize what they say upon it—that the statements are very vague; that the statistics or figures given are hopelessly confused; and confused in this way, that the number of seals fired at is confounded with the number killed, and in other cases it is often estimated that the number of rounds of ammunition disposed of represents the total number of seals that are actually killed.

I make one observation in that connection. I think one cannot but be struck in this matter that while they were endeavoring to show, and succeeded in showing, that a great many seals fired at were not captured, they do not show that the seals so fired at were either killed or seriously wounded. In other words in a great many instances, they do not show that they were hit at all. I have been struck also with this fact it is true that the specific gravity of the seal taken as an animal, is greater than the specific gravity of the water, and therefore that the seal will sink; but I notice that some of the witnesses point out a curious fact worth noticing in passing, that when the seal is hit in the head, which is where it ought to be hit by scientific marksmen, the effect is that its head goes down first in the water, and in that way the air which is already in its respiratory organs is preserved and so there is a certain buoyancy given to it and it will float for a short space of time.

I see no reason to doubt that scientifically at all; but that is not the point I was going to make allusion to. Where there is no such air in the respiratory organs to afford buoyancy to the seal, it will sink if its specific gravity is greater than that of the water. That may be conceded: but after a certain time, as we all know, the process of decomposition goes on, which thus occasions a fresh principle of buoyancy in the dead animal, just as it is in the case of a human body. In the case of a person who has suffered death from drowning the body sinks, disappears; but after the lapse of a certain time the body again floats, when that process of decomposition has gone on, and in that way the principle of buoyancy is illustrated. So with much inferior subjects. Dead cats and dead dogs, as we know, sink in the first instance, but come to the surface again. So it ought to be, and so it must be. There is no natural reason in the world why it should not be in the case of the seals. The process of decomposition, of course, is slower where the water is colder; but it goes on in the summer months. If this allegation of this tremendous loss of life by killing and not securing seals were true, one would expect to have some account of the presence of large numbers of floating dead seals over the surface of the water. I do not find there is any substantial evidence pointing in that direction at all; and I cannot therefore but think that the evidence on this point as to loss in that way is considerably exaggerated.

Another matter that they point to which again is not unimportant, is that whereas there is a consensus of opinion and evidence about the more or less depleted condition of the islands, there is not the same consensus of opinion as to the lesser number of seals to be found at sea; which is rather a significant fact. It is common ground that the numbers on the islands have diminished from their normal condition; that there has been a marked decrease, and a marked decrease of particular kinds as to sex and as to age; but there does not seem to be the same marked decrease in the number of seals perceived at sea; and the Commissioners, not unfairly, as I suggest to the Tribunal, say that that is one of the results of the system pursued upon the islands, that these seals driven and redriven, as they have been, make their escape to the sea, and do not return to the land. Except for the purpose of breeding they do not require to return to the land. I say that especially for the benefit of Senator Morgan because he thinks it is a necessity of their nature that they should return to the island to get their coat changed. I do not admit that that has been established as a scientific fact at all.

Senator MORGAN.—Sir Charles, in that connection, it has occurred to me that there must be some definite way by which these experts, or so called experts, can determine the age of a seal, and that relates somewhat to the color of its coat; for instance that two-year-olds are not of the same color as four-year-olds. They probably get at their results by observing the change in the color of the seals, and in the characteristics of its coat.

Sir CHARLES RUSSELL.—I will tell you, without pledging myself to be literally accurate, how that matter is upon the evidence. (Addressing the President) The Senator was asking me as to the evidence, Sir, remarking with reference to the alteration of the pelage, the age of particular seals. The evidence, as I understand it, is in this position. When the pup is born, it is nearly black.

Senator MORGAN.—And has no fur.

Sir CHARLES RUSSELL.—Or if so, very little. The impression is that it has some downy fur; but that may not be. It is nearly black. When it gets older it becomes gray. Then when it gets into the yearling and two-year-old and three-year-old class—I do not affirm positively—but I am not aware that any distinction is pointed in the color of the coat from two to three, four or five years of age; but when they get to an advanced age, there are undoubtedly marked differences, and in the case of males, one great difference is a hirsute appendage that it has, its whiskers, etc. I will not commit myself positively to what I have said, but I think, broadly speaking, that is about approximately correct. So far as the female is concerned, there is of course a difference in size between a female of two years and a female of five or six years, etc.; but I do not recall that there is any evidence of a difference in the color of pelage between the female of two years old and a female of greater age.

Senator MORGAN.—I think Mr. Elliott, in his capacity as an artist, has drawn those descriptions pretty vividly.

Sir CHARLES RUSSELL.—In which, Sir; 1874 or 1890?

Senator MORGAN.—Between the ages of 2, 3, 4, and 5. I merely wanted to call attention to it.

Sir CHARLES RUSSELL.—We will see, Sir, if there is any more evidence bearing upon it.

Senator MORGAN.—Then there is a period when they, like the Queen's Counsel, begin to wear wigs?

Sir CHARLES RUSSELL.—Oh yes; the Queen's Counsel wear wigs; and sometimes people who are not counsel at all wear them. But that is not a case in point.

On page 17, Sir, they devote themselves—my friend Mr. Carter thinks most impertinently—to the consideration of the interests involved. Well, I respectfully think it very important. In paragraph 102, dealing with the interests on shore and the interests at sea, they say that the only basis of settlement which is likely to be satisfactory and permanent is that of mutual concession, by means of reciprocal and equivalent curtailments of right, in so far as may be necessary for the preservation of the fur-seal.

And they go on to say that

the line of division between the shore and ocean interests is not an international one.

That I have already dealt with, because I have shown by the figures which I cited in answer to the question of the learned President the other day, that up to a certain point, and in certain years, the number of United States sealers exceeded those of Canada, although in the later years the Canadian vessels had exceeded the other. Then in dealing with the question of capital involved, they say, paragraph 105:

105. At the present time the actual value of the buildings, plant, and equipment of the North American Commercial Company, on the Islands of St. Paul and St. George, is estimated not to exceed 130,000 dollars (20,000 l.). Adding to this a further sum to cover other items of capital less directly connected with the islands themselves, the entire invested capital would probably be over-stated at 200,000 dollars (40,000 l.); and it is not to be forgotten that the Companies leasing the seal islands habitually do a profitable retail trade in supplies, etc., with the natives and others in addition to acquiring the seal-skins.

Then turning to the Canadian interest:

106. The estimated aggregate value of the British Columbian vessels employed in sealing, with their equipment, as they sailed in 1891, was 359,000 dollars (72,000 l.). It has been asserted that only a portion of this total, corresponding with the length of the period in each year in which these vessels are actually engaged in sealing, should be taken as the capital invested. This statement is, however, as a matter of fact, incorrect. The sealing-vessels are seldom used in or fitted for other employment, and nearly all of them remain laid up in harbour between the dates of the closing and opening of the sealing season—that is, between October and January, or February.

107. Adding to the above amount an estimate of the value of the United States sealing fleet in the same year, which, it has been ascertained, exceeds 250,000 dollars (50,000 l.), and may probably amount to 300,000 dollars (60,000 l.), an aggregate amount of capital of about 650,000 dollars (130,000 l.) is represented by the combined fleets.

The PRESIDENT.—Do those two paragraphs mean that there are special boats built for the sealing at sea?

Sir CHARLES RUSSELL.—Yes.

The PRESIDENT.—A special description of boats which would be unfit for any other fishing?

Sir CHARLES RUSSELL.—Yes, Sir; that is what it means. I do not think it would be correct to say they could not possibly be applied to some other purpose if this was prohibited; but they are built with that object, that design.

The PRESIDENT.—Perhaps you mean the small fishing boats that are let down from the schooners themselves?

Sir CHARLES RUSSELL.—Oh no; it means the schooners.

The PRESIDENT.—The schooners themselves are specially built?

Sir CHARLES RUSSELL.—They are fishing schooners—I used the word boat, but not in the small sense—fishing schooners, specially adaptable for this particular purpose, as I understand, but not unfitted for other kinds of fishing, or to be used in other kinds of commerce.

Lord HANNEN.—I suppose as in the case of fishing vessels of considerable size, they are fitted for fishing, and though they could be converted, it would be a considerable expense to convert them to other purposes?

Sir CHARLES RUSSELL.—No doubt that is so.

Senator MORGAN.—All these fishing schooners carry from five to fifteen small boats, armed with men. The evidence is that the boats go out and do the sealing.

Sir CHARLES RUSSELL.—Oh, no doubt. They do not shoot at the seals from the schooner really.

Senator MORGAN.—Not at all.

Sir CHARLES RUSSELL.—The real sealing is done by the boats that are sent out from the side of the schooner. That is quite true. I may state the information which Mr. Tupper gives me, which I have no doubt is correct. The great majority of these schooners, probably not all of them, are boats that come from the Atlantic side of America, and that have been principally used for fishing on that side. They are brought around to the west coast of America. There is, of course, a great field for fishing on the west coast, but like a great many other places where there are valuable products of that kind, the communication is so defective that if they caught fish, as there is no doubt they could, there is no means of readily utilizing them to any extent; so that the mere pursuit of the fishing industry, in the ordinary sense, of that word, is not profitable.

The PRESIDENT.—There is no cod-fishing organized on the north-western coast as yet?

Mr. TUPPER.—So far as the Canadian portion is concerned, the deep sea fishing is not yet really developed.

Sir CHARLES RUSSELL.—What I have said applies to a great many of these schooners, not all of them, as Mr. Tupper has said. You are aware, Sir, that railway enterprise may, in a few years change the whole aspect of things there. The Canadian Pacific, which traverses the whole of that continent at that point and has its terminus at Vancouver, may in time with the further development of railway enterprise, make a very great change; and so regards Washington Territory.

The PRESIDENT.—You mean for the building of schooners?

Sir CHARLES RUSSELL.—No; I was talking about the development of fishing in the ordinary sense.

The PRESIDENT.—That is so as to allow these boats to be applied for other fishing besides sealing?

Sir CHARLES RUSSELL.—At some future time perhaps. They probably will not be fit when that time comes.

The PRESIDENT.—Our regulations must be framed before that time.

Senator MORGAN.—The difficulty about fishing in Behring Sea is that they have no sun-shine to cure the fish, and it is too far away from the market to permit of the fish being transported to the market.

Sir CHARLES RUSSELL.—That is, no doubt, the fact. I am not speaking from my own knowledge at all, but from what others say;—the difficulty is not really insuperable at all as regards the sun, because they can preserve the fish, if there were a market for it,—(that is the real difficulty)—quite sufficiently without any sun to dry it, if they have the salt.

The PRESIDENT.—I suppose that is the real reason,—that there is no market?

Sir CHARLES RUSSELL.—That is the real reason.

The PRESIDENT.—Of course, a great deal of the fish on the North-west Coast goes to support this enormous family of seals.

Sir CHARLES RUSSELL.—Of course; and as I understand on Washington territory, Columbian territory and in Alaska from the North there is great promise from the great salmon rivers.

On page 19, the Commissioners discuss the "principles involved" in the paragraph so headed. They point out the necessity for protection both on shore and at sea. They point out, in paragraph 118 which excited my friend Mr. Carter's wrath, I think, the less danger at sea.

They say:

In sealing at sea the conditions are categorically different, for it is evident that by reason of the very method of hunting the profits must decrease, other things being equal, in a ratio much greater than that of any decrease in the number of seals, and that there is therefore inherent an automatic principle of regulation sufficient to prevent the possible destruction of the industry if practised only at sea.

And, finally, they refer to some other reasons. In paragraph 119, they say:

It is, therefore, abundantly evident, if we judge by actual experience—(that is historically true, I submit)—

control of seal life beginning and ending with protection at sea, either partial or absolute, can do no more than palliate, and certainly cannot materially lessen, the danger to seal life as a whole, unless such control be devised and adopted in close co-operation with agreed-upon equivalent measures on the breeding islands.

The PRESIDENT.—I suppose that is one of the points upon which the American Commissioners differed and dissented from the British Commissioners.

Sir CHARLES RUSSELL.—I have no doubt they would have differed. The PRESIDENT.—They have not stated it.

Sir CHARLES RUSSELL.—They have not gone into it at all. I say that that is historically true, because we do know that pelagic sealing, by itself, has never seriously threatened seal life in any quarter of the globe.

We know, on the other hand, that uncontrolled, or, as Senator Morgan preferred to call it, "indiscriminate slaughter" on land, has been the cause; and if it be answered by the United States, as it may be answered, that they are wise men who will not kill the goose that lays the golden egg—that self-interest will suggest their doing the proper thing on the island—our answer is that their self-interest was as great 20 years ago—10 years ago, as it is to-day, and yet—in face of that we have this—if you accept the report of Professor Elliott which I have endeavored to justify, without going into the details upon it—(it will be gone into in fully hereafter)—that they have pursued upon the island the most pernicious and most destructive system inflicting a very grievous injury upon the seal life, from which it may be long before it ultimately and completely recovers. Therefore we have no such protection merely resting upon their motives of self-interest; they must continue, whatever their own personal desires may be, to vary that course of dealing if they would make it a source of revenue to a great and prosperous community. I believe it is supposed that they have so much money in their treasury as to know not quite what to do with it, but if they continue to let the Islands to the sealers those lessees will pursue their own personal ends, looking to the limited interest they have got in the subject matter, however stringent Regulations may be devised for their control.

Now on page 21 the British Commissioners mention a fact which will become important, which I mention now in passing. It is paragraph

132. In the second sentence in that they are still dealing with Pribilof sealing and they say:

In pelagic sealing, the weather is usually such as to induce a few vessels to go out in January, but the catches made in this month are as a rule small. In February, March, and April the conditions are usually better, and larger catches are made. In May and June the seals are found further to the north, and these are good sealing months; while in July, August, and part of September sealing is conducted in Behring Sea, and good catches are often made till such time as the weather becomes so uncertain and rough as to practically close the season.

I think that is the nearest approximation to a precise statement as to date. As a matter of fact it may be taken—I do not think this will be seriously at all disputed—that as far as pelagic sealing is concerned, the weather makes it impossible to carry it on after the early part of September in Behring Sea. It is a pursuit which needs calm weather for its successful operations, and after the early part of September it is practically at an end.

The PRESIDENT.—Do those indications relate to the first months of the year—do they relate only to the Behring Sea or to the Pacific?

Sir CHARLES RUSSELL.—Those earlier ones relate to the Pacific.

The PRESIDENT.—I should think so the months being February, March and April.

Sir CHARLES RUSSELL.—Those are all south of the Aleutians.

The PRESIDENT.—They go later into Behring Sea, I am told.

Sir CHARLES RUSSELL.—They go later into Behring Sea.

Mr. Justice HARLAN.—They commence to go into Behring Sea sometime in early April.

Sir CHARLES RUSSELL.—I think there may be certainly a few such cases.

Mr. CARTER.—Do you mean the seals, or the sealers?

Sir CHARLES RUSSELL.—The sealers I am speaking of.

Mr. CARTER.—They are there in July.

Sir CHARLES RUSSELL.—No; they are earlier than that.

Sir RICHARD WEBSTER.—There is abundant evidence of their being earlier than that, in the United States books.

Sir CHARLES RUSSELL.—I do not quite follow this.

The PRESIDENT.—The sealers, I was referring to.

Sir CHARLES RUSSELL.—The sealers go into the Behring Sea, some of them, as Mr. Justice Harlan pointed out, in April; but some of them in May.

Mr. Justice HARLAN.—I meant the seals; they turn northward and commence to enter Behring Sea in April.

Sir CHARLES RUSSELL.—That, Sir, is quite true.

Now, on the next page, these partizan and unfair Commissioners having stated those circumstances of those earlier months, just let me point out the clear and emphatic way in which, (where they think themselves warranted), they express themselves about the effect of the pelagic catch in the early Spring.

On the top of page 22, there is a paragraph bearing on the point which Senator Morgan was good enough to mention a few minutes ago; it is in conformity with the evidence which will be referred to in detail. They say in paragraph 134.

With seals killed at sea, the skins are never found to be in a "stagey" condition, as has been ascertained by inquiries, specially made on this point, and there is, therefore, no naturally definite close to the time of profitable killing, such as occurs on the islands. The markedly "stagey" character of the skins at a particular season appears to be confined to those seals which have remained for a considerable time on the land.

I am reminded by my learned friend that there are some instances, (but I think so very few as to make the exception to the rule), of some damaged skins being taken at sea.

The PRESIDENT.—That would confirm the observation of Senator Morgan.

Sir CHARLES RUSSELL.—I should have thought, with great deference, it was the other way,—that if it be the fact that it is only a very rare exception to find a “stagey” skin on a seal taken at sea, it would seem to me to point in the opposite direction.

The PRESIDENT.—That shows that they must go on land, as you say, to shed their hair when they are in a “stagey” period.

Lord HANNEN.—What is meant by a “stagey” condition? Is it merely shedding their hair, or is it not something like an ailment of the skin?

Senator MORGAN.—Thinness is the cause of their shedding their hair.

Sir CHARLES RUSSELL.—I really do not speak with confidence about it, but I have understood it is very much like the case of another animal which I understand much better than the seal,—the horse,—it is like the shedding of the coat, only in a more aggravated character; namely, the disappearance of the older hair and the older fur, and the formation of a younger undergrowth.

The PRESIDENT.—With all hairy animals, that is the case.

Sir CHARLES RUSSELL.—But of a more aggravated and strongly marked character.

The PRESIDENT.—But can that go on in the water? It seems no, according to this.

Sir CHARLES RUSSELL.—With great deference, not so. I tried to explain this the other day—it is surrounded in mystery. It is one of the many points in connexion with the seals that we do not know a great deal about. I endeavoured to explain it the other day by saying this: in accordance with what we know of most animals, some process like stageyness or shifting of the coat occurs with all these animals that are fur-bearing.

The PRESIDENT.—That is general observation.

Sir CHARLES RUSSELL.—That is so; but my suggestion was (and probably it will be found to be the correct one) that in the case of seals which do not go on land, that the change of process is more gradual, so as to be less observable—that it takes place in the water more gradually so as not to be so observable. When I say “gradual”, it is with great deference to what Senator Morgan said—that there is not any evidence to warrant the conclusion—I mean to satisfy one’s mind to a fair conclusion that it is a necessary condition of the existence of the animal, that they all go on land; and, *exempli gratia*, when I say it is conclusively proved by the evidence which I have referred to more than once of Mr. Bryant who states that when the female pup leaves the island as a pup, it never returns to the island again, until it comes to deliver its first young.

Mr. PHELPS.—Who says that?

Sir CHARLES RUSSELL.—Mr. Bryant. I will read the passage.

Senator MORGAN.—The question would be, how would you come to find that out?

Sir CHARLES RUSSELL.—How is anything found out?

The PRESIDENT.—I think we must come to the conclusion that there is a great deal that is doubtful as yet as to these animals.

Sir CHARLES RUSSELL.—Undoubtedly. What is not known about the fur-seals would fill volumes, but I was following this up. On page 22, paragraph 138, you will see the straightforward way in which these Commissioners meet the allegation by admitting it. As to what is the allegation which can truly be made against pelagic sealing they say, in paragraph 137:

An equitable basis of protection is therefore not to be found in the adoption of any simple and corresponding close season, including a part of each year applicable to both shore and sea alike; but as pelagic sealing might easily be regulated by the adoption of a close season, while shore sealing might with equal facility be governed by a limit of number, it seems probable that some compromise of interest may be arrived at by a combination of these methods.

If certain months should be discussed as a close time for sealing at sea, it becomes important to inquire which part of the season is most injurious to seal life in proportion to the number of skins secured, and to this inquiry there can be but the one reply, that the most destructive part of the pelagic catch is that of the spring, during which time it includes a considerable proportion of gravid females, then commencing to travel on their way north to bring forth their young. It is on similar grounds and at corresponding seasons that protection is usually accorded to animals of any kind, and, apart from the fact that these seals are killed upon the high seas, the same arguments apply to this as to other cases.

Now if you refer back to the paragraph as to which you asked me a question a moment ago—paragraph 132 on the previous page—the time they are there referring to, and the catch, is in the month of January, when they are small; and February, March and April, when they say they are much more considerable.

The PRESIDENT.—Yes, but they say the most destructive part of the pelagic catch is that of the spring.

Sir CHARLES RUSSELL.—That is what I am pointing out.

Lord HANNEN.—Do not they mean destructive in the sense of it destroying gravid females?

Sir CHARLES RUSSELL.—That is it.

The PRESIDENT.—That seems to imply that that is a reason why it ought to be closed.

Sir CHARLES RUSSELL.—That is undoubtedly what they say. I am calling attention to it—as I should if I had no other reason for it—in order that the Tribunal may have a fair idea of their Report. I am calling attention to this as proof of the straightforwardness of the British Commissioners—that they are admitting that the pelagic catch which takes place to a small extent in January, to a greater extent in February, March and April, is the portion of the catch which includes the greater proportion of gravid females, and therefore is, in proportion to the catch, more destructive.

The PRESIDENT.—The pelagic catch is that of the spring. That would include—the end of the spring—the month of May. They propose a new close season, on page 25, from the first of May.

Sir CHARLES RUSSELL.—No, Sir, as they say, in May and June the seals are found further North, and these are good sealing months.

The PRESIDENT.—At page 25 they say the close season is to be provided from the 15th September to the first of May. It might be said to be those three months during which sealing is destructive.

Sir CHARLES RUSSELL.—I think I shall show you when I come to that part of the case, that that is not so. By that time the great bulk of the gravid females have got very nearly up to the Behring Sea.

Mr. Justice HARLAN.—By the first of May.

Sir CHARLES RUSSELL.—Well, I do not say they have all got into the Behring Sea by the first of May. However, it is rather anticipating what I have to say on that subject of regulations; but still we con-

sider that a date may be fixed for the commencement of the sailing of sealing vessels which would prevent their overtaking the gravid females going to the breeding islands.

The PRESIDENT.—You consider they have all passed into the Behring Sea before the first of May?

Sir CHARLES RUSSELL.—No, I think not. Indeed, this is a very convenient opportunity for emphasising my position in this regard. I have pointed out that these commissioners were dealing with the question of regulations, both on land and at sea everywhere for the fur-seal preservation. They were arguing upon the general assumption that regulations may and ought to be made affecting both land and sea.

The PRESIDENT.—Both Behring Sea and the Pacific.

Sir CHARLES RUSSELL.—Certainly both Behring Sea, the Pacific, and the islands.

The PRESIDENT.—Yes, and the islands.

Sir CHARLES RUSSELL.—They were not, as I have more than once said, writing in view of any construction of the Treaty, even if they had the Treaty, in fact, before them. They were dealing with the question generally; and assuming that the whole thing was under one Power's control, what would be the proper adjustment of regulations to apply to the whole; but that brings me back to the question I referred to yesterday, and as to which I wish to state distinctly what the position of the British Government is, as to which Senator Morgan yesterday rather challenged me.

The British Government are today as ready as they always have been to deal with the whole of this question inside and outside Behring Sea, the Pribilof Islands and the rest, but they decline to be parties so far as they can refuse to be parties to an arrangement by which the whole thing is to be preserved to the benefit of the United States, without any concession or guarantee from the United States; and, therefore, it was that I submitted to you, admitting I conceded it to be a point most arguable and difficult, as a matter for your consideration whether your jurisdiction extended outside Behring Sea on the Treaty.

On the assumption that your jurisdiction does extend outside Behring Sea I shall have to make some suggestion on that view presently. That is our position and I think it is a perfectly just and perfectly fair position. If there is to be no concession on the part of the United States and the whole of the Regulations and claim of the United States were simply to be directed to the preservation of the fur-seal for their benefit and for their benefit alone, I do not know what we have got to arbitrate about. It would have been a thousand times better to have admitted all these questions of alleged rights as raised in Article VI. Let them go back to the Ukase of 1799 or the Ukase of 1821 against which they struggled so severely. This new scheme of proposals is but an assertion again of the old exploded claim of territorial jurisdiction or claim of property, and except that it is put under circumstances very greatly changed it is the old claim put if possibly in a more utterly untenable form.

For the present I content myself with re-affirming our position submitting respectfully for your judgment and consideration the construction of the treaty which of course, you must construe for yourselves whether we raise the points or not, because within the ambit of that Treaty and that alone is your authority to make regulations at all. Having decided that point as you shall see fit to decide it, if you come to the conclusion your authority extends beyond, you will consider what would be fair and just and equitable Regulations in that wider area. Returning,

to where I left off reading the Report of the British Commissioners at page 23, they then proceed to their summary of general considerations. These are they:

(a.) The facts show that some such protection is eminently desirable, especially in view of further expansions of the sealing industry.

(b.) The domestic protection heretofore given to the fur-seal on the breeding islands has at no time been wholly satisfactory, either in conception or in execution and many of its methods have now become obsolete.

(c.) Measures of protection to be effective must include both the summer and winter homes, and the whole migration-ranges of the fur-seal, and control every place and all methods where or by which seals are taken or destroyed.

(d.) Although primarily devised for the protection and perpetuation of the fur-seal itself and of the sealing industry as a whole, any measures must be such as to interfere as little as possible with established industries, and such as can be instituted under existing circumstances.

(e.) Equitable consideration must therefore be given to the several industries based upon the taking of seals, and especially to the number of persons dependent on these for a livelihood and to the amount of capital invested, so that the measures adopted may be such as to recommend themselves on the ground of common interest.

(f.) The controlling Regulations should be so framed as to admit of varying degrees of stringency in accordance with the changing exigencies of the case.

Then they deal with improved methods in taking the seals, and restrictions in the number of seals taken and finally on page 25 is the specific scheme of regulations which they suggest as to which I may briefly say they mean a restriction in numbers on the Pribilof Islands, a zone of protected waters 20 nautical miles from the Islands, and a close season from the 15th of September to the 1st of May. That would mean that all that spring catch of January, February, March and April would cease to be made. Then they suggest alternative measures not inconsistent with the other, but elastic measures I prefer to call them, by which in consideration of a decrease in the number killed on the Islands there should be an extension of the zone. As regards these I do not propose to examine them in any detail.

The PRESIDENT.—That is not your scheme, you have your own to submit I suppose?

Sir CHARLES RUSSELL.—Yes. We borrow some features from this adapted to the altered circumstances which we will submit to you presently, but, I have now in conclusion still two important topics to deal with namely a consideration of the American proposals and then a consideration of those which we venture to suggest for the acceptance of the Tribunal, and that will not occupy me, I hope, the whole of Tuesday.

[The Tribunal thereupon adjourned till Tuesday the 13th June at 11.30 a. m.]

THIRTY-SEVENTH DAY, JUNE 13TH, 1893.

Sir CHARLES RUSSELL.—Mr. President, I have up to this point, upon the question of Regulations, dealt with what I conceive to be, and what we respectfully submit ought to be, the general questions which ought to enter into that question; and, in order wholly or in part to remove prejudice, and in order also that the Tribunal should have a just appreciation of what the actual facts were, I endeavoured to show in some detail, and I hope I succeeded in showing, that, upon no view of the actual facts of the case, could it be established that pelagic sealing had been the main or even the principal cause of the depletion of the seal race which, it is admitted, has to some extent taken place; and though I have always admitted that pelagic sealing was a contributory cause, I showed also, or endeavoured to show that the true cause, the main and principal cause, was the pernicious system pursued upon the Islands: a system condemned by the voice of the strongest authorities representing the interests of the United States themselves; the great and main fact being, that instead of observing the moderation that had been pursued during the Russian *régime*,—that instead of observing periods of rest as the Russian Government did during that *régime*, the United States, beginning by permitting that extraordinary wholesale slaughter in the year 1868 of nearly a quarter of a million of seals, had permitted their lessees to take year by year the full *quota* of about 100,000 a year, unmindful of the fact that they were sapping the future male stock of that herd upon which, to a great extent at least, its future health and prosperity depended. The general considerations, which I have submitted should be borne in mind by the tribunal were, that the Regulations should be just and equitable in view of the common interest to be affected by them: that they ought to be such that the concurrence of other Powers might be expected in observing them, that it was a question of the *regulation* of rights upon the high seas, not a question of the *prohibition* or *annihilation* of those rights: and that the great object, of the Regulations is the preservation of the fur-seal species, and not the aggrandisement of the United States, or the putting them in a position in which they could reap a larger profit from the killing of the seals.

I submitted also that while you had no power to make direct Regulations upon the Islands, yet that you have the power, and I submit ought to exercise the power, of making your Regulations conditional upon the observance of certain distinct rules upon the Islands, the main one of which would be moderation as to the number killed, as to which the Russian example to which I referred, would seem to afford a safe and convenient guide: and lastly, as to general considerations, I submitted that in view of the incompleteness of the information which is even now possessed in relation to the conditions which affect seal life, your Regulations ought either to be for a definite period of time only, or if on the face of them they purported to have a longer existence or application, that there ought to be power, after the lapse of a reasonable time for either Power to denounce those Regulations and recede

from them. I would wish in that connection to add only this word, that if such a power as I have suggested of denouncing the regulations after a definite period of 5, 7 or 10 years, or whatever is thought reasonable by the Tribunal, then each party would be remitted to its original position, its original rights, whatever they were, unaffected and unimpaired, and that they each of them would be in a position to approach the consideration of proper Regulations in view of the wider experience which the actual working of such Regulations as you are pleased to propound will have afforded; and that there is no reason to apprehend that in view of that further light thrown by experience upon the conditions of seal life so far as they may be affected by any Regulations that you formulate—there is no reason to suppose that these Powers could not come easily and satisfactorily to an arrangement of the matter.

Now having dealt with these considerations, but two things remain for me to do. The first is to consider the suggestion made on the part of the United States. The second is to assist the Tribunal by suggesting the character of the regulations which upon the part of Great Britain are suggested as being just and fit and equitable, in all the circumstances of the case.

First, as to the regulations put forward on the part of the United States. I do not know whether I am to regard that suggestion as put forward seriously.

Mr. PHELPS.—I think you may, Sir Charles.

SIR CHARLES RUSSELL.—Well, I really cannot so regard it. I cannot think that any member of the Tribunal will so regard it.

Why, Mr. President, it takes us back to the year 1799, to the year 1821, and we begin to wonder, in the face of this suggestion of the United States, at the moderation of the Emperor Paul, because all that he claimed was 100 miles from the shore, but in that memorandum of Baron de Tuyl was content with six miles over the area which corresponds with the area which is here in dispute.

Now what is this suggestion. I may describe it correctly thus: a deprivation for all time of the rights of British nationals over an area of the sea approaching 3,000,000 square miles; a deprivation forever of the rights of British nationals to fish for seals in that enormous area; a monopoly to the United States in that area; a monopoly to the United States which is to be secured in part by the co-operation and at the expense of Great Britain, because I take it that whatever scheme of Regulations is laid down by this Tribunal, each Power will be morally bound, internationally bound, to lend its part in the enforcement of those Regulations; and all this perpetual exclusion, this monopoly to the United States, this expense to Great Britain, without one fraction of security that the object of this Treaty, which is the preservation of the fur-seals, shall have been secured.

I have spoken of the extent over which this perpetual prohibition is proposed to extend. I have had coloured on this map of the northern hemisphere what it means. The north pole, of course, is in the centre of the map.

It is a worse state of things—a wider and a more reckless and unfounded assertion of the jurisdiction or claim of jurisdiction than in the time of the Ukase of 1799 or of 1821, because in those days this region was not a field of much commerce or of much enterprise. But what is the state of things to day? This prohibition extends over that area [Pointing to it.] *Here* is Vancouver, and *here* is Victoria, and this line traced upon the map is the new and established mail route to Yokohama and China, and I need not say that that means the following of commerce and of considerable commerce in its train, and yet over

this vast area there is to be this power reserved to the United States of searching, seizing, condemning any vessel found engaged in sealing or prosecuting a voyage with a view of sealing. I say, looking to the altered condition of things, the increase of population, the extension of commerce in the region affected, it is a proposition worse than the proposition propounded by the Russian Rules of 1799 and 1821 against the assertion of which both the United States and Great Britain protested. But it has other vices than the almost unbridled attempt to assert jurisdiction. What would be the cost of policing that enormous area? It would defeat absolutely its own object. What is the experience of everyone who has had to do with practical legislation or the enforcement of practical legislation in reference to these matters and who has read of these matters? Why, that if you put up excise duties applicable to a particular frontier line a high point, smuggling follows as a necessity. Here the United States propose to take a monopoly in the principal fur-seal producing area of the world.

What does that mean? It means driving up the price of the fur-seals to the highest point of popular demand: It means getting the highest obtainable price for the fur-seal. What does that mean? It offers the highest inducement that can be offered to persons to violate this area and to violate these Rules and to pursue an enterprise attended with some risk, but, if successfully carried out, with enormous profit; and as I said in the case of a great frontier when there is an article subject to a very high duty, so here, you would have reckless venturesome persons sending comparatively worthless ships to infringe the Regulations and so, defeating the very object at which the scheme is aimed. I observe in the Argument of the United States upon concurrent Regulations, at 205, dealing with this matter and dealing a much more limited area, that they say as to:

What would it cost to maintain the naval police required to enforce this scheme of the British Commissioners of a 20 mile zone?

Will you be good enough to bear that in mind?

How many armed steamers would be needed to guard effectually against the entrance of a trespasser within a prohibited zone, the circumference of which is upwards of 140 miles, in a region of thick and almost perpetual fogs? A million of dollars annually would be a moderate estimate of the expenditure required, and this must be paid by somebody, the Commissioners do not tell us by whom.

What then, I ask, would be the cost of policing this enormous area? Granted that Great Britain, as no doubt she would, pay proper respect to the Regulations of this Tribunal, and would discharge her proper duty in that regard, what would be the cost of policing this enormous area? Against United States citizens, against the people of Japan, it may be against the citizens of Russia, and against the citizens of British Columbia: aye, against the subjects of other Powers who have now no temptation from a remote distance to engage in this enterprise at all—you would have this state of things: seeing that these Regulations apply only to bind the nationals of Great Britain and the nationals of the United States you would have a resort to foreign flags—United States vessels sailing and sealing under foreign flags, and British vessels sailing and sealing under foreign flags: you would have an absolute impossibility of enforcing effectual safeguards, and an occasion at all points of international difficulty and international complication: and lastly, you would have, as I have already said, the impossibility of expecting the adhesion of foreign Powers which is contemplated by article VII of this Treaty. I have already pointed out in my introductory observations that by their own force and virtue your Regulations

would carry no legal sanction with them, they would carry with them very high moral sanction, but to give legal effect to them, as I have pointed out, legislation by the United States would be necessary—legislation by Great Britain would be necessary and I have to point out, while I am perfectly certain that Great Britain would not fail in doing its duty in paying due respect to the Regulations of this Tribunal that such a scheme as this would present enormous difficulties, in its passage through an assembly whether it be the Congress of the United States or through any popular Parliament. No, Mr. President, this scheme, if scheme it can be called, has all the evils which could be well concentrated in any scheme to be suggested. Let me read the first and second of these propositions. First that no citizen or subject of the United States or Great Britain shall in any manner kill.

So that however discriminatingly we could kill—killing barren female or only old males,—nevertheless the prohibition is absolute. Next it extends over the area that I have mentioned with a ludicrous qualification provided that it shall not apply to such pursuit and capture as may be carried on by Indians on the Coasts of the territory either of Great Britain, or the United States for their own personal use.

We get back to that old condition of things in which whoever framed this paper seems to have thought that the Indians on this coast, went about half naked or with a seal-skin girt about their loins, a state of things which no longer exists at all, nor has for many, many years. They wear clothes like the white men, and tall hats I am told on their Sundays and holidays like the white men, the tall hat being universally admitted to be a proof of advanced civilisation. But “for their own personal use”; which, as I understand, means if they want a skin with which to gird about their loins, or for their wives or for their children, they may have it; but to sell it, no; and they are to do this in vessels propelled wholly by paddles. Oars, in the ordinary acceptance of the word, are not to be admitted; and they are not to be manned by more than two men. Two men and a boy would be fatal. Two women and a man would be fatal; and all this is to be done “in the way anciently practised by such Indians”. Who is to fix the point of what is “ancient”? And who is to tell us what was anciently practised by such Indians? What are the sanctions that follow any breach of these regulations? Why, that any ship actually engaged in killing, or the pursuit, or capture of seals, or prosecuting a voyage for that purpose, and I want to know how that purpose is to be ascertained,—only by search, of course,—supposing, for instance a vessel engaged in whaling; how is it to be ascertained whether she may not be also contemplating a voyage for the purpose of sealing, or in the days not remote when the great general fishing wealth of this region may be turned to profitable account by new modes of access to rapidly rising markets and as population grows and as the means of communication increase, for the purpose of fishing; and all these are to be harassed over the enormous area of nearly 3,000,000 square miles at the will and pleasure of the authorities of the United States or at the caprice of those in charge of its Revenue vessels and subjected to search upon the high seas and if found prosecuting a voyage or engaged in sealing, then what is to follow? The ship of Great Britain is to be carried into an American port, condemned, and the men sent adrift, as they were cruelly sent adrift in the case to which I have drawn attention, thousands of miles and penniless, away from their homes. The very contemplation of such a scheme makes one feel as I feel, I must confess, indignant, especially when it is to be borne in mind that this is the scheme which it must be admitted requires legislative

action both on the side of Great Britain and the United States to give effect to it. I should like to know what would have been the scheme which the United States would have put forward if its claim of territorial jurisdiction, its claim of property in the individuals and in the fur-seals collectively had been established as clearly as it is, I submit, now established to be non-existent? Suppose, when these first five questions had been framed, Great Britain had chosen to say, "It is a remote region; it is not a matter of much consequence to us. The thing we feel most about is this assertion of right upon the high seas to seize and search the ships of our nationals; but suitable reparation being made for that in the past, we care not about it in the future; by all means have your assertion in relation to Behring Sea,"—those assertions were confined to Behring Sea,—and yet absolutely the result sought to be pointed at by this so-called suggestion for Regulations is infinitely worse to Great Britain than if she had never challenged the right which the United States has claimed at all.

Mr. President, I cannot seriously consider this scheme. It is selfish; it is one-sided; it is inequitable; it is unworkable, and it is entirely framed in oblivion of the fact, if fact it be, as we submit it is, that we have established that the United States have in no form in which they have ventured to put it forward any legal rights in this matter at all, except the rights belonging to their territorial ownership, and those rights only.

Now, Mr. President, I turn to the suggestion which we think it right to offer, which at least, I hope the Tribunal will think, we have considered in a serious, in an anxious, in an equitable spirit, and with the desire to do something to assist this Tribunal in arriving at a just and, at the same time, a practical conclusion in this matter.

The first suggestion which we submit to this Tribunal is, assuming that we are right that Regulations and not prohibition is the question, that in future all vessels engaged in pelagic sealing, belonging either to Great Britain or the United States, shall be permitted to do so only on condition of obtaining a license and carrying a distinctive flag; that is to say, that no ship belonging to a British national shall be allowed at the mere will and pleasure of its owner to engage in pelagic sealing, and that the same shall apply to the ships owned by the citizens of the United States, that as a condition of their right to engage in pelagic sealing at all, they shall be furnished with and shall obtain a license and bear a distinctive flag. This presents no difficulty and no complication. There are four ports, and four ports only, belonging respectively to the United States and Great Britain, from which the pelagic sealers set forth. Those are San Francisco, Port Townsend, Vancouver, and Victoria; and there can be, therefore, no difficulty in providing a scheme by which there could be at each of these ports a Licensing Authority to license sealers to pursue pelagic sealing. I put that in the first place for a reason which I think you, Sir, will appreciate; it is that experience of similar systems has shown that if you pursue that licensing system, you have some guarantee for the character of the persons who are licensed, and you have persons who are giving by their position and by their means and by their character some guarantee that they are entitled to pursue this calling. But that is not all, nor principally what is the advantage. It is that once you introduce a system of licenses you constitute automatically an effective police force. How? Because, to begin with, you make the whole number of those who have licences a police force upon those who have none. Those who have the privilege of the license will, in their own interests, do all they can to safeguard and secure it, and to see that no vessels that do not comply with the

legal conditions of the license engage in pelagic sealing at all. That is the first point.

The next point is this, that as regards the licensees themselves, when you proceed to consider the question of Regulations relating to zone or to close time, one or the other or both, you make each licensee a police or detective upon every other licensee to see that such licensee gets no advantage over him, the particular person, either by entering within a prohibited zone and thus securing an undue advantage to himself or entering a particular Sea before a particular time if a close time is fixed. So that in that way you get, automatically working to a large extent, a system of checks and restraints for the enforcement of such Regulations as are laid down. That is the first, therefore, that we should respectfully suggest. It has been suggested by the British Commissioners in their most candid Report,—I think it is in their Report; at all events, I know in the Supplemental Report which I am not stopping to refer to,—that, for reasons which will be more apparent when I come to consider the other suggested Regulations, that nothing but sailing boats should be engaged in pelagic sealing; in other words, that steam vessels should be excluded.

Now I come to the next question. I deal first with the area in which it is admitted without any conditions at all that the Tribunal has complete power to make such regulations within the scope and for the object contemplated in the Treaty, namely, the eastern part of Behring Sea. First of all, the point that naturally occurs to one is the question of zone round the islands. I shall be able to afford a very good illustration of what has been found to be, or considered to be, reasonable and practicable in the case of other islands further to the west in the case of Russia, but I reserve that for the later period of my argument.

Now the British Commissioners have suggested a 20 mile zone round the island, and that has been treated with some derision by my learned friends in their arguments; and Mr. Condert who was most fair and candid in his, with the exception which I am about to mention, addressed an argument to show that seals were not got within 20 miles of the island. I will read the passage in a moment. It is on page 635 of the print. It is only a word, but it is a little disingenuous, I think. He is citing the evidence of Ohlsen of the steam schooner "Anna Beck" and he states through the Victoria Daily Colonist of August 6th, 1887, that anyone who knows anything of sealing is aware that such a charge, that is catching seals in Alaskan waters within three leagues of the shore is ridiculous as we never took fur-seals within 20 miles of shore; and Mr. Coudert proceeds, "This may explain why that 20 mile zone was admitted by the Commissioners". That was not ingenuous on the part of my learned friend. I will not say that it was intentionally disingenuous, but I do not think that he could have quite realized the matter. What that points to, Mr. President, is this, that a 3 mile zone, which is the territorial zone generally admitted, means more than a 3 mile zone. It means that owing to the circumstances of climate principally, the atmosphere in Behring Sea, that vessels will not run the risk of approaching anything near the distance which they might in fact approach the islands, if they were minded so to do; in other words it means not that there are not seals within a 20 mile zone of the island—not that—but that they are afraid to approach, although the zone is only 3 miles, within 20 miles of the islands, because of the serious penalty that might fall upon them if they found themselves within the territorial waters, and what I want to impress upon this Tribunal is that a 20 mile zone means a great deal more than a 20 mile zone. A 20 mile zone means for the prudent navigator, for the prudent sealer, for the prudent

pelagic sealer, a zone probably closer to 40 miles than 20 miles, because he cannot always perfectly satisfy himself as to the distance he is from the nearest land, and looking to the serious penalties that would follow from an entrance within the prohibited area he keeps outside that area. I do not stop to consider whether the exact figure that the Commissioners have mentioned, of a 20 mile zone, is adequate. What I do wish to point out is that if you think that 20 miles is not adequate you ought to have present in your minds that 25 miles means probably 50, and 30 miles means probably 60, and that in the case in which the penalties necessarily would be serious which would attach for an infringement of regulations as to zone that prudence and the instinct of self-interest keeps the pelagic sealer away, and widely away, beyond the outside limit of that zone.

It is important in this connection to consider two things: what are the facts in relation to the greater or less plentifulness, if I may use that word, of seals during the important months which we have to consider, namely, the months of June, July, August and part of September, for pelagic sealing is at an end in the early days of September unless there is exceptionally fine weather, and then it may be prolonged for a few days longer.

The PRESIDENT.—In Behring Sea.

Sir CHARLES RUSSELL.—Yes, Sir, all I now say has reference to Behring Sea, and to Behring Sea only.

There are two matters to be dealt with in relation to that. First of all, the question of what is the evidence as to whether or not during those months that I have mentioned which are the important months, the vast majority of the seals are not either upon the islands, or within a comparatively small zone of the islands themselves, and, further, there will be an important consideration in this regard applicable particularly to the question of the animals who have delivered their young.

Upon the first point I should just like to say a word or two for the purpose of illustrating what I have to say, for I am, as you of course understand, not reinforcing these points I am making, with a fulness which I should be able to if it were not that I am following the plan which I have described, of merely stating our case in general outlines, and my learned friend will fill up the picture. If you would turn to the seal chart n° 6 of the United States Counter Case you will see what I mean. In order to save you trouble and that you may see what I mean, will you refer to this map also, N° 4, where you see the lines crossing and recrossing. It is also a United States map in their Counter Case, and it shows the series of voyages the results of which are set out in the map to which I first called attention. I only want you to see the way in which they traverse it.

Mr. PHELPS.—It is the cruising map.

Sir CHARLES RUSSELL.—Yes, the result of the cruising is shown in the map to which I have called attention. That is all I want to show you in that connection.

Senator MORGAN.—That is the map, in connection with Hooper's report.

Sir CHARLES RUSSELL.—Yes, Hooper and Conlson.

Now forgive me asking your attention to this. You will see a double circle. Will you be good enough to note what the description of this chart is. It is Counter Case Chart N° 6, showing the position and number of seals observed and reported by the United States naval vessels in Behring Sea, during the season of 1892. So that this was, as far as they could do it, not merely general and vague observations,

but accurate observation, numerically taken, of the actual number of seals that they saw and were able to count, and the result of that is shown in the number of little red ticks that are to be found in Chart 6. I may say it has been very carefully and correctly done, as far as we can judge, considering the difficulty of doing it, but looking to the size of that map, one of those little ticks which represents a seal covers a space of something like a mile, still it is done as well as it could be done; and in some instances the number recorded in the logbook of the particular ship has been checked with the number of ticks to be found on this map, and they have been found to coincide, I believe, accurately in the number that have been checked.

There is one other of the 29th July, 1892, where there is quite a cluster just north of the Akutan Pass.

Now I wish to call attention to what these voyages were. They were voyages during the months of July and of August, and you will observe that within the St. Paul and St. George circle zones what is printed across that area is this: "Seals within this area very numerous". The circles are quite properly described there looking at the character and shape of the islands; the outer line of the circle will be in some places more than 20 miles from the nearest land, but the circle is at the least 20 miles in each case from the nearest land. Now we have taken the trouble of checking their log books, and by absolutely computing the seals that are here found in these numerous voyages extending over the months of July and August, to see what they total up to. The total shown on the map itself is 1,068 seals altogether, outside the 20 mile zone, and computing the entire number in the log, 1,800 seals. That is the result of the observations although they say in their logs that they did not begin to count until 5 or 8 miles from land.

I need not say that when you bear in mind that the notation of one of these seals upon this map occupies the space of nearly a mile or about a mile, that does not show a very large accumulation of seals outside the 20 mile zone, and when you have that in connexion with the statement that within the 20 mile zone the seals were very numerous, it does go some way to establish the proposition that during that which is the important time to consider, the great bulk of the seals are to be found within that very limited area. Of course, you will bear in mind what I have said on another branch of the case that our case is that there is a considerable number of seals that do not go to the Islands each year and some that do not go for years. I referred to the evidence of the United States Government Agent, Captain Bryant among others, who expresses the opinion that in one class particularly the female seal does not go from the time it leaves as a pup till it comes back to deliver its young; that would, be in the third year, and Bishop Veniaminoff puts the same date. The same argument may be based upon map 4 to which I have already referred. It refers to a corresponding period in 1891. This map refers to 1892.

Now there is another very important matter and that is this question of whether, and if so, to what extent the seals that come to sojourn on the Pribilof Islands go, and if so to long distances to feed during their sojourn on the Islands. I referred to this matter on Friday as showing the incompleteness of information that we have on this very important point. But there are certain facts in regard to the question which are not in dispute, and I beg that these undisputed facts be first noted. First it is an undisputed fact that the breeding males which come to take up their place on the rookery and await the arrival of the cows do not during the whole of the time that they are on the Islands and when

the work of procreation is going on feed at all; that is an undisputed fact between us. The universal testimony is that they come on the Islands fat and sleek and in good condition, and that they leave them, having stayed by the Islands during the whole of the time lean and emaciated; and they do not during that period seek any sustenance at all. Nature seems to have made the curious provision for them that in the early part of the year and in the winter they have been able to accumulate an amount of fat upon which practically they subsist during this very exhaustive period of their existence. So much as regards the breeding males, that is common ground. But it is also common ground, as you will find when you come to the case of the holluschickie or young males; but as that is not so clearly admitted between us, I must ask leave to call attention to one or two small points of evidence on the matter. I will rely in this connexion, in the first instance upon what appears in the United States documents themselves put forward in their Case and Counter Case. In their Case on page 121 they make this statement:

Both Captain Bryant and Mr. Morgan say that in their opinion the bachelor seals feed very little while located on the islands, and Mr. Glidden states that the bachelors once in a while go into the water, but remain in the vicinity of the islands.

The bachelor seals, the holluschickies are the young males who have not yet been in a position to acquire a place upon the rookery.

Mr. Glidden states that the bachelors once in a while go into the water, but remain, in the vicinity of the islands' Anton Melovedoff, the native chief on St. Paul Island for seven years (1884-1891) states that he has found that the seals killed in May and early June were fat and that their stomachs were full of food, principally codfish, and that later in the season they were poor and had nothing in their stomachs, and that, in his opinion, none but the mother seals go out in the sea to eat during the time the herds are on the islands.

I will deal with the mother seals in a moment.

And his opinion in this matter corresponds with the views of natives and whites who have been long resident on the Pribiloff Islands.

Further evidence on that point is to be found in collateral testimony in the United States Argument under the title "Feeding" page 159.

In that page the last paragraph but one.

The Holluschickie (batchelors) do not go out to feed. When they come in May there is plenty of fish in their stomachs but after June there is nothing.

Again:

Young wigs go into the water, but during the breeding season hang about the rookeries never going far from shore.

And again on the top of page 160.

I have also observed (says Mr. Fowler) that the male seals killed soon after they come to the Island are fat and their stomachs filled with food while those killed in the latter part of the season are poor and lean and without food in the stomachs.

Then Mr. Fratis:

I do not think the batchelors go to feed from the time they haul out until they leave the islands in November for I have observed the males killed in May are fat and their stomachs full of fish, mostly cod fish, while the males killed in July and afterwards are poorer and poorer and their stomachs are empty.

I pass the next and go to Nicoli Krukoff:

I think the batchelors do not eat from the time they arrive till they go away, and I think so because the seals killed in May and early June are fat and have plenty of food in their stomachs, while those killed later than June are poor and their stomachs are empty and they get poorer and poorer until they go off in November.

Then:

I have found that the seals killed (says Molovedoff) in May and early June were fat and that their stomachs were full of food principally cod fish, and that later in the season they were poor and had nothing in their stomachs.

Then Mr. Redpath:

Young males killed in May and June when examined are found to be in prime condition and their stomachs are filled with fish—principally codfish, but those killed later in the season are found to be poor and lean and their stomachs empty, which shows that the males rarely leave the islands for food during the summer months.

Mr. Webster is to the same effect, and then he proceeds to express an opinion about the females going out to feed which I will now proceed to consider.

Senator MORGAN.—Is there any evidence that you have seen contradicting the statement you have just read.

Sir CHARLES RUSSELL.—No not that I am aware of. There are statements scattered here and there which say they do not feed much which would imply therefore that they feed a little—during the latter period of their sojourn on the Island they do begin to feed but not in the months I have mentioned.

Lord HANNEN.—The probability is when the sexual excitement begins they are provided with a greater supply of fat as in the case of the old ones, and that probably arises at the same time—the increase of fat in the males—which serves them as a reserve force.

Sir CHARLES RUSSELL.—It may be. It obviously is so in the case of the older males, but these observations that I have been just reading do not apply to the older males.

Lord HANNEN.—No, it was *apropos* of that I made the observation that at the same time that the sexual passions were roused there is a greater supply of reserve and fat.

Sir CHARLES RUSSELL.—And the real question is that nature having made that extraordinary provision in the case of males is there any reason for supposing that nature has not made a similar provision in the case of the females. That is a question that is not admitted, and I will call attention to the evidence in a moment about it. But it is a very remarkable thing that in all the seals that have been killed you will find some reference made to them in what I am about to state, that what is stated as true of the males is true of the females—that until you come to the end of the period when their nursing operations are nearly over then apparently they take again to food.

I will deal with the females in a moment, but there is also a passage in the earlier Report reprinted in 1881 what we have been calling the brown book report, of Mr. Elliott bearing on the same subject; and he does not restrict it, though I do not say he does not mean to restrict it (as a matter of fact he does not) to sex. He says:

I have examined the stomachs of hundreds which were driven up and killed immediately after their arrival in the spring, near the village; I have the word of the natives here, who have seen hundreds of thousands of them opened during the slaughtering-seasons past, but in no single case has anything ever been found, other than the bile and ordinary secretions of healthy organs of this class, with the marked exception of finding in every one a snarl or cluster of worms, from the size of a walnut to a bunch as large as a man's fist. Fasting apparently has no effect upon the worms, for on the rare occasion, and perhaps the last one that will ever occur of killing three or four hundred old bulls late in the fall to supply the natives with canoe skins, I was present, and again examined their paunches, finding the same *ascaridæ* within. They were lively in these empty stomachs, and their presence, I think, gives some reason for the habit which the old bulls have (and others do not) of swallowing small water-worn boulders, the stones in some of the stomachs weighing half a pound apiece, in others much smaller. In one paunch I found over five

pounds, in the aggregate, of large pebbles, which, in grinding against one another, I believe, must comfort the seal by aiding to destroy, in a great measure, those intestinal pests.

Now, I turn to the wider consideration of the case of the females; and I turn to the British Commissioners' Report, section 232, where the matter is carefully gone into at page 39 of that Report.

Some particulars are given on a later page respecting the abstention from food of the fur-seals while remaining upon or about the breeding islands. It appears to be certain that the mature males doing duty on the breeding rookeries do not feed at all during the breeding and for some time at least after landing females do not leave the rookery grounds in search of food.

That is a common fact admitted, that for some weeks after,—this is a fact not in dispute,—the female landing and giving birth to her pup, she does not for some weeks leave the island, and, therefore, for some weeks does not obtain any food at all. That is an admitted fact. The witnesses vary as to the length of time, but the body of evidence turns to that being something like three weeks.

Mr. CARTER.—We do not concede any period of several weeks.

Sir CHARLES RUSSELL.—The shortest time that is put (I assure you, Mr. Carter, we are not making these statements without considering them).

Mr. CARTER.—When you say that we concede it, I submit that you do.

Sir CHARLES RUSSELL.—Well, if you will be kind enough to pay attention and look at the evidence, I think you will find I am right. There is not one witness who speaks on the subject who was called by the United States who does not admit that for a considerable period they do not leave the Islands after giving birth to their pup, and the shortest period, I speak from recollection but after careful examination, is a period of 17 days. Other witnesses put it longer, and I say the bulk of the testimony fixes it at about three weeks.

My learned friend, Sir Richard Webster will read this for me.

Sir RICHARD WEBSTER:

There is no apparent reason why the "holluschickie," or young males, should not go to sea in quest of fish. Singularly enough, however, though animals of this class have been killed by hundreds of thousands upon the breeding islands under all conceivable conditions of weather, and often within less than an hour of their deportation from their hauling-grounds, the almost universal testimony is to the effect that their stomachs are invariably found to be free from food.

Then follow some passages about male seals that I need not now read again. I may say the first number killed was 20 seals, and the second 98.

Then n^o 235 is—

From the large North Rookery on Behring Island, 5th September, an adult male or "seacatch," two females, and an unweaned pup, were driven directly from the rookery ground, about 200 yards distant, and killed, by permission of the authorities, for presentation by us as specimens to the British Museum. The stomachs of all four were completely empty, with the exception of a few worms in those of the three adults. Not only the pup, but the females, and even the old male, were fat and in good condition.

Sir CHARLES RUSSELL.—Now, on the next page, paragraph 242:

Perhaps the most notable feature in regard to this food question, and one directly consequent on the prolonged abstinence of the seals from food while on and about the islands, is the entire absence of all excrement on the rookeries and hauling grounds. Captain Bryant appears, however, to be the only author who has specially mentioned this particular and striking fact. He writes:

The fact of their remaining without food seems so contrary to nature, that it seems to me proper to state some of the evidences of it. Having been assured by the natives that such was the fact, I deemed it of sufficient importance to test it by all the means available. Accordingly, I took special pains to examine daily a large

extent of the rookery, and note carefully the results of my observations. The rocks on the rookery are worn smooth and washed clean by the spring-tides, and any discharge of excrement could not fail to be detected. I found, in a few instances where newly-arrived seals had made a single discharge of red-coloured excrement, but nothing was seen afterwards to show that such discharges were continued, or any evidence that the animals had partaken of food. They never left the rocks except when compelled by the heat of the sun to seek the water to cool themselves. They are then absent from the land for but a short time. I also examined the stomachs of several hundred young ones, killed by the natives for eating, and always without finding any trace of food in them. The same was true of the few nursing females killed for dissection. On their arrival in the spring they are very fat and unwieldy, but when they leave, after their four months' fast, they are very thin, being reduced to one-half their former weight.

Now, it does not seem more remarkable that the male, subject to the trying conditions he is subjected to during this period, should go without food than the nursing female should go without food.

The matter is further referred to at paragraph 242, on the top of page 42.

In a note appended to the above by Professor Allen, that gentleman writes: Steller states that in the numerous specimens he always found the stomach empty, and remarks that they take no food during the several weeks they remain on land; Mr. Dall confirms the same statement in respect to the present species, and Captains Cook, Weddel, and others, who have opportunities of observing the different southern species, affirm the same fact in respect to the latter. Lord Shuldham long since stated that the walrus had the same habit, though its actual fast seems somewhat shorter than those of the eared seals. . . . This singular phenomenon of a protracted annual fast during the period of parturition and the nursing of the young—the season when most mammals require the most ample sustenance—seems not wholly confined to the walruses and eared seals. So far as known, however, it is limited to the pinnipedes; and, excepting in the case of a single member, the sea-elephant, to the two above-named families. By some of the old writers the sea-elephant was said to feed sparingly, at this time, on the grasses and sea-weeds that grew in the vicinity of its breeding places, but the weight of the evidence in respect to this point seems to indicate that this species fast similarly to the eared seals and walruses during the period it resorts to bring forth its young.

243. The fur-seals on Juan Fernandez are likewise reported, and without qualification as to sex, to abstain from nourishment during the breeding season: "Toward the end of the month of June these animals come on shore to bring forth their young, and remain to the end of September without stirring from the spot, and without taking any kind of nourishment."

Those are extracts from the authorities mentioned. Then the British Commissioners proceed:

Though not at the time aware of Bryant's statement, above quoted, the absence of excrementitious matter was one of the first points noted and remarked on by us after landing upon the Pribyloff rookeries, and it is to the absence of such matter alone that the continuous herding together on one spot for several months of so many thousand animals is on sanitary grounds rendered possible. It became obvious that so soon as the seals commence again to feed, it must be absolutely necessary for them to abandon their crowded quarters on shore. The evidence thus afforded, that the females do not feed to any notable extent until the young are practically weaned, or, at all events, until very late in the suckling season, is perhaps more definite than that given in any other way.

I think there is only one other passage that I have to refer to in that connection. It is on page 54 of the Report commencing with paragraph 303, which my learned friend will, no doubt, kindly read for me.

Sir RICHARD WEBSTER.—Paragraph 303:

The feeding habits of the seals, and the distances to which seals engaged in breeding on the islands may be supposed to go for food, as well as the period of the breeding season at which excursions in search of food begin to be made, are important because of their direct bearing on the limits of protection which might appropriately be accorded about the islands at the breeding season.

Then 304 deals with the full grown bulls; and 305 is:

304. The full-grown bulls, or beachmasters, holding stations on the rookery-grounds, undoubtedly, in the majority of cases—if not invariably—remain on duty throughout

the breeding season and to the close of the rutting period without seeking food. The young again, born in any particular season, are not weaned, or not fully weaned, nor do they, under normal circumstances, leave the immediate vicinity of the shores till the time of their final departure.

305. It is thus only the classes of bachelor and female seals that can, under any circumstances, be found leaving the islands in search of food during the breeding season. Of the females, the yearlings associate with the bachelors. Some of the two-year-olds may seek the vicinity of the rookery-grounds for the purpose of meeting the males, but probably they do not long remain there, while it is believed that most of them are covered at sea. Barren females, again, whether without young from age, from an insufficiency of males, or inefficient service, are not in any way permanently attached to the islands at this time.

306. The remaining—and, at the time in question, most important—class is that of the breeding females. These, some time after the birth of the young and the subsequent copulation with the male, begin to leave the rookery-ground and seek the water. This they are able to do because of the lessened interest of the beachmasters in them, and more particularly after many of the beachmasters themselves begin to leave their stands. Thus, by about the middle of August, probably only one-half of the females, or even less, are to be seen at any one time on the rookeries. Snegiloff, the native foreman in charge of the rookeries on Behring Island, expressed the opinion that the females first leave their young and begin to frequent the water about a month after the birth of the young. Bryant says about six weeks. Other authorities are less definite on this point, but, according to observations made by ourselves, the mothers and young were present on the Pribyloff rookeries in approximately equal numbers in the last days of July, while, on the same rookeries, in the third week of August, the young largely outnumbered the mothers present at any one time, and, in so far as could be ascertained by observation, the females were disporting themselves in the sea off the fronts of the rookeries.

307. It is very generally assumed that the female, on thus beginning to leave the rookery-ground, at once resumes her habit of engaging in the active quest for food, and though this would appear to be only natural, particularly in view of the extra drain produced by the demands of the young, it must be remembered that with scarcely any exception, the stomachs of even the bachelor seals killed upon the islands are found void of food, and that all seals resorting to the islands seem, in a great degree, to share in a common abstinence. While, therefore, it may be considered certain that after a certain period, the females begin to seek such food as can be obtained, the absence of excrementitious matter on the rookery grounds, elsewhere referred to, show that this cannot occur till towards the close of the breeding season. It may, further, be stated, that there is a very general belief among the natives, both on the Pribyloff and Commander Islands, to the effect that the females do not leave the land to feed while engaged in suckling their young, and that neither of the two females killed in our presence for natural history purposes on Behring Island, on the 5th September, had any trace of food in the stomach, though killed within a few yards of the rookery from which they had just been driven. Also bearing on the same point is the statement made in a memorandum received from Her Majesty's Minister at Tôkiô, based on information obtained from a gentleman fully conversant with the habits and haunts of the fur-seal of the western side of the North Pacific, as follows: "It is sometimes stated that the breeding cows are in the habit of leaving the rookeries to fish for the support of their young, but the experienced authority on whose remarks these notes are founded is not of this opinion. He has never found food inside the female fur-seal taken on the breeding grounds."

Sir CHARLES RUSSELL.—Now it is not unimportant, I think, to note there, that the two females who were killed, whose migration is vouched for as a fact, were killed as late as the 5th of September; and when it is borne in mind that all the pup-bearing females have got to the Pribyloff Islands admittedly by some where about the middle of June—certainly all practically by the 20th June,—it is a remarkable fact there are two female seals bearing pups killed on the 5th of September, and therefore very late in the season, and yet even without any particle or trace of food in their stomachs.

Now the British Commissioners seem to have weighed this matter very carefully and judiciously, and I think in paragraph 308 they probably state what is the actual fact. They say:

It appears to us to be quite probable, however, that toward the close of the season of suckling, the female seals may actually begin to spend a considerable portion of their time at sea in search of food. It is unlikely that this occurs to any notable

extent till after the middle of September, before which the season of pelagic sealing in Behring Sea practically closes.

Now, Sir, I leave this subject, although there is more to be said about it. The bearing of it upon the question of zone you well see is important because if it be true that they do not leave the islands for food until that late period when they have accomplished their work in not only giving birth to, but of suckling, their young for a considerable time, of course it justifies the claim for a narrower area and shews the non-necessity for a wider area of restriction. I have not lost sight of the fact, and I do not lose sight of the fact, that there are instances given of females with milk killed at very long distances from the islands—I have not lost sight of that fact at all; but when it is borne in mind first of all, that the percentage of death of pups from natural causes is so enormous, and that these natural enemies of theirs—the Killer Whales—attack them when they can get at them in the water, is not it a fair presumption, in the absence of evidence to the contrary, to say that the seals so found at remote distances, are either seals that have accomplished their work of nursing their young—that are going off milk so to say—or that they are the seals that have lost their pups from natural causes; for I do ask the Tribunal here (without dwelling on the evidence which must be examined more in detail), to note this: That while these instances are mentioned here and there in the evidence on the part of the United States, I cannot recall any case where there is a combination of three essential things in order to enable the Tribunal to judge of the weight of that particular evidence. What I mean is this—a combination of statement as to *time*, of *place*, and of *number*. I find isolated instances of killing at a great distance, without statement as to *date*; of *date*, without statement as to *place*, and in both instances no enumeration of *numbers*, so that they would probably be, not infrequently what might properly be characterised as “exceptional cases.”

The PRESIDENT.—Is it not a general rule of Natural history, that all animals that shed their hair or lose their feathers, like birds for instance, abstain from food and go through a certain process of disease or illness, at least, during that period of changing their hair or losing their feather?

Sir CHARLES RUSSELL.—I have not a sufficiently large acquaintance with Natural history to answer the question in a reliable way—in a way that would assist your view, Sir. In the case of birds of a domestic kind, I have never known of their *abstaining* from food. They no doubt go through a period of indifferent health, and they may abstain, to some extent, from food; but I am not aware that they entirely abstain. There are of course such cases as the case of Deer who abstain, during the rutting season, from food to any appreciable extent, and cases of that kind.

Now, Sir, I have said all I have to say upon that, except one other observation. You will recollect the Correspondence relating to an interview between Lord Salisbury and Mr. Phelps as to which there appears to be some difference of recollection between those two gentlemen upon the question of a “close time”—This correspondence—(I am not going to deal with it now) took place in February 1888, and April 1888, and is referred to in December of 1888, where a close time from April to September, was proposed by Mr. Phelps with a conditional or provisional assent by Lord Salisbury. Now I could not have a more notable instance than this, of the amazing ignorance that prevailed on the question of the habits and conditions of seal life, because of course, the suggestion of a “close time”,—(and I ask attention to be paid to this)—to Lord Salisbury who knew at that time as much about seals

as I did six months ago, which was nothing, implies of course that there is a *legitimate* season. A "close time" means a time when you are *forbidden*, and implies a time when you are *permitted*. And this, of course, had relation to Behring Sea, and to Behring Sea only. But I need not say that I do not charge Mr. Phelps with bad faith in the matter—I merely charge him, and those who instruct him, with entire ignorance in the matter, because the proposition of a close time from April to September in Behring Sea would have meant to say in other words, *no pelagic sealing* in Behring Sea; and I need not say that Mr. Phelps would have been no party, if he had known it, to the fact of putting forward a suggestion of a close time (which would have meant the prohibition of pelagic sealing), without conveying to Lord Salisbury if he knew it—I am sure he did not know it—that that meant no permissible season at all.

Now I leave the question of zone. I have made the suggestion and I have given the reasons why I think a zone of a character which the British Commissioners have suggested looking to the fact that a prohibition of twenty miles from the shore means a prohibition of nearer 40 miles if not actually 40, would practically leave, during the breeding season inside Behring Sea, an ample protection for the great mass of the fur-seals, and the practical protection of all who were engaged in the actual business of breeding and nursing while they are there.

Senator MORGAN.—Do you offer that in connection with your proposition for a licensing system, or independently?

Sir CHARLES RUSSELL.—I mean the licensing system in connection with it, so far as regards Behring Sea, with one other important point: The British Commissioners authorize the suggestion (and I submit it is one which shows their perfect and entire good faith in the matter), that there should be an absolute prohibition against any pelagic sealing vessel entering Behring Sea before the 1st of July. That is in addition to the zone which I am speaking of. The zone is a *perpetual* zone, you understand—a regulation forbidding the entrance into Behring Sea of any vessel before the 1st of July.

Senator MORGAN.—July or June?

Sir CHARLES RUSSELL.—July, before the 1st of July; and I shall show reasons why we justify that.

Lord HANNEN.—Do you mean justify it in the sense of proposing it yourself as the proper time.

Sir CHARLES RUSSELL.—Why we justify it as one which would be effective for the object in view contemplated by the Treaty, and one which would be just. But before I come to that I have, of course, a word to say. We admit your perfect right, within your undoubted jurisdiction, to say, as regards Behring Sea, no vessel shall enter before the 1st of July. That is within your undoubted authority and jurisdiction. *Outside* Behring Sea we have already submitted—(I am not going to re-open the question) for your consideration and determination, whether your authority extends beyond it? If your authority extends beyond it, and you feel justified in exercising that authority, then of course I have to consider what ought to be the regulation outside Behring Sea. And now in that connection, without dwelling upon the 1st of July, I will approach the question from the other point of view, namely, from the point of view of earlier in the season.

Senator MORGAN.—The question whether our authority does extend outside Behring Sea, is one for the determination of the Tribunal.

Sir CHARLES RUSSELL.—I cannot doubt that you must determine what is open to the Tribunal on the question of authority, and if you

come to the conclusion that you have authority and you ought to exercise it, then you, of course, have the right to exercise it.

Now, Sir, you will bear in mind, or if you have not it in mind you will receive it from me for the moment—that the British Commissioners have stated that the worst part of the pelagic operation so far as effecting the birth rate of the fur-seal species, is what is described as the “early spring catch”, and the evidence corroborates their opinion—I will not dwell upon it now; that is to say, the catch beginning far down south, and made during the migration northward to the breeding islands: that those catches begin in the months of January and February, and go on through March, April, May, June and so on, following the herd, so to speak, in its migration northward; and the British Commissioners point out with clearness that that is the portion of the catch in which gravid females are killed, and they pronounce that to be the kind of killing which it is desirable should be put a stop to. There is no such thing I think practically speaking, as the killing of gravid females in Behring Sea—it is the killing of gravid females on the migration of the herd northward.

Senator MORGAN.—Is there any disagreement between the parties here as to the blue line on the map being substantially the route of travel?

Sir CHARLES RUSSELL.—There is; but I must ask my friend as far as he thinks it necessary, to deal with that. I do not myself conceive that the differences may be important—I do not conceive it to be very important.

The problem, therefore, is this, as we submit it: how can you make a Regulation which will ensure that the gravid females, and the bulk of the herd connected with the procreation and continuation of the species shall have reached the Pribilof Islands free from the attack of the pelagic sealer? Now I think I am stating the proposition fairly: the British Commissioners suggest that an effective mode would be to prevent them sailing from any one of these licensing ports before the first of May. Whether that date is late enough or whether the Tribunal may think that that date is late enough I do not know; but they justify it by saying this. They say: by that time there is far ahead of the pelagic sealer the great mass of the gravid females; and that does seem to be borne out to a considerable extent by another Chart of the United States which is called the “Migration Chart”, which is n° 7 in the Counter Case, to which I should like now to draw the attention of the Tribunal. This, Sir, I think I must ask you to have before you. You will see in the centre of the map, the months “November”, “December”, “January”.

I do not think you need really be troubled with those, they are very unimportant months. The weather is such in those months that pelagic sealing, practically, can hardly be said to be pursued at all; but now when you come to the other months, you will see for instance, the months of “February”, “March” “April”. I wish to indicate that the *black* dots are intended to represent the *females*, including the gravid females; and the *red* dots are intended to represent the *males*. Now you will see that during the month of February there is an admixture, the males preponderating; that during the month of March, again there is an admixture; but that as you progress in the month of March the female seals of the gravid herd get ahead of the rest on their way up to the Islands. You may see that, Sir, just under the word “March”. Again, if you follow the stream right up, by the month of April you will see as you follow that line in its bend round, that the females get

ahead again there. So in the month of May; so in the month of June; so in the month of July. You will observe that in the months of June and July the whole of the tail of the herd is male, and that the greater number of females are all to the front. Now take that fact finally followed out, and you will see that when you get to the north of the Aleutian chain you have nothing but *black* dots. There the bulls have got to the islands before, and they are not shewn by this plan. You have nothing but *black* dots there—in other words a continuous stream of gravid females on their way to the islands. Now the evidence is—(I cannot stop to refer to it)—that by the middle of June the great bulk of the gravid females have got to the Pribilof Islands: that by the 20th of June practically all have got to the Pribilof Islands and therefore practically all—when I say practically all I do not mean that there may not be some remaining—but practically all have got to the islands by the 20th of June; and therefore the proposition is to regulate the date of sailing from these licensing ports so that the great bulk of the herd shall have got away, and into the Behring Sea on their way to the Pribilof Islands before they could be taken or overtaken by pelagic sealers setting out from San Francisco, Vancouver, Port Townsend, or Victoria.

Lord HANNEN.—Upon that assumption we are to prevent their entering Behring Sea before the first of July?

Sir CHARLES RUSSELL.—I quite agree, because the Commissioners, apparently, desire to be on the safe side in order to allow the work of parturition—the business of producing the young—to have been accomplished before there could be capture.

Lord HANNEN.—A zone round the islands would protect that.

Sir CHARLES RUSSELL.—That is undoubtedly my opinion if I were to be asked it. I am putting it on the authority of those who.—

Lord HANNEN.—That is why I asked you, when you said you justified it, whether you meant yourself to put forward the 1st of July as the proper time?

Sir CHARLES RUSSELL.—Undoubtedly I do not gainsay the suggestion of the Commissioners; for as they think proper to make it, I do not in any way oppose it. It does seem to me an unnecessarily wide restriction; but as they have made the suggestion we feel bound to act upon it, and put it before the Tribunal.

Now, as bearing on this matter, it is important to call attention to distances. We have taken the distances, in order that the Tribunal may have them in their minds, from these various ports to one point, Unimak Pass, which is the principal pass. From San Francisco the Unimak Pass is 2,080 miles. From Victoria to Unimak Pass is 1,560 miles.

Senator MORGAN.—In a direct line?

Sir CHARLES RUSSELL.—In a direct line. These are all direct lines. From Port Townsend to Unimak Pass is 1,560 miles, the same as Victoria; and Vancouver is practically the same. There is very little difference.

The PRESIDENT.—Could you state the time required for a sailing boat to go from those places to Unimak Pass?

Sir CHARLES RUSSELL.—That, of course, is a matter which depends on various circumstances.

Lord HANNEN.—Why restrict them then as to the time of sailing? Why not say they shall not begin to fish before such and such a time?

Sir CHARLES RUSSELL.—The only reason is the difficulty of checking.

Lord HANNEN.—Other means might be taken for checking.

Sir CHARLES RUSSELL. I quite agree that the licensing system would act as a check.

Lord HANNEN.—They could be required to keep a log, stating when they begin to fish, and where they catch the seals, how many they catch, and so on.

Sir CHARLES RUSSELL.—I am coming to that in a moment.

Lord HANNEN.—The other way, it seems to me, is a very artificial way, of regulating the matter, saying they shall not start until a particular day. It is giving the advantage to particular sealers, and so on.

Senator MORGAN.—I would suggest to Lord Hannen that this is what is done in the case of the hair seal on the northeastern coast, by the laws of Newfoundland.

Sir CHARLES RUSSELL.—The last suggestion that I have to make in this connection—because this will be worked out more elaborately by reference to the evidence—is that each of these licensed vessels should be required as a condition to their having a license to preserve an accurate record of their catch, and time, place, age, and sex, and certainly similar regulations ought to be observed upon the islands.

Now I have said really all that I intend to say in the way of our suggestions, which I confess seem to me to be—I perhaps ought not to express my own opinion—to have been suggestions conceived in a broad and liberal spirit by the British Commissioners, and a very large recognition and a very honest recognition of what they conceive to be the object of this treaty.

Mr. Justice HARLAN.—Are they reduced to writing separately?

Sir CHARLES RUSSELL.—No; we will put them in a more definite form later.

Now, Mr. President, I have very little more to say on the question of regulations except this: Senator Morgan I think already has intimated the opinion in which we, representing the British Government, entirely agree. The suggestion of the United States is that you should, in your regulations, not merely lay down rules, but also lay down sanctions and remedies and proceedings and methods for carrying out those rules, for enforcing them. I cannot conceive that that is the function of this Tribunal at all. It cannot be doubted that when this Tribunal has discharged its functions of intimating the rules which, within its authority, it thinks to be necessary for the object contemplated in the treaty, that both the United States and Great Britain will be ready to give effect by adequate measure to the enforcement of those rules on their respective nationals.

Senator MORGAN.—I have been misunderstood, if I was understood to express the opinion that this Tribunal should enforce its regulations by prescribing penalties.

Sir CHARLES RUSSELL.—I quite agree. I am anticipating that view. That was not the course which was followed and which exists—one of the Tribunal, I have no doubt, has acquaintance with the working of it,—in the case of the Janmayen. Each of the powers interested in the observance of that Janmayen Convention has made its own legislation directly in restraint of its own nationals, and of course claiming the right to deal with its own ships and in its own court of judicature. The notion of an American ship being taken into a British port and there dealt with, or a British ship, being taken into an American port, is of course entirely repugnant to the national feeling which would prevail either in one country or the other.

The PRESIDENT.—You would also exclude the right of searching?

Sir CHARLES RUSSELL.—Certainly. I have dealt with that point already. Lastly, I have to make one reference. My learned friend

Mr. Phelps in his printed argument make this statement at page 169. It is in reference to what he supposes to have been the action of Russia. He says:

The firm and resolute recent action of the Russian Government in prohibiting in the open sea, near the Commander Islands, the same depredations upon the seal herd that are complained of by the United States in the present case, and in capturing the Canadian vessels engaged in it, is well known and will be universally approved. That Great Britain, strong and fearless to defend her rights in every quarter of the globe, will send a fleet into those waters to mount guard over the extermination of the Russian seals by the slaughter of pregnant and nursing females, is not to be reasonably expected. The world will see no war between Great Britain and Russia on that score.

No indeed, it will not; because Russia is wise, and is wisely advised and understands what the limitations of its rights in fact are. Now I wish to make this point clear, as my learned friend has invited attention to it. We know that the Russian Government is—or more correctly we ought to put it that the United States Government has been in communication with Russia, and has been endeavouring to get Russia to make common cause with it upon this question. I refer, Sir, for this purpose to the dispatch set out in the largest volume of all, volume three, United States No. 3, 1892, part 4, page 21. It is only a sentence and I need hardly trouble you to do more than take the reference to it. It is from Sir Robert Morier to the Marquis of Salisbury, June 10, 1891, from St. Petersburg:

When your Lordship's telegram of the 2nd instant respecting the seal question in the Bering's Sea reached St. Petersburg on Wednesday morning, I chanced to be in Finland, whither I had gone for an indispensable change of air. M. de Giers also intended to proceed thither at the end of the week. The places where we were staying were a considerable distance apart, and I was not sure which day M. de Giers was leaving St. Petersburg. I did not know whether to go to the capital or to his country-house. I accordingly telegraphed to Mr. Howard to at once address a note to the Foreign Office in the sense of Your Lordship's telegram, and arrange to meet M. de Giers at his country-house on Sunday. By this means no time was lost, for as early as Thursday night M. Chickine, the Under Secretary of Foreign Affairs, had telegraphed the contents of Mr. Howard's note to M. de Giers, who when I reached him on Sunday, had had the papers connected with the subject sent up to him and was in a position to give a provisional reply.

His Excellency's statement was to the following effect.

The question of seal hunting in the Behring's Sea had formed the subject of continuous negotiation between the United States Government and his own for a very considerable time, and many proposals had been submitted to him by the United States Department, to none of which, however, had he been able to give his assent. So far as he could see, your Lordship's proposal was very reasonable, and its principle—namely, to give the seal fisheries a year's rest in order to come to a definite arrangement as to the best means for preventing the destruction of these valuable animals—was one with which he had the fullest sympathy.

I do not think there is anything else in that that I need read. My point is to show that Russia was made aware of the pretensions which the United States was advancing, and declined, as is there stated, to join in those pretensions; but we are now in a position to put before you reliably what is the attitude of the Russian Government. That appears in a Parliamentary paper, with which I am not going to trouble the Tribunal, but the effect of which I will shortly state.

Mr. CARTER.—What is about to be read now?

Sir CHARLES RUSSELL.—A Parliamentary paper, Russia No. 1, 1893.

Mr. CARTER.—Where is that to be found?

Sir CHARLES RUSSELL.—It is not to be found in the books. It cannot be, because it is a paper which was written in 1893.

Mr. CARTER.—Do you propose to put it in evidence?

Sir CHARLES RUSSELL.—I am proposing to meet a statement which Mr. Phelps has made in his printed argument, which bears with it a

certain implication, and to meet that by evidence of historical documents, to show that implication is not correct.

Mr. CARTER.—In other words, you propose to put it in evidence.

Sir CHARLES RUSSELL.—Certainly.

The PRESIDENT.—Mr. Phelps, do you object to that?

Mr. PHELPS.—We do not care to object to this paper, Sir. The whole of it of course goes in, so that we will have the opportunity to refer to it.

Sir CHARLES RUSSELL.—I have not the slightest doubt that my learned friend is in possession of all these papers. I hope he is.

Mr. PHELPS.—Of course we are not to be understood as waiving the ground upon which we have stood all along, that new evidence is not admissible at this time; but we do not care to raise the objection to this paper.

Sir CHARLES RUSSELL.—This must be unarguable. It is not new evidence, I submit with great deference. It is in reference to a statement of my learned friend from which he wishes the Tribunal to draw a certain inference, which is in fact incorrect, but which we had no opportunity of meeting because it appears in the argument.

Mr. CARTER.—It certainly is new evidence; but we do not care to raise any objection on that score. We do not agree that new evidence is generally admissible.

Sir CHARLES RUSSELL.—I first of all call attention to this fact (I am not going to read it in detail; my learned friend will do so) that when in 1893 the seizures by Russia had taken place, we called upon the representative of the Russian Government for an explanation in the letter of the 25th of January, 1893, from Sir Robert Morier to Lord Rosebery, page 5 of the correspondence:

His Excellency stated incidentally that he believed that in the case of the sealers captured last season it would be found that none of them had been taken illegally, for if they had been seized outside of the territorial waters, it was after the clearest proof that they had just emerged therefrom.

In other words, they say: None of our seizures were against the rules of international law as to territory, because they were either within the three miles limit or had just emerged from it, having committed an offence within it.

Finally this correspondence takes the shape of negotiation between Russia and Great Britain for a *Modus vivendi*; and that *Modus vivendi* stated shortly thus: It is now finally agreed that the zone from the Russian coast shall be 10 miles and around the Russian seal islands 30 miles; this agreement be it understood being entirely provisional, each party standing upon its own rights and in no wise affected in its possession by this provisional or temporary agreement.

Mr. Justice HARLAN.—How long was the *Modus* to last?

Sir CHARLES RUSSELL.—One year. Each Government standing upon its own rights and the Russian Government perfectly aware of the position assumed by the United States, reserving its right to say that it might extend its territorial jurisdiction for the purpose of putting sealing down, etc. . . those contentions, of course, being traversed on the part of Great Britain, but each party standing on its rights. But the value of the correspondence is this: That there is an entire absence of that which has been the great—up to a certain point—argument of my learned friends of a claim to property in the seal collectively or individually, or in respect to the industry founded upon the seal, or that pelagic sealing was an invasion of that right or industry. Next that they have recognized that in the circumstances of the case a zone of

thirty miles around the islands, or being under the impression also that breeding females do go to feed and urging, as you will see from the correspondence, when it is read, that even a smaller zone may be adequate to the purpose, yet that thirty miles would be adequate to cover the extent to which females would go during the nursing season for the purpose of feeding.

And lastly this is the concluding point to which I have to call the attention of the Tribunal that in the case of the seizures I give you the names of the vessels, the *Marie*, the *Rosie Olson*, and the *Vancouver*. Russia claims that those were lawfully captured because they had committed an offence within the territory of Russia, within the three miles limit, some there captured, or if not there captured, pursued, having offended, within the three miles limit.

But as regards two other vessels, the *McGowan* and the *Ariel*, they have undertaken to pay damages in respect to the seizure of those vessels, because while they allege that they believe it to have been morally certain that they had been sealing within the three mile limit, they have not sufficient evidence to justify it, and therefore they are paying damages in respect to the seizure of those two vessels.

Mr. PHELPS.—Is that in the correspondence, Sir Charles?

Sir CHARLES RUSSELL.—It is not in the correspondence.

Mr. CARTER.—Where is it?

Sir CHARLES RUSSELL.—It is in a telegraphic communication received from St. Petersburg, a copy of which will be handed to you.

Mr. CARTER.—And which we object to the reception of.

Mr. PHELPS.—Of course. We have no means of refuting it.

Sir CHARLES RUSSELL.—Why do you, if you are not prepared for the consequences, make a statement in which you seek to imply before this Tribunal that Russia is making assertions which Russia is not in fact making?

Mr. CARTER.—We make that upon evidence.

Sir CHARLES RUSSELL.—Where is the evidence? There is not a particle of evidence to justify it. On the contrary I have pointed out the statement appearing in the argument of my friend Mr. Phelps, and it is not supported by any evidence to be found in the Case or Counter Case.

Mr. CARTER.—Then you do not require any new evidence to refute it.

Sir CHARLES RUSSELL.—I do not stop to bandy words at this moment with my friend.

I had forgotten to mention,—my friend Mr. Robinson very properly reminds me—that one of the stipulations that Russia did not consider unworthy of its dignity was to reduce the number of seals taken on these seal islands to thirty thousand. That appears in the correspondence; and also they agree to the presence of an agent of Great Britain on the islands with reference to this *modus vivendi*.

Mr. PHELPS.—Perhaps my friend will allow me to ask his attention to the debate in the House of Lords on one of the days of last week, reported in the London *Times*, in which Lord Rosebery made a statement in regard to this, which to my recollection contains nothing about damages.

Sir CHARLES RUSSELL.—No; you are perfectly right; it does not. But I am stating upon direct information from the Foreign Office what is the actual state of things to-day. I have no objection to my friend referring to the debate at all—not the least.

There was only one other matter I have to mention. It has nothing to do with the regulations. You recollect the question of the find-

ings of fact and counter findings suggested respectively by my learned friends and by ourselves. I am glad to think that you will not be troubled so far as any disagreement is concerned. Of course the findings will be on the responsibility of the Tribunal; but we have in fact agreed, and I do not think the Tribunal will find there is any difference between us as to the findings of fact in relation to the question of damages.

Mr. Justice HARLAN.—Do you mean that the two papers agree, or that you have since come to an agreement?

Sir CHARLES RUSSELL.—We have agreed upon a *via media* which will be handed in at a later stage.

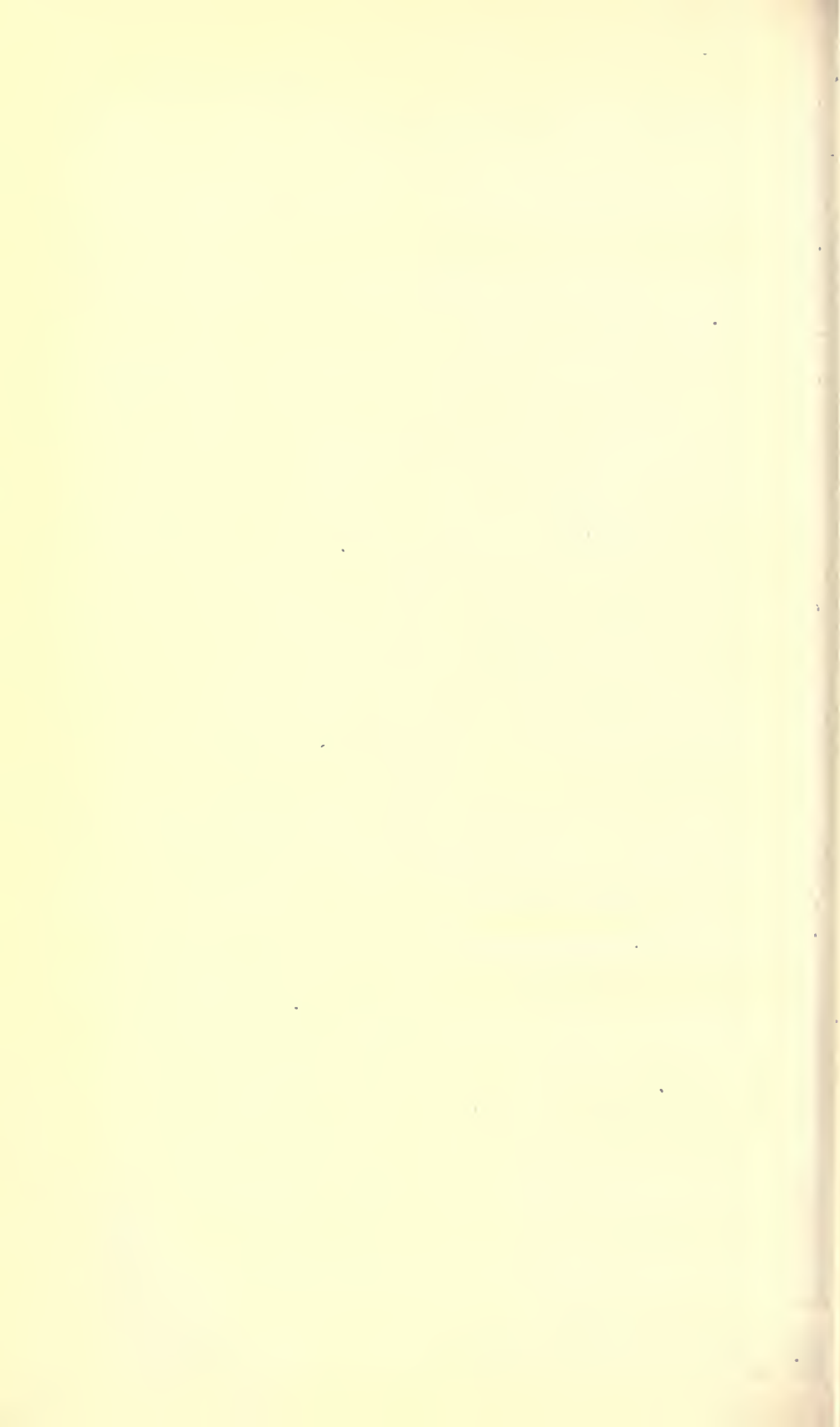
Now, Mr. President, I have concluded all I have to say in discharge of my duty on this question of regulations; but I do pray the Tribunal to bear in mind that I have tried to follow the plan which I outlined at the commencement of my argument, and I have not built up and reinforced the points I have been submitting with at all that detail or reference to evidence which I might have done. I have tried to outline, with the consent and co-operation of my friends, the general scheme of argument upon the subject of regulations. Having done that, I leave to my learned friends the task which they are well fitted to discharge of going into the justification of that scheme in detail.

I will ask the Tribunal to believe that not the British Commissioners only but the counsel who are representing directly Great Britain in this matter have approached the question of regulations with an honest desire to do something to aid the Tribunal in coming to a system of regulations which should be just in themselves, in view of the common interests at stake, and which should be effective to the object in view. We have addressed ourselves to that task in all seriousness, and I would ask you to believe, in all honesty of purpose, too; and I hope the Tribunal will think we have done something which may be of help to them in the formidable task which they have to discharge.

It remains for me only to express to each member of this Tribunal my sense of the extreme courtesy and patience with which, taxing them to a very large extent, I have been treated during this argument.

The PRESIDENT.—Sir Charles, we appreciate your kindness and your efforts in this direction. We are certainly thankful for all the trouble you have taken.

[The Tribunal here adjourned for a short time.]



FUR-SEAL ARBITRATION.

ORAL ARGUMENT

ON

REGULATIONS

BY

SIR RICHARD WEBSTER, Q. C., M. P.,

BEFORE THE

TRIBUNAL OF ARBITRATION,

CONVENED AT PARIS.

THIRTY-SEVENTH DAY, JUNE 13TH, 1893.

The PRESIDENT.—Sir Richard, we shall be pleased, if you are ready, to hear you.

Sir RICHARD WEBSTER.—Mr. President, I am painfully conscious of the time that our case has occupied, and of the extent to which we have trespassed upon the attention of this Tribunal, but I trust that upon this part of the case I shall be able to give the Arbitrators some substantial assistance at any rate in forming a judgment as to the true facts of the case. It is quite impossible to attempt to touch every point that is referred to in these papers; so to attempt would be to defeat, to a large extent, one's object. I do not pretend that this part of the case can be put in the same way, as the arguments on the question of right. These are questions of fact upon which there is counter evidence upon both sides. It will be my duty as fairly as I can, to put before you the material evidence bearing upon the questions of fact which ought, we submit, to affect your minds in deciding this question of Regulations. I will endeavour to exhaust each point as I pass it by so as to curtail within the shortest possible limits, the time that I must ask you to be good enough to devote in listening to my observations. It will be convenient if I dispose once and for all of this Russian question. It has a bearing upon Regulations, it has an indirect bearing upon the question of property which I discussed some days ago. If I take it at once as I said, once and for all, I shall clear it away from the minds of the Tribunal and be able to refer to the incident afterwards without actually referring to the papers. You will remember, Sir that in the counter case of the United States at page 29 the United States say:

In making this assertion the United States believe they are fully sustained by Russia's action during the summer of 1892. In that year sealing vessels assembled in great numbers about the Commander Islands and killed fur-seals in the extra territorial waters surrounding this group. Russia anticipating that her seal herd would be thus preyed upon, had dispatched to those waters in the early part of the season two cruisers, which seized six vessels, five of them British and one of them American, carrying them in from a distance greater than three miles from any land.

Now, Mr. President, I ought to mention that Mr. Coudert, or Mr. Carter in his argument referred to the Russian action, as indicating an intention by Russia, to make the same kind of claims as those which were made by the United States. We were therefore in a somewhat difficult position—that whatever our own knowledge might be with regard to the matter we were not in a position to state it because as you will well know as long as matters form part merely of diplomatic negotiations, is it not considered that they should be brought in any way into the arena of public discussion; but by the paper of which my friends have a copy—the Parliamentary paper which was presented to the House of Commons and House of Lords last week—that restriction upon our utterances is removed and I am in a position, as the Attorney General told you, to put before you the simple facts with reference to the matter in the briefest possible way.

Mr. President, two questions were involved—one the seizure of five or six British vessels in the year 1892, the other a question of Regula-

tions, and it is because this paper deals with both that I have taken it first. As you will see in a very few minutes, it has a very important bearing on the question of Regulations, but I mention the two subjects together so that I need not mention them again. My learned friend, Mr. Phelps mentioned today that in the debate in the House of Lords last week when part of the arrangement respecting Regulations was referred to, Lord Rosebery, the Foreign Minister for Great Britain had not stated that there was any definite arrangement with regard to the seizures of last year, but as had been previously stated in the House of Commons by the Under Secretary, the matter was still in negotiation; and, Mr. President, it was not till to day that the Attorney General or myself could have told the Tribunal that which the Attorney General has told you. We knew perfectly well what was happening, but were not in a position to state it for the reasons I have already mentioned. The matter had been referred by the Russian Government as appears by the papers to a Committee on which a very distinguished jurist is sitting—Mr. Martens one of the gentlemen whose authority we have cited in the course of the case, and till that Committee reported, the question of the seizures during the last year could not be dealt with.

Now with regard to the seizures, I will dispose of them in a moment. Russia never did claim at any time to seize these vessels outside the territorial waters except where there was evidence that they had been inside. That will appear from the correspondence which I will read in a moment. I merely mention that in the final arrangement, made as read to you this morning by the Attorney General the only case in which they seek or ask to justify the capture is where the boats of the ship herself had been actually engaged in sealing in territorial waters. In the other case they admit a responsibility and liability to indemnify.

This paper from which I am about to read which is now before my learned friends and before you, would have told you the same story, but not quite so shortly as the telegram or information from the Foreign Office that the Attorney General read to you this morning. I will read no more than is necessary and if I might trouble you to take the paper and to look at p. 3.

In the despatch from Lord Rosebery to Sir Robert Morier on the 18th January, 1893, occurs this passage.

But the seizures of British vessels by the Russian authorities in Behring Sea during the course of last year, at considerable distances from land, render it expedient to arrive at some definite understanding of the attitude of the Russian Government in this respect.

I have, therefore, to request that your Excellency will inform the Russian Government of the application that has been made by the Canadian sealers.

You will state that in the opinion of Her Majesty's Government, which they doubt not will be shared by that of Russia, the memorialists ought in justice to receive early information as to the limits within which they may lawfully and safely pursue their industry.

And then, Sir, on page 4, on the 11th of January, Sir Robert Morier, writing to Mr. Chichkine the representative of Russia, puts the matter in these words:

As at present advised Her Majesty's Government propose to inform them

That is the sealers:

that the *modus vivendi* agreed upon between Great Britain and the United States having been prolonged during the pendency of the arbitration on the questions in dispute between these two Powers, sealing will be entirely prohibited to their respective subjects and citizens during the next season in the waters affected by that agreement; but that outside those waters sealing vessels will be at liberty to pursue their

avocation provided they are careful not to infringe the Russian regulations, which strictly prohibit the pursuit of seals and other animals within 3 miles of the Russian coasts and islands.

Then on the 25th of January at page 5, Sir Robert Morier reports to Lord Rosebery the result of his interview with Mr. Chichkine, and I will read as much as is necessary from that paper:

His Excellency said that he would not be able to do so until my note had been returned from the Ministry of Domains, which was the Department which dealt with the question of sealing, and to which it had been sent. He would press its return, but there could be no doubt what the answer would be. The Russian Government were not at present raising the pretension of prohibiting seal fishing on the high seas, but were only determined to stop the resolute and organized attacks made upon the rookeries within her territorial waters. I said that the strongest warning would be given to British sealers to abstain from violating Russian territorial waters, and that Her Majesty's cruisers would be instructed accordingly.

His Excellency stated, incidentally, that he believed that in the case of the sealers captured last season, it would be found that none of them had been taken illegally, for if they had been seized outside territorial waters, it was after the clearest proof that they had just emerged from them. I said this was a matter of evidence in each particular case, which I could not attempt to judge; but that from the statements made by the Russian cruisers themselves, it was difficult to admit that the captures were lawful.

I call the attention of the members of the Tribunal particularly to the report of the interview given by Sir Robert Morier, in which the Russian representative draws the distinction between a legal taking inside territorial waters, and an illegal taking outside.

Now you may pass over the intermediate correspondence and come to page 11 to the translation of the letter from M. Chichkine to Sir Robert Morier which you will find will have a very important bearing when I come to discuss the question of Regulations and I read it now so as not to have to refer to the correspondence again. This is the second paragraph:

While thanking you M. l'Ambassadeur, for this action, of which the Imperial Government takes note, I hasten to inform you that the question of the measures to be adopted to prevent the destruction of the seal species has been under consideration for some time past, and that I have been obliged to wait the preliminary results of this investigation before replying to the note which you were so good as to address to me. In approaching, on the present occasion, the question of the seal fisheries, I must first of all point out to your Excellency that the insufficiency of the strict application to this matter of the general rules of international law respecting territorial waters has been proved by the mere fact that negotiations were commenced in 1887 between the three Powers principally concerned with the object of agreeing upon special and exceptional measures.

I am desirous to avoid lengthening the matter by unnecessary comment, but I must be allowed to point out that which will appear over and over again in this correspondence that the attitude of Russia has been consistent throughout, namely, claiming a right to exercise these powers within the territorial limit subject to the agreement outside and a reference to the fact that the general rules of international law are not sufficient for the purpose required.

Now turning to page 12 the letter continues.

The following figures clearly show this:

The number of seals to be killed annually is fixed by the Administration in proportion to the total number of seals. In the years 1889 and 1890, before the establishment of the Anglo-American *modus vivendi*, the catch amounted to 55,915 and 56,833, while for the years 1891 and 1892 (after the above-mentioned agreement) the figures fell to 30,689 and 31,315. On the other hand according to the statistical information which the Imperial Government has been able to obtain, the quantity of seal skins of Russian origin delivered by the sealers to the London market increased during those two years in an infinitely greater proportion. According to the observations made by the local Administration the number of vessels engaged in sealing and seen in the neighbourhood of the Commander Islands and Luellen (Robben) Island has also increased considerably.

You will find that means seen from the Islands.

The barbarous and illicit proceedings of these sealers are also proved by the fact, established by seizures, that more than 90 per cent, of the seal skins carried away by them are those of female seals, who are hardly, if ever, found far from the shore during the sealing season, and whose destruction entails that of all the young which they are suckling.

The destructive character of the fishery is also shown by the number of seals wounded or abandoned on the shore or within territorial waters, and afterwards found by the local authorities.

Language could not be stronger, Mr. President, to point that which I desire to bring prominently to the mind of the Tribunal after the fullest investigation and postponing this matter till there had been complete investigation, the considered opinion of the Russian authorities, who had managed the Commander and Robben Islands at any rate not worse than the United States authorities have managed the Prybilof Islands is that the female seals are hardly if ever found far from the shore during the sealing season, and further they were complaining of the seals injured in territorial waters, and they gave as evidence the fact that numbers of them have been found on the shore actually abandoned within the territorial waters.—Then:

The Imperial Government on their side do not hesitate to recognize the fact that protection cannot be carried out in a really satisfactory manner unless it is preceded by some such agreement.

I need not point out that this is absolutely inconsistent with any suggestion that Russia themselves meant to take the law into their own hands.

Accordingly they are disposed to enter into negotiations at once with the Governments of Great Britain, and of the United States of America; but they recognise at the same time the absolute necessity of immediate provisional measures, both on account of the near approach of the sealing season and in order to be in a position to reply in good time to the question contained in your Excellency's note of the 11th (23rd) January.

With this object, and after thorough investigation, the Imperial Government has thought it necessary to decide on the following measures to be in force during the year 1893:

1. No Ship unprovided with a special authorization shall be permitted to hunt for seals within a distance of 10 miles along all the coast belonging to Russia. 2. This prohibited zone shall be 30 miles wide around the Commander Islands and Inlenew (Robben) Island according to the Russian official maps, which implies that the passage between the Commander Islands will be closed to vessels engaged in sealing.

With regard to the 10 mile zone along the coast, these measures will be justified by the fact that vessels engaged in the seal fishery generally take up positions at a distance of from 7 to 9 miles from the coast, while their boats and crews engage, in sealing both on the coast itself and in territorial waters. As soon as a cruiser is sighted the ships take to the open sea and try to recall their boats from territorial waters with regard to the 30-mile zone round the islands, this measure is taken with a view to protect the banks, known by the sealers as "sealing grounds" which extend round the islands, and are not shown with sufficient accuracy on maps. These banks are frequented during certain seasons by the female seals, the killing of which is particularly destructive to the seal species at the time of the year when the females are suckling their young, or go to seek food on the banks known as "sealing grounds". While requesting you Mr. l'Ambassadeur, to bring the foregoing considerations to the knowledge of Her Majesty's Government, I think it important to insist on the essentially provisional character of the above measures adopted under pressure of exceptional circumstances which may be regarded as a case of *force majeure* and analogous to cases of legitimate self-defence.

It does not, of course, enter at all into the intention of the Imperial Government to dispute the generally recognized rules with respect to territorial waters. In their opinion, far from attacking these general principles of international law, the measures which they think necessary to take must be regarded as confirming them, as the exception proves the rule.

Then occurs a statement which I need not read—I am willing to if my learned friends wish it—but it is a repetition of the reason why they

ask for 10 miles because of the vessels stopping outside and the boats themselves going in.

Then you will find, on page 14, Lord Rosebery's reply, agreeing in this proposal; I need not read much, but, at the beginning of the letter, Lord Rosebery calls marked attention to Mr. Chichkine's statement:

Her Majesty's Government have given their most careful consideration to the note of Mr. Chichkine of the 12th (24th) ultimo, inclosed in your Excellency's despatch of the following day, and stating the measures which the Russian Government deem necessary for the protection of their sealing interests in the North Pacific during the approaching fishery season, and which are submitted to Her Majesty's Government for consideration with a view to their acceptance.

Those measures consist in:

(1) The prohibition of sealing to vessels not specially authorised within a zone of 10 miles from the Russian coast.

(2) The extension of this prohibitive zone to a distance of 30 miles round Robben Island and the Commander Islands.

For the purpose of securing the due observance of these restrictions, it is proposed that the Russian cruisers should be authorised to pursue and seize all vessels whose boats or crews have been found fishing for seals within the prohibited limits, and further to pursue and search any vessels whose boats have been seen within those limits whether actually employed in seal hunting or not. In the latter case the presence on board of instruments specially employed in seal hunting or of seal-skins, the majority of which are those of females, is to be held to afford sufficient presump-tive evidence to justify seizure.

Her Majesty's Government take note of the statements made in M. Chichkine's note that the Russian Government have no intention of disputing the generally recognized rules of international law as to territorial waters, that these measures, of an exceptional and provisional nature, are designed to meet a pressing emergency, and that Russia is desirous of entering at once upon discussions with the Govern-ments of Great Britain and the United States with a view to an agreement between the Powers principally interested for the proper control of the sealing industry.

Then, at page 15, Lord Rosebery undertakes, on behalf of the Govern-ment, to issue the necessary instructions, and refers to the privilege of British vessels resorting to Russian ports for shelter repairs and sup-plies; and expresses, as would be expected, the willingness of Her Majesty's Government to agree in any reasonable arrangement for the proper protection of seal life. Then:

If these proposals should, as I hope, be agreeable to the Russian Government, I should be glad to learn at the earliest moment their views as to the limitation which they would agree to place on the number of seals to be killed on the islands. The Reports of the British Commissioners as to the care that, as a rule, has heretofore been taken to prevent any excess in this respect on the Komandorski Islands, lead me to believe that there would be no difficulty in arriving at an agreement on this point.

My learned friend, Mr. Robinson, reminded me, and I am very much obliged to him, because it is important to note, as I shall presently, that the Russian Government, as a consideration for Great Britain restrain-ing the legitimate rights of their sealers, offered to reduce or limit the number of seals to be killed. It appears also in fact on page 15, a little higher up than that; and these are Lord Rosebery's words:

The Russian Government would further engage that the number of seals to be killed on the Russian seal islands should be limited to a certain specified number to be agreed upon before hand, or to a certain proportion, to be equally agreed upon, of the total number of seals estimated to have resorted to the islands in the season.

The Russian Government would further allow an Agent of the British Government to land upon the islands for the purpose of consulting with the Russian authorities on the working and observed results of the arrangement.

Therefore, you will observe that the proposition coming from Russia was that, by agreement, there should be a zone of 30 miles and a zone of 10 miles in order to protect the sealing Islands, an infringement of the ordinary territorial waters; and that, in consideration of those con-cessions they, Russia, would limit the number of seals to be killed on the Island.

Mr. Justice HARLAN.—I do not, from that paper of Russia, find a proposal made to limit the number of seals.

Sir RICHARD WEBSTER.—It is stated by Lord Rosebery.

Mr. Justice HARLAN.—It is not material.

Sir RICHARD WEBSTER.—I do not think it is. I was reading it perhaps a little too shortly; but I think it will be found, on looking at the papers, that it did; but it makes no difference. They agreed to it. Perhaps it would be more important for us if the suggestion came first from Great Britain.

Now I will ask the Tribunal to turn to page 22 where they will find the proposal of Russia dated the 6th of April which led up to the arrangement to which I shall be able to refer very shortly. Mr. Chichikine, writing on the 6th of April, says:

In reply to my note of the 12th (24th) February, your Excellency was good enough to send me a copy of Lord Rosebery's despatch of the 17th March in which the British Government proposes to establish at once a *modus vivendi* on the following basis:

1. The British Government would forbid their subjects to fish for seals within zones of 30 and 10 miles, and would offer the co-operation of their cruisers to carry out that measure. The Imperial Government would engage to hand over to the English cruisers or to the nearest British authority the English vessels seized outside territorial waters in the above mentioned zones, whilst the English cruisers would, in reciprocity, hand over the Russian vessels seized under the same circumstances.

I need not point out the reasonableness of that provision, and contrast it with what is demanded by the United States in this matter.

2. The Imperial Government would limit to a specified number the amount of seals to be killed on the islands.

3. The Imperial Government would authorize an agent of the British Government to proceed to the islands in order to confer with the local authorities as to the working and result of the arrangement.

4. It would be understood that this arrangement should in no way affect the facilities hitherto afforded in Russian ports to English vessels for refuge, repairs, or supplies.

5. The arrangement would not have any retrospective effect, more especially as regards the English vessels seized last year.

I cannot discuss the subject, M. l'Ambassadeur, without calling your attention in the first instance to this fact, viz., that the object of my note of the 12th (24th) of February was to warn the British Government of certain legitimate measures of defence necessitated for the moment by exceptional circumstances, and not to lay down the basis of a regular *modus vivendi*, that is to say, of a bi-lateral arrangement, which might be prolonged until the question was definitely settled.

The only idea was to provide a minimum of protective measures intended to prevent the disappearance of the subject of the dispute, even before the negotiations with regard to it were commenced.

In view of the near approach of the fishing season, which has now already begun, the Imperial Government considered at the date of my note that there would not be sufficient time to discuss and to establish a *modus vivendi*, which would necessarily affect not only questions of interest, but also questions of principle.

If it had been intended to lay down bases of a *modus vivendi* of this kind, the Imperial Government would not have failed to claim that a restriction of territorial rights, that is to say, the engagement to limit the number of seals to be killed on land, should in equity carry with it the corollary of a complete suspension of pelagic sealing in the open sea. They would have especially regarded it as indispensable to make their reservations as regards the definitive settlement of the seal question, in order to retain their entire freedom of view as to the measures to be agreed upon for the preservation of the seal species, whether by the prohibition or regulation of sealing in the open sea, or by the extension of special rights of protection of that species beyond the various distances commonly designated as the limits of territorial waters.

Yet, after making these observations, I am authorized, M. l'Ambassadeur, to inform your Excellency that the Imperial Government being anxious to meet halfway any conciliatory offer on the part of the British Government, are ready to accept the proposal made in Lord Rosebery's despatch, with the exception of some modifications on the first point.

Thus, the Imperial Government would be disposed to limit for the current year the number of seals to be killed on the islands to a maximum of 30,000, reducing thus 20,000 the average of 50,000 provided for in their contract with the sealing Company.

They would not object to an Agent of the British Government coming to the islands in order to discuss matters with the local authorities, and to obtain information from them as to the working and results of the arrangement. The place and the time of his visit should, of course, be fixed hereafter.

Then :

There would certainly be no modification as regards the facilities which English vessels enjoy in Russian ports for refuge, repairs or supplies.

The arrangement agreed upon would have no retrospective force, because the different cases of seizures effected last year have been already examined by a special Commission on the basis of general principles of international law.

It was that to which I referred to-day when I told you that we had known, though we had not been able to mention it before, that this question of the rights and wrongs of last year had been referred to an International Committee and we knew that the Russian distinguished adviser on international law was a member of that Committee, whose opinion we have already referred to in connection with this case.

Finally, in regard to the first point of the proposal contained in Lord Rosebery's despatch, the Imperial Government are of opinion that it would be quite impossible to apply it as it stands, at any rate under the circumstances existing for the present fishing season, especially as to the engagement to hand over to the English cruisers or to the nearest British authority the English vessels caught trespassing outside territorial waters within the forbidden zones of 30 and 10 miles.

Then occurs a discussion, which I do not think my learned friends will think it necessary for me to read, with regard to the alternative suggestion. If they should not happen to find a British cruiser, they must take the vessel to some other port for that purpose.

Then, at the bottom of page 23, Sir Robert Morier states :

That Her Majesty's Government would not consider themselves justified in handing over British subjects and property captured outside of bona fide territorial waters to the jurisdiction of any Government but their own. But there ought to be some way of turning the difficulty, such, for instance, as a British cruiser being stationed at Petropaulovsk or Vladivostock.

Then, on page 24, you will find the draft agreement, which is, I believe, the agreement that has been entered into; I do not remember any modification of it. If there be, it will appear in the later documents; and I read the first paragraph :

During the year ending the 31 December, 1893, Her Britannic Majesty's Government will prohibit British subjects from killing or hunting seals within the following limits :

- a) Within a zone of 10 marine miles following the sinuosities of the Russian coasts which border on Behring Sea and any other part of the North Pacific Ocean.
- b) Within a zone of 30 marine miles round the Komandorsky Islands, and round Tulénew (Robben Island).

Then :

Her Britannic Majesty's Government undertake to co-operate with British cruisers in preventing British subjects from killing or hunting seals within the aforesaid limits. British vessels engaged in killing or hunting seals within the aforesaid limits may be seized either by British or Russian cruisers, but if seized by the latter they shall forthwith be handed over at Yokohama, or at any port in the British possessions or to the Commander of any British ship of war for trial by the British authorities.

That is what was suggested by Sir Robert Morier as a way out of the difficulty.

The Imperial Russian Government engage to limit to 30,000 the number of seals which may be killed during the whole of the year 1893 upon or around the said Islands of Komandovsky and Inlenew (Robben Island).

It is agreed that a British Agent may when so desired by Her Britannic Majesty's Government, visit the said Islands to confer there with the Authorities and to inquire into the working and results of the present Agreement.

The present Agreement will in no wise affect the facilities hitherto accorded in Russian ports to British vessels as regards repairs obtaining supplies or other matters for which they may properly require access.

It is understood that the present Agreement relates solely to the year 1893. It has consequently no retroactive force of effect—more especially as regards the British vessels captured previously by Russian cruisers.

Then on page 27 will be found the Russian reply to that draft.

I have the honour to inform you that the Imperial Government while accepting the draft arrangement annexed to that communication, prefer to give it the character of an exchange of notes, for the following reasons:

Because the too concise wording of the above-mentioned draft would leave room for certain misunderstandings and perhaps even for complication, which it would be desirable to avoid;

Because the Imperial Government could not agree to the draft in question without some reservations designed to safeguard their freedom of judgment in the future.

It is understood that the agreement to be arrived at between our two Governments will leave intact all the rights of Russia in her territorial waters.

As to our reservations, they refer to the points mentioned below:

1. In consenting to hand over to the British authorities the English ships engaged in sealing within the prohibited zones, we do not wish to prejudice, generally, the question of the rights of a riverain Power to extend her territorial jurisdiction in certain special cases beyond waters properly called territorial.

2. The Imperial Government desire to preserve complete liberty of action as to choosing in the future between the two systems of protecting seals, either by the method of a prohibited zone or by the method of entirely prohibiting pelagic sealing, or regulating it in the open sea.

3. The present arrangement cannot in any manner be considered as a precedent, and will be looked upon by us as of an essentially provisional nature, intended to meet present circumstances.

I pause to note here I think nothing could be more reasonable than Russia reserving her position at the present time. We know from the correspondence that has been printed she had been kept in constant and close communication with the United States. We know that she declined to ally herself with the United States in their contention; and this question is now raised before a great Tribunal, and if the result of this Tribunal should be to declare property in these animals *feræ naturæ* on the high seas or to declare the right of a nation to exercise these extraordinary rights of seizure and search, it was certainly most reasonable that Russia should not have bargained herself—so to speak contracted herself out of the opportunity of taking advantage of this award.

Senator MORGAN.—Has there been any complaint or is it a fact that pelagic hunting has existed on the Japanese or Russian coasts by following up the herds before they reached the lands.

Sir RICHARD WEBSTER.—To a certain extent, but not much practically speaking, though there was some, as appears. Until the *modus vivendi* the pelagic sealers had not gone across to the western side of the ocean.

Mr. PHELPS.—Will my learned friend allow me to ask him from what he infers the Russian Government declined, as he says, to participate with the United States on the ground they did?

Sir RICHARD WEBSTER.—The letter has been read and it is printed at page 22. The date is the 10th June, 1891.

Mr. PHELPS.—That I am aware of.

Sir RICHARD WEBSTER.—It is from Sir Robert Morier to Lord Salisbury, and it stated the question of seal hunting in the Behring Sea had formed the subject of continuous negotiation between the United States Government and his own for a very considerable time and many pro-

posals had been submitted to him by the United States Department, to none of which, however, had he been able to give his assent. There are other letters, though they are not stronger than that.

Mr. CARTER.—Are there any others that have any value?

Sir RICHARD WEBSTER.—Yes, there are, and I will give my learned friends references to the others, should they desire to know those which I rely upon, but I am quite satisfied with that I stated from the correspondence to which attention was called this morning and from this correspondence, it is perfectly plain and quite proper that Russia while declining to endorse the view taken by the United States was naturally willing and anxious to reserve to herself the benefit of this discussion, should it turn out the United States were right.

Then, if you will kindly look at the bottom of page 27:

With these reservations, we accept the British proposal in the following terms.

There is no alteration in the terms which I read; and the final assent is given on the 29th of May, 1893, by Lord Rosebery to Mr. Howard:

With regard to the reservations made in Mr. Chichkine's note you will state that Her Majesty's Government have taken note of them, but do not at present propose to discuss them; that, on the other hand, they must adhere to the reservation previously made by them, and contained in your note of the 12th of this month, and that it is understood that the rights and position of either Power are in no way affected by the conclusion of this provisional arrangement.

Now, Mr. President, on page 29, appears the assurance or answer from Sir Robert Morier, in consequence of which, as Mr. Phelps informed the Tribunal, Lord Rosebery last week introduced the Bill to give effect to this *modus vivendi*; for, without the consent of Parliament, the rights of British subjects cannot be interfered with on the high seas. And it was on that occasion, as Mr. Phelps rightly stated, that Lord Rosebery, not being then in a position to announce the satisfactory conclusions with reference to the claims made by Great Britain, stated that the matter was under discussion; but it is the fact, as the Attorney-General has told you this morning, since then, having fully investigated the matter, Russia has adopted that line which was in accordance with all her previous actions, for she stated, as appears by this correspondence, that no vessels had been illegally seized because they were within the 3 miles or had just gone out of it; and, in accordance with that, she has acted throughout.

Senator MORGAN.—Is it intimated in this correspondence, or is there any action of the Government, as to how far the Russian Government would have been authorised to follow those vessels after crossing the line?

Sir RICHARD WEBSTER.—I do not know; but I really speak without having looked up the subject lately,—I do not think that there is any limit of distance as to hot pursuit. I know that the question has been raised whether you can follow them into other territories,—I know it has been raised with reference to the high seas; and I should think you can go for 40 or 50 miles in hot pursuit. I am now speaking of matters that have come before me when I was Attorney-General, with reference to France and Germany, where the right was recognised to follow vessels that had broken the Fishery Conventions on the high seas.

Senator MORGAN.—Would not that rather be, Sir Richard, *ex proprio vigore*?

Sir RICHARD WEBSTER.—Well, I should hardly say that, Sir; but by the assent of Nations to the arm of the law being stretched. I do not think it would be quite right to say it was done *ex proprio vigore*,

though I agree it is an extension of municipal law. That was a point I endeavoured to argue before you, and I hope made clear, some few days ago.

From beginning to end of these transactions there is no foundation for the statement made in the argument that Russia was exercising these rights in support of the same principles as the United States were claiming in 1886 down to 1892—they had certainly as strong a case as to original jurisdiction. If the United States had a good case up to that boundary line to the east of it, Russia had the same case to the west of it, but we know from this and from everything that has gone before that no such case was made by them. But I ask you, Sir, not to forget when I come later on to discuss this question of zone that with the fullest knowledge of the matter and investigation upon their Islands Russia has come to the conclusion a 30-mile zone is sufficient and is only required in consequence of special circumstances and that a female seal when actually at the Islands are never to be found far from the islands and even in cases in which it is evident the Russians think during a certain portion of that time they go for food—it is obvious that the opinion of the Russian officials is that during a portion of the time the female seals go out for food, so that I am justified from an impartial view in one sense, and on the other hand an interested view—on looking at the matter fairly—in saying that an arrangement has been come to which is a corroboration of the case the Attorney General pointed to this morning I pass from that incident. The real importance of it was that the Tribunal should have the real facts; and as, interlocutorily, my friend Mr. Carter spoke of us introducing fresh evidence, I do not agree that that is the right view of the matter. The Tribunal wishes to have the real facts and from those real facts it will be seen we submit that the assumption or inference drawn by the United States as to Russia's action was not well founded.

Now, Mr. President, I desire to supplement what has been said by the learned Attorney General with regard to the question of area as briefly as I possibly can. I must not, I am afraid, pass over the subject altogether because as I indicated to you it is an important question. While it is for this Tribunal to decide the ambit of its own jurisdiction and the terms of the Treaty, it yet is of extreme importance (having regard to what may be said hereafter as to the conduct of the two nations in dealing with this matter) that this question of area should be fully and clearly (but I hope not at too great length), discussed before the Tribunal. My friends remind me that I had not read the telegram received from the Foreign Office this morning; but the learned Attorney General read it.

Mr. CARTER.—Yes, and he read it without giving us the opportunity to object to it which we regretted. But we do object to it and do not consider it in.

The PRESIDENT.—I consider you may make use of whatever public documents you have, because those we all know. You cannot use them as evidence, but as general information; but as to documents which are not public I think you cannot use them unless they have been inspected by the other side.

Sir RICHARD WEBSTER.—The objection of my friend (I say it in all seriousness), if he will only think for a moment, does not amount to anything. It is not a question of what may be called public documents, although it will be a public document before twenty-four, or forty-eight hours have passed.

Mr. CARTER.—It is a telegram.

Sir RICHARD WEBSTER.—I know; but you do really have telegrams sometimes. The fact is that Russia insists upon her right to seize vessels whose boats have actually been sealing in territorial waters, and does not insist, but on the contrary pays compensation to those vessels whose boats they could not prove to have been inside territorial waters. What complaint there can be, I cannot understand.

The PRESIDENT.—Of course we do not doubt your assertion personally, but it is a personal assertion.

Sir RICHARD WEBSTER.—You must not say my personal assertion, Sir.

The PRESIDENT.—You bring it personally forward.

Sir RICHARD WEBSTER.—You will be good enough to understand, Sir, that it is not my personal assertion—it is a statement made by the learned Attorney General speaking of a communication made to him in his official capacity from the Foreign Office. You must not put it on me—I mean to say a communication would not come to me—it came to the learned Attorney-General, and was read by him.

Mr. CARTER.—We must not admit the right of Counsel on the other side to read communications (by whatever name they may be called) merely from the Foreign Office of Great Britain. They are communications perhaps stating facts which may be deemed of greater or less importance to the inquiry here, and facts therefore which it may be necessary for us to meet. We have not a Foreign Office within twelve hours communication. We cannot communicate with Russia for the purpose of ascertaining what the full facts were.

It certainly will not be permitted by this Tribunal, I should suppose, that a partial view of facts may be presented here without any opportunity to the other side to make that view full and complete—that surely is not the way in which the question should be brought before this Tribunal. Therefore we feel bound here to object generally to the introduction of new evidence which certainly must be considered to be irregular; and inasmuch as no provision is made for it by the Treaty—and it is particularly irregular as we think for Counsel to get up on the other side and offer new evidence without even asking the permission of the Tribunal for doing so—getting it in simply without provision, before the Tribunal, for what it is worth. That of course we must be understood most distinctly objecting to, and hope it will not be permitted.

Sir RICHARD WEBSTER.—I would rather abstain from answering any complaint of my friend Mr. Carter. I have not, by my assertion—nor has my learned friend the Attorney General sought in any way to introduce fresh evidence. He has simply sought—and I should submit to the Tribunal for their judgment properly sought—to remove an impression which would have been made upon the minds of the Tribunal, by a passage in Mr. Phelps' argument for which we knew there was no foundation.

Mr. CARTER.—If there was no foundation for it, that could easily be shown.

Sir RICHARD WEBSTER.—But I say—my friends have the fullest notice now—if we had made any mistake, they have the same means of communication that we have.

Mr. PHELPS.—With the Foreign Office?

Mr. TUPPER.—With Russia.

Sir RICHARD WEBSTER.—With their own Foreign Minister in Russia. But really, Mr. Phelps, I am sure you will understand what I mean—that there is no ground for the suggestion that my learned friend the Attorney General, (in stating that which he knew to be the

fact officially), was doing otherwise than giving you the earliest friendly notice, according to our view, that a mistake had been made in the inference you attempted to put on certain acts in your argument which for the first time he told us we saw when that argument was presented.

Mr. CARTER.—We take a wholly different view.

The PRESIDENT.—I think we should maintain a distinction between documents which are public. If you mention that which is merely mentioning any fact or statement from a public paper, it is for us to consider the importance that should be attached to it; but as to other documents not public which are altogether private or almost private—that are official and confidential, at any rate, communication from your government to Counsel, I think we must reserve our opinion on that, and upon the use you may personally be going to make of them, until those documents or communications have been communicated to your friends on the other side and inspected by them.

Sir RICHARD WEBSTER.—I entirely agree if I may be allowed to say so; I only desire to point out that the communication to the Attorney General was only the fact of the telegram being received or communication being received officially from Russia—just in the same manner as this book that I hold up—although it has not become a Parliamentary paper. But I follow you, Sir, in what you say, and I will take care that as far as possible it shall not rest upon that statement of the Attorney General or any document which is not equally at the disposal of my friends. There will be ample time. The distinction you have drawn is of course a most important one, Sir, and one which at any rate I should not have overlooked, but I again point out that it is in order to remove a false impression not established by what I may call, shortly, the facts of the case.

The PRESIDENT.—We have perfect faith in your intention.

Mr. PHELPS.—My friend should understand now that I shall maintain in the close of this argument, the absolute correctness of every thing that is there said in respect of the action of Russia; and, not the least, from the very correspondence that we have permitted them to introduce to-day.

Sir RICHARD WEBSTER. I am perfectly willing that my friend.

The PRESIDENT.—I think we had better let Mr. Phelps argue that in his turn.

Sir RICHARD WEBSTER.—I was about to make that observation. I cannot preclude my friend Mr. Phelps from arguing every thing; I have given him the fullest materials upon which to support his contention if he can.

Now, Sir, when you were good enough to make that observation to me, I was about to argue, and to argue for a very short time as briefly as I possibly can, the question of jurisdiction.

Senator MORGAN.—Before you proceed to that, is this agreement of Russia to pay damages part of the *modus vivendi*?

Sir RICHARD WEBSTER.—No, quite independent—it is kept independent by both. It is stated in terms that the *modus vivendi* is to have no operation on the seizures last year which were to be governed by the ordinary principles of International law.

It is understood that the present Agreement relates solely to the year 1893. It has consequently no retroactive force or effect—more especially as regards the British vessels previously seized by Russian cruisers.

Neither Great Britain nor Russia wished or intended to put that as operating with regard to those seizures—they desired that that should be outside. May I be permitted to remind you again that the question

of liability of Russia was referred to a Committee; and it was not (this appears in these documents), until after that Committee had reported that the decision was come to.

I must not be tempted to make any further incursion on my time or upon the time of the Tribunal by referring to the observation of Mr. Phelps. I pass at once to the point to which I invite a few minutes attention, and that is as to what is the area over which the Regulations are to be made.

Now I begin by saying that if it is desirable to consider the whole question of seal preservation, most unquestionably the area *outside* Behring Sea as well as the area *inside* Behring Sea, ought to be considered; and not by one single word of mine do I mean to.—

Senator MORGAN.—Do you mean that is within the powers of the Tribunal.

Sir RICHARD WEBSTER.—No, I say it is not within the powers of this Tribunal—I say it is a general question of dealing with seal life as a whole which ought to be dealt with by anybody who is discussing the whole question.

Senator MORGAN.—How can we deal with it unless it is within the powers of the Tribunal?

Sir RICHARD WEBSTER.—It is contended by us Senator that it is not within the powers of the Tribunal. It has been argued by my friend that it is not. He asked me to present to the Tribunal any additional observations that occurred to me on that question of area and I was about to present to you some observations and submit them to your judgment, to show that the ambit of Article VII is the same as the ambit of Article VI—in other words that the ambit of Article VII relates to regulations to be made in some part of Behring Sea eastward of the line of demarcation defined by the Treaty of 1867.

Nobody will at any rate accuse me, I am sure, of desiring in any way to overlook or minimise or belittle the difficulties which are in my way. I quite agree if you simply look at the language of Article VII by itself without reference to the rest of the Treaty, without reference to the other arguments words used at the same time, or without reference to the real questions which had arisen between the parties, then you might say the words are sufficiently large. But as a question of construction I am submitting to the Tribunal that the ambit of Article VII was intended to be the same as that which had been the subject of discussion and dispute between the parties, and which is covered by Article VI.

I must, I am afraid, refer to a very few documents. I will ask the Tribunal to be good enough to follow me with them that I may be as brief as I possibly can. I will ask them to take the United States Appendix, volume I; and I will refer only to documents in that book, with one very brief exception. At page 286 the letter under date of the 17th of December, 1890, from Mr. Blaine they will find the first form of Article VII. It was then the 6th question and it is well that I should read to the Tribunal what the first form of Article VII was:

If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur-seal in any part of the waters of Behring Sea, then it shall be further determined: First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and feeding therefrom. Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limit shall be prohibited) is necessary to save the seal-fishing industry, so valuable and

important to mankind, from deterioration or destruction. And, if so, third, what months or parts of months should be included in such season, and over what waters it should extend.

There will be found in that letter, Mr. President, other passages supporting our views; but in the interest of that brevity to which, I have alluded very often I am going to keep very closely indeed to this matter and refer only to the most important passages. So far, I submit, it cannot be successfully disputed that the question distinctly pointed to Behring Sea or a part of Behring Sea, and had no reference to regulations outside Behring Sea.

That form of question was objected to by Lord Salisbury on the 21st of February, and in view of the suggestion that by the terms of the treaty we are supposed, to have enlarged that question I will ask the Tribunal to look at the language in which that question was objected to. I refer to page 294 of the same volume, reading from the letter of the 21st of February, 1891, just before the end of the letter.

The sixth question, which deals with the issues that will arise in case the controversy should be decided in favor of Great Britain, would perhaps more fitly form the substance of a separate reference. Her Majesty's Government have no objection to refer the general question of a close time to arbitration, or to ascertain by that means how far the enactment of such a provision is necessary for the preservation of the seal species; but any such reference ought not to contain words appearing to attribute special and abnormal rights in the matter to the United States.

On the 14th of April, at page 295, you will find the sixth question repeated by Mr. Blaine, with this comment in the beginning:

While Lord Salisbury suggests a different mode of procedure from that embodied in the sixth question, the President does not understand him actually to object to the question, and he therefore assumes that it is agreed to.

Then, Mr. President, Mr. Blaine again repeats the sixth question in the same terms as before, containing in it the words:

in any part of the waters of Behring Sea, then it shall be further determined: First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and feeding therefrom? Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal-fishing industry, so valuable and important to mankind, from deterioration or destruction? And, if so, third, what months or parts of months should be included in such season, and over what waters it should extend?

On the 3rd of June, 1891, page 305, Sir Julian Pauncefote proposes the commission of experts, which, as you are aware, subsequently took the form of the two commissioners nominated by either party.

In lieu thereof they propose the appointment of a commission to consist of four experts, of whom two shall be nominated by each Government, and a chairman who shall be nominated by the Arbitrators. The Commission shall examine and report on the question which follows:

For the purpose of preserving the fur-seal race in Behring Sea from extermination, what international arrangements, if any, are necessary between Great Britain and the United States and Russia or any other power?

On the 4th of June, page 307, Mr. Wharton, writing to Sir Julian Pauncefote—when, as you will see Mr. President, there was no dispute about the question at all—uses this language. I read from page 307, the 5th line from the top:

I am also directed to remind you that the contention between the United States and Great Britain has been limited to that part of Behring Sea eastward of the line of demarcation described in our convention with Russia, to which reference has already been made, and that Russia has never asserted any rights in these waters affecting the subject-matter of this contention, and can not therefore be a necessary

party to these negotiations if they are not now improperly expanded. Under the statutes of the United States the President is authorized to prohibit sealing in the Behring Sea within the limits described in our convention with Russia and to restrict the killing of seals on the islands of the United States, but no authority is conferred upon him to prohibit or make penal the taking of seals in the waters of Behring Sea westward of the line referred to or upon any of the shores or islands thereof. It was never supposed by anyone representing the Government of the United States in this correspondence, or by the President, that an agreement for a *modus vivendi* could be broader than the subject of contention stated in the correspondence of the respective governments.

I need not remind you, Mr. President, the *modus vivendi* are temporary regulations—regulations for 1891 and regulations for 1892.

Negotiations for an arbitration have been proceeding between the United States and Great Britain, and, if these powers are competent to settle by this friendly method their respective rights and relations in the disputed waters upon a permanent basis, it would seem to follow that no question could arise as to their competency to deal directly with the subject for a single season.

That is, of course, my point put very graphically and clearly by Mr. Wharton.

On the 9th of June, page 312 of the same volume—

Lord HANNEN.—We have had all these, you know. I see every passage has been scored by me as already read.

Sir RICHARD WEBSTER.—I will accept the hint, my Lord. I am extremely obliged for a hint of the kind; and whatever may be the consequences to myself I am quite satisfied, I may say, to take the suggestion made by any member of the Tribunal.

The PRESIDENT.—Do you not believe the limitation put by Mr. Wharton in this dispatch of June 4th, related merely to the prerogative of the President?

Sir RICHARD WEBSTER.—Certainly, Sir.

The PRESIDENT.—And you say the *modus vivendi* practically entered into afterwards had been submitted to the Senate?

Sir RICHARD WEBSTER.—But that also was limited to the same area.

The PRESIDENT.—The point of Mr. Wharton is that the President could only make regulations temporary for the Behring Sea.

Sir RICHARD WEBSTER.—You will observe, Sir, that the *modus vivendi* which goes to the Senate goes no further. The *modus vivendi* does not go outside Behring Sea at all. That is my view.

The PRESIDENT.—All these treaties went to the Senate when they had nothing to do with the power of the President.

Sir RICHARD WEBSTER.—I entirely agree, Mr. President. I point out that the *modus vivendi*, to which you have referred, which went to the Senate, limited the damages to be paid and limited the remedies to be given to the respective Governments to the area of Behring Sea.

Senator MORGAN.—Do you mean the first or the second?

Sir RICHARD WEBSTER.—Both of them—both in 1891 and in 1892.

Senator MORGAN.—I am not aware that the one of 1891 went to the Senate.

Sir RICHARD WEBSTER.—Then I correct that with regard to that one going to the Senate.

Senator MORGAN.—The one of 1891 did not go to the Senate, but the one of 1892 did go to the Senate, and was incorporated in the treaty.

Sir RICHARD WEBSTER.—My mind is entirely acting upon the same line. Whether I am right or wrong I have no right to say.

The PRESIDENT.—I think there is a distinct intimation in the letter of Mr. Wharton, at page 315, that the preservation is to be extended to the North Pacific Ocean.

Sir RICHARD WEBSTER.—Because, Mr. President, you will remember that there was proceeding at the same time the collateral line of negotiation with regard to an arrangement to which all the interested nations should become parties. You have to consider most carefully whether the letters which are referred to relate to the discussion between the United States and Great Britain solely, or relate to that other negotiation which was going on all the time.

Would you kindly look, Sir, to the letter you have been referring to, page 316.

Mr. Wharton to Sir Julian Pauncefote.

DEPARTMENT OF STATE, Washington, June 13, 1891.

SIR: The President directs me to say, in response to your note of this date, that his assent to the proposition for a joint commission, as expressed in my note of June 9, was given in the expectation that both Governments would use every proper effort to adjust the remaining points of difference in the general correspondence relating to arbitration, and to agree upon the definite terms of a submission and of the appointment of a joint commission without unnecessary delay.

Therefore I submit that independently and collaterally to the agreement which affected Great Britain, and affected the United States alone, there was this parallel line of negotiation; and my reply to that reference to the North Pacific, Sir, is that you will find the North Pacific referred to many times, and referred to by nobody more pointedly than by Lord Salisbury, at a time when he was desirous and at a time when Mr. Blaine on behalf of the United States was not desirous that the whole question should be dealt with in the way of arrangement between the United States, Great Britain and other nations who were to be interested in the matter.

That is my answer to the point to which you were good enough to call my attention. I submit you will not forget, Sir, that the United States Government did not attempt to go outside Behring Sea until this year. It was only in this year, 1893, attending the sitting of this Arbitration, while the Arbitrators were actually sitting, that a bill was passed to enable the President to give effect, so far as United States citizens were concerned, to any award made by this Tribunal. Therefore, the action of both countries, both Great Britain and the United States, points to the fact that up to the time of the delivery of these arguments, the suggestion of the Tribunal being seized of the control of matters outside Behring Sea had not, at any rate, as we submit, formed the subject of agreement or even of discussion between the parties.

I equally agree—I have said so more than once, if you merely take the language of article 7 quite apart from the other articles of the treaty, quite apart from the fact that you are dealing with questions which have arisen concerning the preservation of the fur-seal in or habitually resorting to the said sea, if you will look at the language of article 7 apart from that, the terms would seem to be wide enough to give you power to go below.

Senator MORGAN.—The same terms are used in article I.

Sir RICHARD WEBSTER.—I quite agree, sir; and that, of course, does not militate against my point, whether it be a good point or whether it be a bad point.

Senator MORGAN.—I had supposed when the treaty came to be formulated and the text was finally determined, that the question was

changed from one of geographical boundaries limited by Behring Sea to one relating to a class of seals that were in or habitually resorting to Behring Sea, and that therefore the powers of the Tribunal were extended to such regulations as might be sufficient and proper for the protection of all that class of seals.

SIR RICHARD WEBSTER.—Mr. Senator, I cannot help saying—I say it with all respect—that I think any such view would be, looking at it broadly, a one-sided and unfair view. The United States within their rights, for reasons best known to themselves, had said, “We will not allow you to bring before the Tribunal as a matter of regulation anything upon the islands”. The United States, for reasons best known to themselves, endeavored to withdraw from the Tribunal even the consideration of what was going on upon the islands. They have protested that it is immaterial except so far as it bears on the question of decrease. They could not, of course, shut our mouths with regard to that part of the case; but they said, “Regulations upon the islands as such cannot be made”, and the Attorney-General agrees, and I of course agree, that that is so. But it is equally certain that regulations might be necessary for the preservation of the seal species upon the islands. It is perfectly plain they might be necessary, as, for instance, if the lease permitted much too large a number to be killed. Supposing the 100,000 a year should turn out to be much more than ought to be killed on the islands. There is nothing more unreasonable in the area outside Behring Sea not being submitted to this Tribunal any more than the question of regulations on the islands being submitted.

Senator MORGAN.—Regulations on the Islands, Sir Richard, were not even the subject of negotiation.

SIR RICHARD WEBSTER.—I beg Senator Morgan's pardon, with great deference. I do not desire to go back upon that; but I could point out, if I were to go into the whole of this correspondence, that in the earlier stages that it was suggested on behalf of Great Britain, and objected to by the United States.

Senator MORGAN.—But it was abandoned.

SIR RICHARD WEBSTER.—But that is my whole point, Mr. Senator. You do not shut it out from the area of investigation when it has been abandoned.

Senator MORGAN.—I thought it did.

SIR RICHARD WEBSTER.—Well, you shut it out from being that which was to be dealt with by the parties, but it is clear that the original conception of Sir Julian Pauncefote was that the whole question of seal life should be examined into, and I must not be tempted by what you have said to me but I must remind you that the Commissioners in 1891 put it beyond all question that Lord Salisbury did instruct the British Commissioners to go into the whole matter.

Senator MORGAN.—That was before the Treaty was signed.

SIR RICHARD WEBSTER.—But it would not make any difference, Sir. May I remind you, Senator Morgan, that when we were arguing some days ago with regard to the question of the function of the Commissioners, you then put to us that it was all in view of the treaty. Now when I remind you of this power of the Commissioners, you say it was before the treaty was signed. I only ask the same rule may be applied in both cases.

I will not pursue that further. I will go at once to my point, if I can. I only say, with great respect, to every member of this Tribunal, that as between the parties, what was submitted to this Tribunal was jurisdiction over and regulations in Behring Sea, and that the United States

withdrew, properly if you like—I care not whether properly or improperly withdrew within their rights direct jurisdiction over the islands; and I say equally that Great Britain never submitted, if that is the proper expression, jurisdiction as to regulations outside Behring Sea.

Senator MORGAN.—I did not insist upon that. I insisted that both Governments had agreed that this Tribunal might take cognizance of the necessary measures for the protection of fur-seals in or habitually resorting to Behring Sea.

Sir RICHARD WEBSTER.—If you were to take those words by themselves, they would include the islands. If the words were to be strained against me in that way, it would actually include the islands. The measures which are necessary to preserve the seals—

The PRESIDENT.—But there are other words.

Sir RICHARD WEBSTER.—I say if you were to take the words the learned Senator puts to me by themselves, it would have included the islands.

Senator MORGAN.—Not unless the Sea means islands. I do not see how they could.

Sir RICHARD WEBSTER.—I must not appear to be arguing with you too much, Sir; but I will call attention to the “proper protection and preservation of the fur-seal in or habitually resorting to Behring Sea”. Now, if the words had not followed, “What concurrent regulations outside the jurisdictional limits of the Governments are necessary”, then the words which you were good enough to call my attention, namely, “regulations for the preservation of the fur-seal frequenting the islands” would have included the islands as well. It is for that reason, Sir, that I press upon this Tribunal that whatever may be the construction they put upon Article VII, which was entirely within their own power, I cannot do more than suggest the view that we contend for to them, whatever construction they put upon it: viz that Great Britain in agreeing to this Treaty, was neither told, nor believed, that they agreeing to submitting regulations outside of the Behring Sea to Arbitrators.

I have said all I intend to say upon the matter, because it has been fully argued; and it was only deference to the wish of my learned friend, the Attorney-General, that I referred to the matter at all again.

Senator MORGAN.—I know you will pardon my desire to ascertain exactly what are the powers of this Tribunal because I do not wish to exceed them in any case or under any circumstances. This is all I am addressing my remarks to.

Sir RICHARD WEBSTER.—Now, Mr. President, I shall not refer again to the question of area; but I will ask you to permit me to deal with Behring Sea first; because whatever be the view, that which gave rise to the discussion, that which called for this Treaty, that which the United States sought to interfere with, was Behring Sea. And I cannot help thinking that upon this question—it is not a matter which you will lose sight of at all—that up to this day they have never moved hand or foot to interfere with their own nationals and their own ships that were sealing outside Behring Sea, almost to as great an extent as the vessels of other nations. Therefore I shall not be doing wrong if I direct the attention of the Tribunal as closely as I can to the question of Behring Sea.

Mr. President, I propose to state the propositions to which I am going to address my argument. I have formulated them because, as I indicated to you early this afternoon, I believe no living man, certainly no man with my capacities, could possibly hope with effect to address the Tribunal upon every issue in this case. Every single matter has been

picked out and made the subject of voluminous affidavits, without the least regard to whether it was of great importance or not; and I hope to concentrate the attention of the Tribunal upon the important points.

I accept the two cardinal principles recognized by the British Commissioners in their most impartial and fair report—a report which never ought to have been attacked as it has been—that no gravid female ought to be killed, so far as it can reasonably be avoided, and that no nursing female upon whose life of the pup depends, ought to be slaughtered, or injured in any way.

Those are the two principles upon which I propose to argue this question of regulations. Do not let it be thought that I make those concessions from the point of view of one course being cruel and the other not. I trust that I have as strong a feeling upon the question of cruelty to animals as anybody living; but I shall demonstrate, I trust, before I come to the end of the argument on the question of regulations, that the outcry, the prejudice, that has been endeavored to be imported into this case from the point of view of cruelty, the exaggerated color which has been given to incidents that do occur or have occurred in the past, is wholly unjustifiable and unwarranted, and that when you look at the real facts, we have nothing to fear from an examination of this case from the point of view of cruelty. I merely mentioned that, Sir, that you may not think that I am shrinking from any onus or burden that may rest upon me in enunciating these propositions. I do not enunciate them upon any consideration from the point of view of cruelty. I look upon them, so far as a counsel may look upon them, in the point of view of what ought to be provided.

It seems to me that upon the simple principle that has governed and controlled the game laws of all civilized people, the killing of a female which is about to bring forth its young, or upon whose life the lives of the young are dependent, is a matter which no Tribunal would endorse by recommendation, and that therefore the contrary of that what would commend itself to the mind of this Tribunal.

From that point of view, Sir, what do I propose to establish? I propose to establish on testimony quite independent of any report which has been disclosed to us during the course of these proceedings—although I shall not hesitate to make plain what has been the conduct of the United States in connection with Elliott's report—I propose to establish upon our evidence which was obtained long before we had seen or knew of the contents of Mr. Elliott's report, the following propositions: that the thick zone of seals is near the islands; that is to say that the zone in which the seals ought to be preserved by their numbers, and ought to be left undisturbed, is to be found near the islands; that outside a zone of twenty miles, the seals are comparatively sparse, that is to say, as compared with the numbers that are inside the twenty miles, very sparse indeed; but that outside the zone of twenty miles, they become so sparse that they may be taken to be scattered seals, as distinguished from what I may call numerous, or seals in large numbers; and in that connection I wish to submit to the Tribunal that a zone of thirty miles, for reasons which I shall call attention to upon the evidence, being the same distance which has been, as you know, already the subject of negotiation between Russia and Great Britain, gives a margin of very great safety. Add to that the observation already made by my learned leader, that all these zones have attached to them, *ex necessitate*, another margin which may be put at twenty-five to fifty per cent, due to the absolute necessity of the persons who have to respect the zones not trespassing within them.

So much for what I propose to establish as to the question of the population of Behring Sea by seals. I then propose, Sir, to establish that as a rule the seals do not feed while resorting to the islands. I must not be misunderstood or my language must not be so framed that my learned friends can merely quote it without fully appreciating what I mean. I am not suggesting that occasional seals may not go out and get food. I am not suggesting that early in the year before they go to the islands, and later in the year, even though they may be going back again for a small portion of time, two or three days, that they never feed, nor anything of that kind. My case is that speaking of the seals, both male and female, while they are upon the islands as distinguished from being in the Sea, they do not feed. They go in the water constantly while they are upon the islands. We know that practically every seal upon the islands, other than the bulls, goes into the sea. But the important contention will be upon the evidence that the seals, speaking of them as animals which are for the time being out of the water and on the land, do not feed.

Next I shall endeavour to establish that from three to four weeks certainly, I know that there is some evidence of a rather less length of time, but that from three to four weeks after the birth of the pup the females do not go into the water again, or, in other words, that for a period of from 17 days as a minimum up to four or five weeks as a maximum, although the work of the nutrition of the pup is going on during that time, although possibly the growth is more rapid than at other times the mother is able to supply the milk without obtaining any food other than that which her own condition gives. That is by no means unknown altogether in natural history, I only mention that by the way, but that the Tribunal may understand my case in regard to that matter I repeat, speaking of the females, it appears that from three to four weeks after the birth of the pup, the mother does not go to the sea for food.

LORD HANNEN.—In order that I may gather precisely your meaning what other mammal is there known where under those circumstances the female does not feed.

SIR RICHARD WEBSTER.—Both the other races of seals which is the nearest possible the hair seal and I think the harp seal, but there is evidence about them my Lord, and apparently the walrus and I rather think the sea lion; there are, four or five of this group of animals that have this peculiarity, or rather feature, because I do not think it is right to call it a peculiarity. I submit the period of 17 days or whatever it may be is quite as remarkable as any other period.

LORD HANNEN.—I cannot agree to that. A 17 days' fast is not as remarkable as 40 days.

SIR RICHARD WEBSTER.—No, but then I had not said 40 days, my Lord. I only said from the point of view we are considering the animal must have drawn on some internal resources during that 14, 15, 16 or 17 days. I think there can be no doubt about it. Your Lordship does not desire that I should argue the point now?

LORD HANNEN.—No, I only wanted to know what was passing in your mind. You say that the other pinnipeds have the same characteristic.

SIR RICHARD WEBSTER.—Yes, but I think one can see, when one comes to consider this question, as fairly as possible, for some reason or other the habits of this seal necessitate in both male and female the power of self-sustenance or support for a considerable period of time. I think the evidence as to when the pup can support itself is left in a very uncertain condition. There is substantial evidence that it does begin to support itself after three or four weeks old, not that it ceases

from sucking; and probably members of the Tribunal will know if they have studied natural history that many animals go on sucking for a long time after it is unnecessary. It is not unknown with four-footed animals, and I believe also, not unknown with others—it is known with regard to descendants of the human race. It is a fact. It is a fact, and you should by no means draw the conclusion that pups cannot support themselves, because when killed they have milk in them.

A striking instance of that was given by my learned friend Mr. Couderc. He said the pups killed in October or November had milk in them, and suggested that this proved that they were not able to support themselves because they had milk in them, but that is at a time when, according to all accounts, they would be able to support themselves, because they were within a day or two of taking to the water for their winter voyage. I submit that there is no doubt that as long as there are female seals on the land with milk, some of these pups will suck their mothers when they get the opportunity. I only mention that to show how very uncertain is the evidence upon which you would form a conclusion as to when the pup can support itself is, I think, after 4 or 5 or 6 weeks or two months the pups do feed in the sea partly upon sea animals of the small kind and partly upon the *algæ* or seaweed, and are not absolutely dependent on the mother but can support themselves very soon after four or five weeks.

I think it must be so for another reason, which I will expand later on. Shortly after the 6th of July, large numbers of pups were found in other parts of the island; and it is doubtful if their mothers find them again. I do not mention that for the sake of saying that the mother has not a natural instinct to come back to the pup; but it will be found to have some bearing upon the question whether the pup is absolutely dependent on the mother after a certain date.

Then, in this connection of food, I shall call attention to the very remarkable evidence which up, to the time of this case, has never been disputed. It is not a very savoury subject, but it is one which has to be examined with some little care; I mean, the absence of all *excreta* or *dejecta* from these animals upon the Islands.

I mention that, because it is a most remarkable thing, when we come to the United States Case, they think nothing of throwing overboard the unanimous testimony and consent of everybody else who has examined the question previously saying that an affidavit made for the purpose of this case is to be preferred to the knowledge of other people who have independently examined this matter without the slightest motive for saying that which is untrue or to exaggerate it. I shall have to call attention to that in connexion with an incident to which I shall refer. Then, following out this line of argument I shall call attention to the fact that upon the evidence there is abundance of food near the islands, and further to a very remarkable solution which is endeavoured to be given by one of the United States witnesses with regard to why the females do not take the food near the islands which he admits to be there in large quantities. That is that some males are so busy catching the fish that the female seal knowing that there are plenty catching these fish she goes to a place which is more distant to catch other fish, because she will be less disturbed than where the males are near the islands. It is a remarkable suggestion and does great credit to the gentleman who thought it out. I will read that affidavit in connection with a part of the case to which I have referred namely, the proof that there is abundance of food near the islands, and then I shall endeavour to make good the statement made by the Attorney General that there is substantial evidence leading us to the belief that the

females killed at long distances from the islands are probably females in whom the milk is drying up, or who have left the islands not with the intention of returning during that season.

That might be for many reasons, among others, the death of the pup, which we know occurs, and it is the case of the United States that it does occur from causes perfectly independent of pelagic sealing, and also from the fact that the earlier births—pups born in the middle of June, some even in the earlier days of June—those which are born before the end of June would be weaned or independent of the mother some time at the end of July or the beginning of August which may account as it does for a certain number of females with milk being killed. It is an important thing to note in the United States affidavits scarcely any attention has been called to this question, what was the condition of the milk found in the mother. As I submit, upon the fair view of the evidence in which nursing mothers have been slaughtered by pelagic sealing that might be the reason.

Then Mr. President you will notice that I have endeavoured to keep all questions of attack upon the way in which the islands have been managed quite independently to the end because I want, if the Tribunal will believe in my wish to argue, fairly the question of regulations from the point of view of what they ought to be assuming the islands to be properly managed—what would be the proper regulations necessary for the preservation of life, that is to say proper regulations at sea for the preservation of the fur-seal.

It cannot be seriously contended that it is necessary to preserve seals at sea in order that the United States may be able to kill a greater quantity on land. It would be most unreasonable, it would be most unjust, it would be most unfair, having regard to the basis upon which we are arguing this question of Regulations; and, therefore, I submit that “necessary” must mean necessary upon the assumption that proper Regulations are in force and are enjoined upon the Islands in order to prevent an undue and improper killing of seals there. In that connection, I shall have to consider this question; Aye or no, it is true that the decrease, such as it is, is due to the action of pelagic sealing? And, in that respect, I shall have to call attention to the facts which, of course, must be expanded more at length to show that now you have the whole facts before you, if you look at what is the real condition of the rookeries upon the Islands and on the number of males that have been killed, the size of the skins that have been taken, you can see quite plainly from the year 1879 or 1880 downwards the rookeries upon these Islands have been in a gradually waning condition; and that the contention that the observed decrease in the years 1884 to 1890 is due to pelagic sealing will not stand the investigation of facts now that we have the facts before us.

Sir, the enunciation of those questions may have seemed a little long. On the other hand, it will enable you to follow the evidence to which I propose to keep closely in each case and will, I trust, show the Tribunal that in considering the scheme of Regulations I shall be able to touch on a particular subject and then to pass from it. Further I have to regard this case as a whole from the point of view of considering what Regulations are really fair.

That is to say not from the point of view of asking you to give any undue privilege or protection to pelagic sealing, but that you may by regulation make a suggestion that will prevent any undue or unnecessary slaughter of the lives of those animals which it is so necessary to preserve.

The Tribunal then adjourned till Wednesday, the 14th instant, at 11.30.

THIRTY-EIGHTH DAY, JUNE 14TH, 1893.

Sir RICHARD WEBSTER.—Mr. President, I proceed at once to the examination of the evidence on the various subjects which I enumerated at the close of the sitting yesterday afternoon. The task of the British Counsel has not been rendered lighter by the action taken by my learned friends on the other side. We always had a hope that there might have been a certain amount of approximation and fair discussion between us as to what I may call the limits of Regulations; but you will have observed, from the paper read some days ago by General Foster, to which paper allusion was made by the Attorney General yesterday and which called forth a remark from Mr. Phelps, I have to justify the whole of my Regulations. It is not a question of degree; they are objected to root and branch by the United States, who contend that an exclusive right is to be given to them of capturing these seals, and that, within the whole of this area, no Regulations are at all compatible with the duty imposed on this Tribunal by the Treaty.

Sir, you will not have forgotten the scheme of the Treaty is that, for the guidance of the Tribunal, there shall be presented to them a joint and several Report of the Commissioners, both of the United States and Great Britain; and in dealing with the various heads to which I have to direct your attention, I must, of course, in every case see that I bring before you, inasmuch as it has not been already brought before you, the contents of the various Reports upon each of these points, supplemented of course, by the evidence which the two countries have laid before the Tribunal. The first question I propose to address myself to is, what is the zone of thick seal-life as I shall contend upon the evidence taken fairly as a whole and disregarding exceptional statements? The thick seal-life is to be found within a comparatively speaking, narrow belt round the Pribilof Islands; outside a narrow belt of somewhere about 20 miles, seal-life is sparse, seals are scattered, and attacks made on seal life would not impair or injure what I may call the main seal herd.

In considering all this evidence, Mr. President, you will have to remember that it has not been subjected to cross-examination. I shall have to point that observation later on when I deal with specific statements upon which cross-examination was attempted and not permitted.

It is very important in reference to the statements on which reliance is placed on one side and the other. The Tribunal will be good enough to bear that in mind and further as to these observations I ask particular attention. It is important to see if the statements made are *ex post facto* that is to say after the discussion has arisen or if they are statements made before the actual contention between the parties had been developed. In that view may I ask the Tribunal kindly to take the British Commissioners' Report and to refer to certain paragraphs beginning at paragraph 209. I do not pause to repeat, but only to endorse with a word my learned friend the Attorney General's argument with regard to the attack made on the British Commissioners. I may have to refer to it later on. It has been a matter of astonishment

and regret to me that such passages as I shall have to read will be found in the United States papers. I will only appeal to the fair judgment of every member of this Tribunal, as I read this, as to whether on every point this Report is not only fair but impartial and giving the authority on for and against every statement whether it tells in favour of the supposed view of the Commissioners or against it. Then paragraph 209 is in these words:

The distribution and mode of concurrence of the fur-seals at sea when congregated in their winter habitats on the two sides of the North Pacific, and while migrating, have already been noticed. While the information on these points is not as complete as could be wished, it is sufficient to show in a general way how the fur-seal is affected in its movements by currents, drift, and winds. In speaking of its food and feeding habits on a subsequent page, it further becomes apparent in what manner the seals congregate and travel in following certain food fishes. It appears to be rather in consequence of such circumstances, operating conjointly upon these pelagic animals, than to any ruling gregarious tendencies while at sea that they become collected into "schools" or groups of greater or less dimensions. This at least is the result of the examinations made during the summer of 1891 in Behring Sea, where, though two or three seals were often seen actually in company, and occasionally as many as six or eight, the general rule seemed to be that each seal was pursuing its own course, travelling, sleeping, feeding, or sporting in the water, without reference to others in the vicinity. This is clearly shown by the observation that even when passing through an area at sea in which seals would be noted as abundant, they are as a matter of fact usually separated by distances much too great to enable any single animal, or any group of two or three individuals, to be in any way cognizant of the presence of the next adjacent individual or similar group.

I should point out the remarkable corroboration of this presently when I call attention to the United States evidence:

Apart from seals met with near the shores of the breeding islands, the densest "school" found by us was on one occasion about five miles to the westward of the land of St. Paul Island, where about forty seals were counted in a distance run of two miles. In all other cases, it was exceptional to meet with seals to the number of four to a mile run, while two to a mile run was much above the average even when passing through areas of abundance. It is thus evident that the seals had been brought together in such areas of abundance by reason of common conditions rather than by their own volition.

Then follow some paragraphs which give some very important statements as to the sources of information, but are not sufficiently material for me to read. I will now direct your attention to paragraph 214:

214. Without attempting to enter into further details here as to the methods employed, the general results arrived at may now be briefly described:

It is evident, in the first place, that the seals are most abundant in the water in the immediate vicinity of the shores of the breeding islands, this abundance of seals extending often not more than half-a-mile from the fronts of the breeding grounds, and seldom for 3 or 4 miles in such a way as to be at all notable. In the case of the Pribilof Islands, it is also observed that seals were numerous in both the monthly periods in the tract included in a general way between St. Paul and St. George Islands, though they differed much in this respect even at nearly approximate dates. It is further clearly shown that the Pribilof and Commander groups form the main centres of abundance of seals in Behring Sea during the summer; but that while this is undoubtedly the case, the seals are not found to decrease in numbers with any approximation to regularity in zones concentric with the islands,—always excluding the seals in the immediate neighbourhood of the shores.

215. It is therefore not possible to outline a series of zones in which the number of seals present will bear an inverse ratio to the distance from the islands. It is, however, possible to draw an approximate limit for a region about the Pribilof group, which will roughly define the area of abundant seals at sea during each of the two monthly periods chosen. In the case of the region about the Commander Islands, data though almost wanting for the first monthly period, and but scanty for the second, are sufficient to indicate a general mode of distribution similar to that demonstrable in the first case. Within the areas of abundant seals, these animals are, however, by no means regularly distributed, even at any particular fixed date, but are scattered in irregular patches in the diffuse character already described, and are very often thickest locally towards the outer limits of the area.

316. Beyond these areas, seals are found more or less sparsely scattered over a great part of Behring Sea

I call attention particularly to this Mr. President.

Which in the first period extends, in the longitude of the Pribilof Islands, from the Aleutian chain northward to about the 59th degree of latitude, includes the whole vicinity of the western Aleutian Islands, and spreads again to a greater width with the Commander Islands as a centre.

217. In 1891 the area of abundant seals about the Pribilof Islands appeared to be not only changed in form, but considerably reduced in size in the second monthly period; while that of scattered seals was not only changed in form, but much enlarged in area.

That would be a natural consequence, Mr. President, of more seals having occasion to resort to the islands—you would expect to find after the period of their visit to the islands became practically finished, more seals out in the scattered regions further away.

It appears, that in most years, in the later summer this area of scattered seals extends to the north-east of the Commander Islands, quite to, or even beyond, the 60th parallel of north latitude. This particular extension is probably to be explained by the drift of that branch of the Japan current which flows through the western part of Behring Sea, assisted by the prevailing southerly winds in the same part of the sea in June and July; while the comparatively restricted spread in a northward direction in the eastern part of the sea may be similarly connected with the general movement of the water from north to south in that region.

Then you may pass the next two paragraphs which bear upon great detailed observations which support their statement, and I wish to read paragraphs 220 and 221.

220. An examination of the area surrounding the Pribilof Islands in which seals were abundant in 1891, together with such other facts bearing on former years as could be obtained from pelagic sealers, indicates that the maximum limit to which this area may reach from the islands in the summer months in any direction is not more than about 180 miles, and it is probable that similar conditions obtain with regard to the Commander Islands.

221. Respecting the number of fur-seals to be found at sea within the areas of abundance above referred to, and exclusive of those frequenting the islands and their immediate shores, it is difficult to attain to anything like certain results. The endeavour has been made, however, in a tentative way to reach some roughly approximate estimates, by finding the number of seals actually seen in measured lengths of runs in or across such areas, chosen as typical, and made at different times in both monthly periods. The results obtained varied somewhat widely, as might be expected, not alone in consequence of the actual difference in density of the seals, but also from circumstances connected with the weather and the state of the sea surface. The observations made were, however, combined in a general average, which, when thus treated, showed about one seal noted to each mile run. On the assumption (which cannot be very far from the fact) that on the average a width of half-a-mile was efficiently scanned from the deck, this would give a mean of two fur-seals to each square mile of Sea surface within the area referred to.

I will ask the Tribunal not to overlook that statement when I come to the corroborative testimony which I shall submit from the United States affidavits. I need read no more there at present, but I will ask you to turn to paragraph 313 page 56 where occurs a statement to which I shall direct attention.

313. So far as the facts actually observed in 1891 go, it is apparent that there is always a considerable number of seals swimming, playing at sea opposite each of the rookery grounds, and that these in August consist largely of females, while in September great numbers of pups are to be found in addition. When extensive kelp beds exist off the rookeries, the main body of seals is generally seen inside the kelp, and at a distance of half-a-mile or so from shore comparatively few seals are seen; while at two or three miles seaward from the rookery there is no notable abundance of seals, and if sailing round the breeding islands, in a fog, at a distance of four miles from the shore, it would be difficult for the closest observer (apart from other indications) to decide when he had passed abreast of a rookery.

I am not now upon the question of the distance which females go specially—I will take that separately; but I refer to the general body of seals.

Now, the Court will remember that the original contention of the United States accorded with our own. I am not at all suggesting that my learned friends are not fully entitled to the argument that they did not know, or Mr. Blaine, when he wrote, did not know, as much as we know now. I am myself going to use that argument in favour of some of my contentions; it is equally open to my learned friends. I am entitled, however, to note in passing the original contention in the celebrated letter from Mr. Blaine to Sir Julian Pauncefote, the actual passage being at page 284 of the first volume of the United States Appendix,—the date was the 17th of December, 1890,—in which you will remember the President asked the Government:

To agree to the distance of 20 marine leagues—within which no ship shall hover around the islands of St. Paul and St. George, from the 15th of May to the 15th of October of each year. This will prove an effective mode of preserving the seal fisheries for the use of the civilized world.

Sir, in my submission, having regard to the evidence that we now have a distance of 60 miles, or 20 marine leagues, is very excessive; but it is to be noticed that that distance was in connection with the dates there mentioned, from the 30th of May to the 15th of September, and would have left Behring Sea outside that 60 miles open during the whole year; and in connection with what I am going to press upon this Tribunal (for I ask to be allowed here again to make the observation), I shall submit to the Tribunal that I am considering this question of Regulations fairly from the point of view of assisting the Tribunal and not trying to argue it too much from the British point of view, and I say it is important to stop pelagic sealing in Behring Sea while the stream of gravid females is going from Unimak pass up to the islands. I mention that because it is quite clear, from that point of view, that Mr. Blaine had not sufficient knowledge. I agree that that scheme of his would have allowed pelagic sealing in Behring Sea in the months of May and June north of the Aleutian Islands, and up to within 60 miles of the Pribilof Islands; and I admit at once, so far as Counsel may make an admission, looking at it impartially, that is a period of time when in Behring Sea the most destruction would be done to gravid females. I speak of Behring Sea as compared with outside Behring Sea, because, from about the middle of May up till the 15th of June, the female seals in large crowds, clustered together, are streaming up from the Unimak pass and other passes close by to the Pribilof Islands.

Therefore, I call attention to this, and I think the Tribunal will think I am not unfairly admitting it, that the zone proposed by Mr. Blaine, which he thought to be effective, did overlook or was insufficient from an important point of view, and that the rights of pelagic sealers ought to be restricted, so as to prevent any pelagic sealing in Behring Sea when the herd of females close together are, to use an expression I used just now, streaming up in close proximity towards the Pribilof Islands. I may make this observation once and for all, and submit this to the Tribunal, in the Pacific Ocean, and even round the coasts of the Gulf of Alaska, the stream has a comparatively speaking wide area, speaking of the stream of seals—that is to say it is dispersed from 3, 4, 5, 6, or even 20 miles from the shore; that is the evidence, and I believe even further. But when the seals get to pass through the Aleutian Islands they might become pressed, be closer together, because the passage through which they go is narrow, and people thought, even at those places, nets put round might catch and destroy a very large proportion of the female seals. So a point to be considered by this Tribunal, and considered I admit most carefully; is to see that during the time that

the congested herd of female seals, or the congested body of female seals, is passing through the Unimak and other passes up to the Pribilof Islands they should be, practically speaking, free from attack.

Now, having reminded you, Mr. President, of what the view of the Commissioners was, put down impartially and fairly, not as an admission forced from unwilling witnesses, let me in a very few sentences remind you of how the United States evidence stands. I must go over somewhat the same ground as was referred to yesterday in order to supplement it a little. Will you take map 4 of the United States Case. That is the sealing chart of the year 1891. How do the United States advisers describe the condition of sealing area in the year 1891? You will find that they have drawn again two imaginary circles round the Pribilof Islands at a distance of 20 miles from the nearest land. The Attorney General was not quite accurate in saying it would be more than 20 miles in some places. That is not the condition. It would be always 20 miles from the nearest land, and therefore more from other pieces of land. It is a zone enclosing the distance between St. George and St. Paul, you will see, because, being 36 miles apart, those two circles would overlap. How do they describe that? "Seals within this area very numerous". That is the statement made in the United States Case for the purpose of showing what was the condition of things in 1891.

Now I will tell the Tribunal what this map shows. It has been used in the United States Argument and in the evidence of the United States witnesses as though outside that 20 miles it showed the sea very thick with seals. On the contrary, it shows the reverse.

The total observations of six cruisers from the 15th July till the 15th September (that is to say, at various times between that), put down the total number, I have no doubt quite fairly, giving the dates and numbers, is 615 seals.

The total area over which those seals are spread is 100,000 square miles. Now do not let me be misunderstood. It is quite possible that on other days, or on the same day in other parts of these 100,000 square miles there would be seals, comparatively speaking, sparse or frequent, as you choose to call it, to the same extent. But it points to this, that the observation, assuming it, as I do, to have been fairly taken, shows that outside the radius of 20 miles from these Islands the seals are, comparatively speaking, sparse, and further than that, that they are existing in the condition, so far as thickness is concerned, where you would expect to find them, if they were, as the evidence leads you to believe, not in the course of actually migrating or going to or coming from the Islands themselves. In other words, as it is described by those who have made these affidavits, and compiled the evidence and described them as being seen in one direction sometimes and sometimes in another, and sometimes sleeping and sometimes not, and evidence in the condition in which seals would be, treating this part of the sea as that part of the universe they were inhabiting, if that is a proper expression to use with regard to seals in such a condition. I only pause, before I leave this map again to remind you of how misleading the appearance to the eye would be when you remember the extraordinary small scale on which this map is. I do not make the slightest complaint, and I shall not be mistaken, but it is a fact that each one of these seals covers from a mile and a half to two miles space on the water and therefore does not represent what would be the physical appearance of the seals in the sea itself.

Now I ask the Court to take the map N^o 6 of the Counter Case which is the corresponding map of 1892 which my learned friend the Attorney General referred to yesterday.

That is important, because a good deal more information is given in connexion with the year 1892 than is given in connexion with 1891, which information I desire to put before the Court in a compendious shape. In 1891, no doubt, not seeing the importance of the matter so much, they either did not keep the logs or they have not given us the logs. I merely mean that we have not the same amount of information for 1891 that we have for 1892. In 1892 they have given us the logs, I think, of all the six or seven cruisers that were engaged.

Now the state of things is this, and it bears, I shall respectfully submit, upon the very important corroboration, of the British Commissioners' view. Six cruisers were engaged for 148 days; that is to say combined, the total days occupied in examination was 148, ranging between the 20th July and the 31st August, some more and some less, amounting altogether to an average of something like 35 or 36 days observations each. All the logs are given, and one, the "Corwin" gives the number of seals they observed in all cases. The "Corwin" in one or two instances—a few outside and a greater number inside the 20 mile radius, says that in certain instances the seals were too numerous to be counted.

It is not quite possible to give an exhaustive statement with regard to this, but this is what the map shows and what the logs show. In the first place, will the Tribunal kindly observe again the 20 mile radius or zone, which is a little more accurately drawn upon this map than upon the other but sufficiently for our purpose corresponding with that of 1891 and the words are written "Seals within this area very numerous". Then occur, Mr. President, the pictorial representations of the other observations extending, as you will notice over a considerable area of sea, and I perhaps cannot point my observation more than by telling you that the map has been correctly made from the logs.

On the 20th July, almost due south-east of the Pribilof Islands, you will find 102 seals in a large cluster, and there are 102 in that bunch when it is counted it is correctly put down, and they cover an area, as nearly as possible, as well as you can check it of 400 square miles. If it is a picture of what was seen the 102 seals would, in fact, cover a space which would be perhaps three or four acres at the very outside they would not cover it, but be in it. The map shows as though they covered a large area. That is perfectly fair, but I want to remove any false impression. This map and the log show this, that during all this time with a number of cruisers in and out, as was shown yesterday—and I need not bring it to your attention again—the total observations outside the 20 mile radius were 1062 seals; the total observations counted inside and outside were 1859, and then within the 20 mile radius there is "thickly populated, very numerous". They very naturally and very properly not only did not attempt to count, but could not because they were so very numerous. The area is nearly as large as the map of 1891 covers, and even of the observed and counted seals 40 per cent are found within the 20 mile radius; but when you remember this area is spreading out and by geometrical progression getting larger and larger.

THE PRESIDENT.—The seals within the 20 miles radius are not taken from the map, but from observation.

SIR RICHARD WEBSTER.—The difference between 1062 and 1859 or about 600 seals is taken from the logs, that is to say, in addition to the

outside 1062 there are other instances of seals actually counted inside the 20 miles which brings it up to the 1859, the total number, that is, independently of the densely thick seals which they did not attempt to count inside close up to the Islands.

I therefore respectfully submit to this Tribunal asking them to remember that these observations are addressed to them for their assistance and not for the purpose of endeavoring to produce an unfair or distorted impression upon the mind of the court—I say that this evidence points to the strongest corroboration of the British Commissioners' judgment that there was a fairly defined area—it may be 20 miles, it may be 15 miles, it may be 30 miles for all I care—I dare say it also varies with the weather, and with the fish and with other incidents connected with seal life, but there is a certain defined area within the immediate proximity of the Pribilof Islands at the time that the Pribilof Islands are densely crowded with seal life—outside that there is a sparse distribution of seals which are not in attendance upon the Islands but which are seals for reasons which I may have reason to examine inhabiting the sea, passing through the sea, and to be found from time to time under such circumstances that they can be occasionally captured by the sealer.

The PRESIDENT.—I suppose the information you have given us in part concerning the Russian Islands tends to show that the general circumstances of seal life on the Commander Islands is the same.

Sir RICHARD WEBSTER.—The information we have obtained—I shall have to refer to it later on—from the Commander Islands is the same, that under ordinary circumstances the seals do not go far from the Commander Islands—it might be 10 miles it might be 15 miles, it may be 20 miles, and that a zone of 30 miles suggested by the Russians, for a special reason which does not apply to Pribilof Islands, as I shall show later on, is certainly an outside distance. But I address these observations to the Court in order that they may understand upon our own independent investigation, quite apart from that which has been subsequently discovered in regard to this matter, these are the considerations that the Court ought to take in view when they decide what are the limits to be put upon a legitimate industry in order that it may not be curtailed further than is necessary for a proper protection of the life of the animals which are the subject of consideration.

The PRESIDENT.—Have you any information as to the proportion of the Commander Island seals to the Pribilof Island seals. Is the Russian herd larger or smaller.

Sir RICHARD WEBSTER.—Smaller.

The PRESIDENT.—Do you know the proportions.

Sir RICHARD WEBSTER.—Yes, I can tell pretty well. In an ordinary year the Russians think they ought to kill 56,000 to 57,000 seals on the island. In an ordinary year the United States contend, and I dare say rightly they kill 100,000. My case is 100,000 is very much too large, but I should think in all probability the correction of it would not bring it down so low as the Russian. I think the evidence is as to the Commander Island group or family, that the number of seals of the Pribilof Islands is larger.

The PRESIDENT.—Comprising Robben Reef, or is that a separate flock.

Sir RICHARD WEBSTER.—I was speaking of it as a whole, but if I am wrong it will not be taken against me.

Mr. PHELPS.—I observe that the last two years before the *modus vivendi* the Russians took about 30,000.

Sir RICHARD WEBSTER.—I think the evidence read yesterday was they used to take 57,000 before the *modus vivendi* and after the *modus vivendi* it had fallen to 35,000 and 33,000. That is my recollection.

Mr. Justice HARLAN.—Which *modus vivendi*.

Sir RICHARD WEBSTER.—Of 1891, 1892. I do not complain of the interruption. On the contrary, if at any time Mr. Phelps thinks I am wrong or wishes to correct an error I am personally obliged to him, for he once said, Mr. President, in a speech which is classic and historic and which will never be forgotten by any one who heard it that a man who never makes a mistake, never makes anything, and I desire to say nobody is more conscious than I in addressing an argument of this kind, that it is impossible to avoid mistakes and if I by ignorance or want of recollection, make a statement which my learned friend thinks to be so inaccurate that he desires to correct it, I am personally obliged to him for calling attention to it. The figures I had in my mind were taken from the Russian correspondence and I thought I was right.

In the years 1889 and 1890 before the establishment of the Anglo-American *modus vivendi* the catch amounted to 55,915 and 56,833; while for the years 1891 and 1892 after the above mentioned agreement the figures fell to 30,689 and 31,315.

Therefore apparently assuming the Commander and Robben Islands to be affected by pelagic sealing, between 50,000 and 60,000 is what the Russians seemed to consider their normal yield.

Having called attention, Mr. President, to the maps of the United States I am going to ask you kindly to unfold Maps 3 and 4 annexed to the British commissioners' Report. There is a preliminary observation which ought to be made. You will remember prior to these Commissioners' Reports very little indeed about the seals at sea was known; something, a good deal, was known about the seals upon the Islands, but the British commissioners and the United States commissioners have added considerably—particularly the British Commissioners—to the knowledge of the world with regard to the seals at sea. You will find Map 3 shows approximately, according to the opinion of the British Commissioners the area frequented by fur-seals in the period extending from July 15 to August 16. The darker coloured area is characterised by abundant seals and the lighter area is characterised by scattered seals. You will notice that the commissioners drew the distinction rather differently between what I may call abundant seals and scattered seals. It is a little difficult to follow that area—it is rather larger in some respects. It looks to me in some cases to go out as far. I should think, as 60 or 70 miles, or even further on the north-east, but judging from the distance, from the Pribilof Islands, it would seem to me to go some where about half way to Unalaska.

General FOSTER.—That is 195 miles.

Sir RICHARD WEBSTER.—I have stated the distance from the Pribilof Islands which is 182. You take 195—I do not care which it is, I do not suggest that these gentlemen are absolutely accurate. They would be the last to wish that I should make any allegation of that kind. They are attacked in the United States Counter Case for having suggested that the seals are found scattered over the sea practically continuously—although of course in sparse numbers—from the Pribilofs to the Commanders. I will call attention to that very shortly, and we will see on which side the truth lies in that respect. This Map N° 4 gives a similar sort of area for the Commanders. I remember the British Commissioners did not visit the Commanders till later in the season. If you turn to Map 4, you will find a general distribution of seals over Behring Sea, an opinion more than supported, proved, by the

evidence now before the Court, and a rough idea of what they thought to be the comparatively speaking dense area.

But, Mr. President, of course, we must define terms before we use them, and it is quite evident from reading the Report that the United States authorities when they speak of these 20 miles about the islands characterized by, very numerous seals so numerous they could not be counted, were not speaking of the same kind of distribution as that which extends all over the thicker part of the British Commissioners' colour. That appears from the British Commissioners' Report itself.

Now, it may be said that I do not correctly interpret the United States Map; and, therefore, I should like to read one passage of very great significance from the United States evidence in regard to this matter. Will you, Sir, be good enough to take the United States Counter Case, and let me read you a passage on page 235? What I have been trying to give the Tribunal, in the hopes of assisting them, is the effect of reading and boiling down these logs, reports and affidavits and to give it to you as shortly as possible; but there is one passage on page 235, which is deserving of special notice. Cap. Coulson was in charge of, I think, the "Rush" and he took his instructions from the "Albatros", and I may tell you, Mr. President that he cruized from South-south-east to North-north-east, that is to say, to the eastward of the Pribilof Islands principally. He says:

At every station where the vessel was stopped, codfish was taken; in some localities they were abundant, at others only a few were caught.

During the month and while prosecuting the work, the vessel has cruized nearly three thousand miles, and in the whole time not one vessel engaged in taking seals has been seen. The weather, as will be noticed by the Seal Log, has been unfavorable for sealing a greater part of the time, added to this the scarcity of seals on the Eastern side of the Pribilof Islands will account for the small number of seals observed or taken and the little information gathered.

On nearly every point of the compass on which the lines were run and the seal herd, or what might be termed numerous seals, were passed at ten miles.—

that means ten miles from the islands,—

And the numbers decreased rapidly, so that at forty miles few seals were seen, and at fifty, on most all of the courses, no signs of seals were seen. The exception to this rule was in one or two of the Northern and North Eastern lines, where seals were met in small numbers, one hundred miles away from St. Paul Island; these were apparently feeding on some surface food, as large flocks of whale birds, and in one instance a whale, were in the vicinity. Night coming on prevented close observation or investigation.

Therefore, that would show you that, at any rate speaking of the eastern side, the view which I have been expressing to the Tribunal was in substance the conclusion at which Captain Coulson arrived as the result of his investigation. Captain Hooper's affidavit I have already read and criticised; I will only remind you of it, on page 216, where he says that he found, what he calls, numerous seals in certain latitudes at a distance of 300 miles, from which,—

I infer that the western limit of the range of the Pribilof herd of seals is between two and three hundred miles from the Islands.

I criticised that when addressing you on the question of property, and will not refer to it any further at present.

Mr. PHELPS.—The figure 300 is a typographical error, and should be 200.

Sir RICHARD WEBSTER.—Is it 200 in the original Report?

Mr. PHELPS.—General Foster can explain it to you.

General FOSTER.—I gave Mr. Tupper notice of the fact that we would claim that that was an error, that it should be 200 in place of

300, and it is plainly indicated by the context, if you read the whole page. It will show itself when you examine it with the Chart.

Mr. TUPPER.—And I may say that you informed me, as I understood you, that the error, whether it is an error or not, is in the original Report signed by Captain Hooper.

General FOSTER.—Yes, it is a type-written copy.

Sir RICHARD WEBSTER.—Well, my learned friend, Mr. Phelps, having said that it is a typographical error, I of course accept it at once; but I attach so little importance to the actual question of distance, having regard to what the maps themselves show, because the 1,068 seals in the 100,000 square miles include the seals observed by Captain Hooper and all the other cruisers, and we know what he means by numerous seals because every single set of seals he observed outside the 20 mile radius was counted and put down. Therefore, whether it be 200 or 300 for the purpose I am contending for is immaterial, but I think I ought in justice to myself to say that, when I made the argument about the 300 miles the other day, I did not receive the slightest notice from my learned friends of the mistake, nor did I hear of it till some days afterwards, when I immediately made the enquiry to know if it was in the original.

Lord HANNEN.—I think, if you look at the paragraph, General Foster's observation is borne out, and I think he is correct, because it speaks of a 200 mile zone "dividing that part of the sea over which the "Corwin" cruised into zones" up to 200 miles, and he says, "I find the percentage of seals", and so on.

Sir RICHARD WEBSTER.—I had not examined it from that point of view, my Lord, I was only looking at the statement with reference to the supposed absence of intermingling when I made my last reference to it.

Now the main point of attack made on the British Commissioners is because they have stated, as the result of their own observations, taken during their own cruising, that the seals did extend sparsely, practically speaking, all the way across Behring Sea. Now if I was entitled, and if I desired simply to incorporate, as part of my argument, the mere statement in the Commissioners' Supplemental Report, I should from their own investigations prove that they did in fact see seals right away across; but I prefer to take another course, and I will ask the Tribunal kindly to turn to Volume 2 of the Appendix to the British Counter Case, pages 23 to 27, where they will find a very convenient abstract of the affidavits which bear upon this matter. I will only pick out those (there are some 57 of them, and I will not trouble the Tribunal with the whole of them) that bear directly on this question of seals in Behring Sea. If you will look at the top of page 24, it is a verbatim extract of Mr. Billard's affidavit given later on in the book, page 56:

Last year the "Beatrice" crossed Behring Sea from east to west, starting from about 35 miles north of St. Paul Island. I saw seals all the way over to the Copper Island grounds and got two seals on 27th July between American and Russian sides of the Sea.

Mr. Bragg, the next man, also on page 56.

In the year 1887 I went over to Copper Island on the schooner "Teresa" and I saw seals in Behring Sea all the way across.

And if you go to the top of page 25, George French his affidavits are at pages 44 and 46, but I read from the summary on page 25.

Last year, 1891, when the "City of San Diego" was crossing Behring Sea from Amutka Pass to Copper Island, we passed small bands and bunches of seals travelling rapidly north-easterly. This took place on three different days. The last lot we met were about 150 miles from the Copper Islands. I am fully satisfied they were crossing Behring Sea to the Pribilof Islands. This was between the 5th and the 12th July 1891.

Then De Witt, the next but one:

I have been over to the Copper Island grounds twice, in 1891 and 1892. In 1891 the "Viva" crossed Behring Sea from about 20 miles north of Amutka Pass to the Copper Island grounds. I saw seals scattered all the way over. This year the "Sea Lion" went over outside the Aleutian Islands. I saw seals in about the same way all the way over.

Then Captain Charles Campbell:

I went over to the Asiatic side of Behring Sea last year and this year, last year through Behring Sea, this year outside. Last year we saw seals on the way across whenever the weather was fine. There was no way of telling when we saw the last of the seals that frequent the Pribilof Islands, and met the first of those that were going to the Commander Islands.

Then Thomas Brown:

Last year and this year I hunted on the Asiatic side of Behring Sea in the summer. On the way across last year through "the Sea" we saw seals whenever it was fine, and got some, and this year we saw some seals south of the Aleutian Islands as we went across.

I need not read more of these, and I come a little lower down to.
Captain James W. Jood.

In September last [on "Enterprise"], on my voyage home from the Asiatic side, I saw seals in mid-ocean 200 miles east-south-east of Attu Island.

That is south of the Aleutians, and I need not have read that.

When ordered out [of Behring Sea] in 1891, I was about 30 miles northward of Unimak Pass. I at once sailed across the sea westward to the Copper Island grounds, following a course along the 55th parallel north latitude. I saw seals all the way across to the Commander Islands. Some of the seals were sleeping, others travelling, some east, some west, most of them going east.

Then if you will turn over to page 26.

Maurice Edwards.

I went over to the Russian side of Behring Sea last year [1891], and I saw a few scattered seals all the way across.

Then the 4th, turn down:

William Edwards.

Last year [1891] I went over to the Russian side of Behring Sea; we saw a few seals all the way across.

The next man, Captain Thomas O'Leary:

I went across to the Russian side of the Behring Sea last year [1891]. We found a few seals nearly all the way across.

Then George Wester.

In travelling from the American to the Asiatic side of Behring Sea from the middle of June to the middle of July, I have seen seals all the way across on fine days.

And then on the next page, last but two, captain Andrea McKiel says that:

In 1891, the "Maud S", after being warned, sailed across Behring Sea in nearly a direct line between the Pribilof Islands and the Commander Islands. I saw seals every day on the voyage over.

Then the next voyage, is passing south. I need not refer to that. Mr. Macoun, when sailing across the Behring Sea in the year 1892 (I read from his Report at page 138 of the first volume of the Appendix to the Counter Case) says:

On the return trip to St. Paul Island we again encountered such bad weather that no look-out could be kept for seals. While the ship was laid to, between noon and 5 p. m. on the 9th of September, many fur-seals were, however, seen swimming about in all directions. The ship's position at noon that day was latitude $58^{\circ} 58'$, longitude $177^{\circ} 8'$ west, about 240 miles from St. Paul Island.

I will not stop to argue whether it is to be presumed that those seals found swimming about there are to be considered as being all female seals and each having a pup on the Islands that would perish if those seals were slaughtered.

I have pointed those out not for the purpose of dealing with general intermingling, not for the purpose of calling attention to the body of evidence to which I alluded when I was addressing you on the question of property. You will remember, however, Mr. President, what the claim of the United States is,—down to this line 35 and everything east of that place where I have left the pointer on the map, longitude 180, is claimed by them to be United States property, under regulations, so that no British vessel can catch or hunt seals there at all. I want to know on what evidence my learned friends are going to suggest that both in the Pacific Ocean south of the Aleutian Islands, and in the Pacific Ocean north of the Aleutian Islands, that is to say in Behring Sea, seals which on the evidence I shall submit to you are proved to be scattered across in that sparse kind of way, and having no direct connection with the Pribilof Islands at the time that they are so scattered, are to be regarded for this purpose as being the exclusive property of the United States, so that the British sealer, and I suppose, somehow or other, the sealers of other nations, are not to be allowed to kill them at all, at any time within those very wide limits to which reference has already been made.

I ought to mention in connection with the subject I have just left, that the United States Commissioners' Report gives us no statement or information upon which we can draw any conclusion as to what is the breadth or width of the populous zone, for reasons which I suppose are satisfactory to themselves. They have not thought fit to investigate that matter at all.

Now, I claim, Mr. President, to have established, upon the United States evidence as well as upon the British evidence, that the zone of sea thickly populated by seals in immediate proximity to the Pribilof Islands at a distance which may be taken roughly at 20 miles; but for my purpose I care not if you consider, on a review of the evidence, it is 15, 25 or 30,—it is immediately round these islands. My learned friends endeavour to meet us in another way. They say, or rather they would say if they would bring their minds to bear on Regulations properly so called,—That may be perfectly true, but we say that outside that 30 miles there is a certain number of seals,—we say a large number of female seals, feeding or desirous of getting food, and these seals are caught by pelagic sealers in such a condition and at such a time that the life or death of the young upon the Islands is involved in their life or death.

Now, I was about to consider this question of the females feeding, and the time during which they feed, and the distance to which they go. It is impossible for me to make any assumption as to what my learned friends may ultimately concede in arguing, but I do not propose to go over the evidence in support of the two statements made by the Attorney General yesterday with regard to the male seals, unless I had an intimation that it was going to be seriously disputed. The first is, that the bulls do not feed at all during the time that they are on the Islands; secondly, that, on the United States evidence, the "hollus-

chickie", or bachelor seals, though out of the water from periods of from 4 to 6 weeks, or even longer, practically speaking do not feed at all. I am prepared to establish both those propositions from the United States evidence alone; but I want to consider whether, on general considerations, it is not highly probable that that which the evidence supports will be the fact. Nobody suggests the individual male seal knows that it is going to be killed at a certain age, or it would try to enjoy life as much as it could during the time that it was going to be allowed to live.

Nobody suggests, for instance, that "holluschickie" at 3 years old know they are going to be knocked on the head at 4 years old; or that "holluschickie" at 4 years old know they are going to be knocked on the head at 5. We know when they come into a proper condition to be bulls 6, 7, or 8 years old, or possibly a little younger, they do fast for these extraordinary periods of from 2 to 3 months. I should have thought that if a seal is going in the year 1890 to fast for 2 months and performing the functions you know of during that period, it is very improbable that it will have eaten for every week of its life, or every day of its life in the previous years of its existence. You would expect from natural laws that if a seal has to go through that state of things and that ordeal, the natural course of its training would be that in these earlier years it will be in a condition to go without food, at any rate after it has grown up, during that time until it is out upon the Island, speaking of the substantial part of the time.

Now, we come to the females; and we start, as I shall show you presently, with this statement (I am aware that I must not treat it as an admission after what was stated), that for a considerable time, and I think the lowest at which it can be fairly put upon the evidence is a period of from 3 to 4 weeks, the female, after giving birth to the young, does not go out to feed at all. Now, I propose to pursue exactly the same course, Mr. President, and to call your attention to such paragraphs of the British Commissioners' Report upon this matter as have not already yet been called to your attention.

Now on page 54 at paragraphs 303 to 308, read by me yesterday when the Attorney General was arguing on this matter, you will find the conclusion of the British Commissioners with regard to the feeding of the female seal, which conclusion is, according to the judgment of the British Commissioners, that until the time when the pup-seals are beginning to take care of themselves the female seal, though it goes into the water, does not go out to feed. It is based upon facts—when I say "facts", upon information, the value of which the Court was able to appreciate when I read it yesterday, and I do not propose to read it again. Now let us see what further evidence there is upon that particular matter. Now I call attention, at once, to a statement made in an Affidavit of Mr. Stanley-Brown, and as this is the first occasion upon which I have had to refer to the evidence of Mr. Stanley-Brown, I wish to say a word or two which will be taken to apply to all the observations on his evidence and to him, which I make. It is no part of my duty, and much less of my intention, to attack the evidence of Mr. Stanley-Brown on any particular point in so far as it depends upon matters which he saw or observed himself. I believe him to be a gentleman who certainly would not intentionally make any statement he did not believe to be true; but in criticising Mr. Stanley-Brown's opinion the Court must remember this fact: That until the year 1891, when he went to the islands, he had never studied seal life at all, and never had been any where near the Pribilof Islands or taken any part in the investigation. I mention that and I shall have to point my observation again when I come to remind

the Tribunal of what has been the conduct of the United States Government in connection with the information they have obtained—that although there were at their disposal five or six competent gentlemen who had been in an independent position and had previous experience of the existing state of things on the Pribilof Islands, and therefore whose opinion would have been extremely valuable inasmuch as they would not be forming conclusions for the first time, but would be bringing their opinions to bear on the changed state of circumstances—the United States, in the exercise of their discretion, thought fit to send, in the years 1891 and 1892—1891 particularly—to the Islands, Mr. Stanley-Brown, who while his powers of observation were, I will assume, equal to those of anyone and his intention to record accurately surpassed by nobody, on the other hand it is obvious from a perusal of his affidavits, that he spoke in ignorance and in inexperience of what had been known before of the habits of these seals, and to a large extent was forming opinions and drawing conclusions which a vast mass of testimony enables one to show are incorrect, or at any rate are not correct to the full extent they are not stated.

Now, Sir, the paragraph to which I was about to refer will be found at page 386 of the United States Counter Case. This is referring, Sir, not to his visit in 1891 but to his visit in 1892. The paragraphs of the affidavit are not numbered, but you will find it is the last paragraph on page 386. He says there:

I arrived on the island this year a few days after the coming of the first cows, and by selecting a small harem composed of seals the arrival of which I had seen, and giving it daily observation, I was able to satisfy myself that females begin to go into the water from 14 to 17 days after first landing. On first entering the sea they make a straight line for the outer waters, and as far as the eye can follow them they seem still to be travelling.

It is perhaps unfortunate that we were not told what distance that was. We know from other evidence that the sea, at those times is densely crowded when the weather is fine, with seals. Then Mr. Stanley-Brown says:

The first cows to arrive are the first to depart in search of food;

Of course that is purely inference, whether or not they depart in search of food:

And by the first week in July the cows are coming and going with such frequency as to be readily seen at any time. The accompanying photograph (taken on July 8, 1892, from the same position as, but one day earlier than, the one last year which faces page 13 of Vol. II of the Case) shows pups the mothers of which are already at sea.

I do not think the photograph will enable you to tell that the pups' mothers are already at sea, but I am quite willing to assume that Mr. Stanley-Brown did see—and I take it from him without a word of criticism—the mother-seals going into the water, and that the conclusion that he draws is that they begin first to go into the water at from fourteen to seventeen days. Whether they first go into the water to feed, or whether they go into the water for purposes of enjoyment, or for other purposes dictated by other instincts, as others have thought with not less experience than Mr. Stanley-Brown, is a matter which one may fairly criticise; but at any rate the furthest that Mr. Stanley-Brown can go, looking at the matter from the point of view that he is entitled to look at it from—namely that of supporting as he fairly wished to support the United States case—is that they go into the water for the first time from 14 to 17 days after they come on shore.

Now I desire to call attention to a gentleman who is equally entitled to be treated in the same way, and will, I have no doubt, be treated by my friend Mr. Phelps with the same fairness as I have treated Mr. Stanley Brown—I mean Mr. Macoun, who also had the opportunity, for a very lengthened time, of observing this matter, and who was also on these islands during the same two years that Mr. Stanley Brown himself was. But I must again be allowed to say that I do not put forward Mr. Macoun as a witness whose opinions are to be taken as of great value based upon previous experience, because he, in the year 1891, went I believe, for the first time, to the Pribilof Islands, and had not been in the position of having previous experience.

Now at page 142 of the 1st volume of the Appendix to the British Counter Case, I call attention to a paragraph that has not yet been read in Mr. Macoun's report. He says:

Within a few hours after a pup is born it receives its first nourishment from the mother; and for some days, while the mother remains about the harem and the pup is too young to wander far from it, there can be little or no doubt that each mother seal suckles her own young one alone.

It was not until the 1st of July that I first noted pups forming "pods" or small separate herds.

The time of arrival, if I remember rightly, of the mother-seals for the purpose of giving birth to the young is about the 10th or 12th June, so that this would make the pups somewhere about 19 to 21 days old.

It was not until the 1st July that I first noted pups forming "pods", or small separate herds; every harem was still well defined, but the pups belonging to each had begun to show greater activity, and the older ones had to some extent formed little "pods" a few yards distant from the mother seals. By the 5th July it was noticeable that the pups from adjoining harems had "podded" together between them, while the harems themselves were still, with few exceptions, compact and well defined.

The cows had not yet begun to go to the water. The few wet ones seen upon the rookeries were without exception females that were still carrying their young. The seals on a great many small harems were counted, and it was always found at this time that the pups and cows were in about equal numbers. Within the next week, however, the cows began to go into the water, but not in great numbers. They seemed content to swim about near the shore, and were often seen hauled-out on some flat rock after they had been but a few minutes in the water, and, after scratching themselves for a little while, would plunge again into the sea, swim to shore, and go back to the harem to which they belonged.

Now you will remember, Mr. President, that the observation of Mr. Stanley Brown was that he saw, as he believed, the female seal to be still travelling when he last saw her. Mr. Macoun, also observing for a very considerable length of time, and having many days to devote to this, describes that which is in accordance with the evidence of previous persons of experience in this matter who had written on the subject, and have called attention to the fact that the mother goes into the water, remains in the proximity of the islands, plays about the islands, and comes out again. Then follows a long passage read by Mr. Coudert (I do not intend to read it again—I want to spare the Court as much as I can), with reference to the question of whether a mother suckles her own pup or not. Sir, I am not going to trouble the Tribunal with a lengthened discussion on that point. From natural instinct it would seem to me—I must not do more than submit it to the Tribunal—that in all probability the mother does as a rule, suckle her own pup; but it is by no means uncommon both in domestic, and in wild animals, to find that mothers do allow other of their species to suck, and of course we know it is a means in the case of sheep, and the case of other animals, whereby the young are kept alive before they are able to feed. But in my judgment the point becomes, comparatively speaking immaterial, for this reason—that there is abundant evidence that after about three or

four weeks to five weeks to put it accurately—the pup seals begin to spread all along the shores of the islands for vast distances—distances of a mile, a mile and a half, and even more, and occupy positions in the islands away from the harem to which the female would return if the pup was absolutely dependent upon her; and therefore it seems to me to be comparatively immaterial unless we were in a position to say, (which we are not), that up to a certain time the pup is dependent on the mother and that after a certain time the pup is independent of the mother. Criticising the evidence as fairly as I can, it seems to me that there is no evidence of the pup feeding independently before it is three to four weeks old, and that after that time there is substantial evidence to show that the pup can, to a certain extent, take care of itself; but again I say I think in all probability that with seals as with other animals, the pup will go on sucking the mother much longer than a period of three to four weeks if it gets the chance.

Now at the bottom of page 143 is another passage in Mr. Macoun's report which I wish to read. He says:

I was repeatedly told by agents of the United States Government that whenever females were seen coming from the water they had been out to sea for food. This was manifestly absurd, as when the morning was cold it was apparent that few seals were absent from the rookeries, but if the sun afterwards came out, or the day grew warmer, hundreds of seals would be seen going to the water, and late in the afternoon, or towards evening, as it became cooler, they would return to their respective harems. At such times the water from 100 yards or so in front of the rookery would be black with seals, while further out but few—and sometimes none—were to be seen. Many females were watched from the time they left the harem until they were lost among the multitude of swimming seals. They would slide into the water and roll about with evident enjoyment for a few minutes, and then come out upon some rock; after a short rest they returned again to the water. Though a careful watch was often kept, no cow was ever seen by me to enter the water and swim out to sea.

On the 23rd July, at Lukannon and Ketavie rookeries, more than half the seals were in the water, but careful examination, through field-glasses, of the sea in front of these rookeries, neither showed seals coming towards the land nor going from it.

During the seasons of 1891 and 1892, but more especially in 1892, I spent much time at sea in the vicinity of the seal islands, and during both seasons kept a careful count of the number of seals seen in the water. It was noted in both years that while the seal were very abundant in the immediate vicinity of the rookeries, and few were always to be seen between 2 and 3 miles from the islands, very few were after that to be seen until we had gone a long distance out to sea. It is thus evident that the number of seals going to and from the islands is very small.

On the 11th September, when on H. M. S. "Melpomene" we steamed from North-east Point to the village of St. Paul—a distance of about 11 miles—being never more than 3 miles from the shore, and most of the time much nearer to it, when off North-east Point, Polavina and Reef rookeries, thousands of seals were, with the aid of field-glasses, seen playing in the water near the shore, but very few close to the ship at the distance stated from the land.

I mention that, Mr. President, in order to show you that Mr. Macoun had opportunities of investigation, exercised those opportunities, and has recorded the results of his observation I submit, fairly; and it leads to the natural conclusion, namely, that these female seals would go into the water according to their inclination, especially if the weather was hot, for the purpose of cooling themselves, or for the purposes enjoying the water and then coming out again; whereas the United States asks you to believe that no female seal ever goes into the water except for the purpose of going away and getting food and coming back. It seems to me to be a somewhat extravagant assumption, and I shall ask the Tribunal when they have considered this and the further evidence, to come to the conclusion that the view submitted by Great Britain with regard to this point is not without ample warrant having regard to the evidence which is before the Court.

Lord HANNEN.—The difficulty I feel about this is that there is a great drain on the males; that nature has supplied means of providing for that drain: there is a great drain on the females during the time of nursing, but there is no evidence that nature has supplied them with any additional reserve of fat.

Sir RICHARD WEBSTER.—I do not think it is quite “no evidence” my Lord. I am not sure whether there is any evidence of the emaciation of the females after the period of nursing. I am very much obliged to the Court for indicating any point upon which they think my statement requires further support. I call attention to the fact—it must be only a question of degree—that there must be that drain, *ex concessis* for a considerable time—I say from 14 to 17 days or three weeks. The whole significance of this, my Lord, is, during what period the pup is dependent on the mother. It is not a question of whether or not the female feeds—the question is, whether a female that is killed is one upon whom the life of a pup depends; because there is nothing morally wrong from the point of view.

Lord HANNEN.—We are merely on the natural history point.

Sir RICHARD WEBSTER.—Quite so, there is nothing wrong from the point of view of the killing of a female. All I meant is, the United States argument proceeds on three assumptions, everyone of which I shall submit later on, are unjustifiable. First: that every female seal killed at sea has got a pup on the rookery; secondly: that every female seal killed at sea has already been impregnated so that she is going to produce another seal; and next they boldly state that the pelagic sealer who kills a female seal kills three seals at the same time. I will not of course refer to the passages in Mr. Coudert’s speech on that. They appeared to me at the time as being extremely exaggerated. My sole object in examining this is not for the purpose of saying that female seals never feed for any given time, which I can fix, after the birth of the pup, but I submit to the Court that upon the evidence they are not shewn to go out to feed until a time when there is reasonable ground for supposing that the pup is to a great extent independent of the absolute necessity of the supply from its own particular mother or from any mother at all.

Mr. President, it is no part of my case—not the least necessary to my case—to suggest that these females must fast for two months, or anything of the kind. I have understated the period with regard to the males, for it appears to be nearer three months; but however, it is no part of my case to suggest that these females are to be subjected and must be subjected to that draft upon their strength. My whole point is to endeavour that the court may have fairly before them the considerations which bear upon what I may call the necessity for regulations in connection with the preservation of seal life; and I submit that so far as the evidence, apart from mere surmise and apart from mere assumption, is before the Tribunal, it would seem that the period when the pup is absolutely dependent upon the mother is, roughly speaking, from three to four weeks at the outside, and that after that time, whether the mother goes to sea to feed or not is, comparatively speaking, immaterial.

My Lord, with regard to the spreading of the seals out upon the shores upon the islands, I desire to call attention to an extract from Mr. Elliott’s Report for 1881. Now, Mr. President, having read this extract, I propose temporarily to make a digression, once and for all, with reference to the way in which I am going to use Mr. Elliott’s Reports and the evidence that I think ought to be before you in con-

nection with them. The statement with regard to the seals that I propose to read is at page 40 of Elliott's Report of 1881.

Mr. Justice HARLAN.—The one that was published in 1881?

Sir RICHARD WEBSTER.—Published in 1881 by the United States Government. It is what Mr. Foster called the Tenth Census Report.

Mr. FOSTER.—Prepared upon observations made from 1872 to 1876.

Sir RICHARD WEBSTER.—Very likely so; but this is a republication. It had been previously published, as I shall show in a moment or two, in earlier years.

The paragraph is headed "Young Pups learning to swim."

Early in August, usually by the 8th or 10th, I noticed one of the remarkable movements of the season. I refer to the pup's first essay in swimming. Is it not odd—paradoxical—that the young seal, from the moment of his birth, until he is a month or six weeks old, is utterly unable to swim? If he is seized by the nape of the neck and pitched out a rod into the water from the shore, his bullet-like head will drop instantly below the surface, and his attenuated posterior extremities flap impotently on it. Suffocation is the question of only a few minutes, the stupid little creature not knowing how to raise his immersed head and regain the air again. After they have attained the age I indicate, their instinct drives them down to the margin of the surf, where the alternate ebbing and flowing of its wash covers and uncovers the rock or sandy beaches. They first smell and then touch the moist pools, and flounder in the upper wash of the surf, which leaves them as suddenly high and dry as it immersed them at first. After this beginning, they make slow and clumsy progress in learning the knack of swimming. For a week or two when overhead in depth, they continue to flounder about in the most awkward manner, thrashing the water as little dogs do with their fore-feet, making no attempt whatever to use the hinder ones. Look at that pup now, launched out for the first time beyond his depth; see how he struggles—his mouth wide open and his eyes fairly popping. He turns instantly to the beach, ere he has fairly struck out from the point whence he launched in; and as the receding swell, which at first carried him off his feet and out, now returning, leaves him high and dry for a few minutes, he seems so weary that he weakly crawls up out beyond its swift returning wash, and coils himself up immediately to take a recuperative nap. He sleeps a few minutes, perhaps half an hour, then wakes as bright as a dollar, apparently rested, and at his swimming lesson he goes again. By repeated and persistent attempts, the young seal gradually becomes familiar with the water and acquainted with his own power over that element, which is to be his real home and his whole support. Once boldly swimming, the pup fairly revels in his new happiness. He and his brethren have now begun to haul and swarm along the whole length of St. Paul coast, from Northeast Point down and around to Zapadnie, lining the alternate sand beaches and rocky shingle with their plump black forms.

I now read from page 141 of Volume I, Appendix to the British Counter Case, from Mr. Macoun's report:

The first pups I saw swimming in 1892 were in the water in front of North rookery on St. George Island, the 18th July. The day was bright and warm, and the tide at the time of my visit was just beginning to flow. A great many pups were playing in the pools among the rocks near the edge of the sea; in one place there were forty or fifty going, in many others more than half that number, while all along the shore the young seals were in little groups of from three to ten. No old seals were near them but those swimming about in the water and those going to and coming from it. As the tide came in some of the pups slowly retreated, but many of them remained among the rocks until the water was some distance beyond them. They played about in much the same way as holluschickie do, and swam from one rock to another and back many times, with no appreciable interval of rest. I neither at this time nor on any other occasion saw an old seal attempt to teach a pup to swim nor carry it to the water; nor did I ever see anything that would lead me to suppose that pups learned to swim. On the contrary, a pup out from its mother can swim for a long time. Ten days later these pups had increased considerably in size, and were swimming and playing about in the water in great numbers, seeming as much at home there as the older seals did; a few of them were 50 or 60 yards from the shore diving without apparent effort through the large waves that were coming in.

Early in August pups had begun to haul out with the holluschickie on the North side of Lukannon Rookery, nearly a mile from the rookery, and by the middle of that month a great many of them were to be seen far from the rookery grounds. They were of course, in greatest numbers in front of and near.

I think, Mr. President, it would save you a little trouble if I asked you to be kind enough to take the chart of the rookeries. Would you kindly take before you—I will have to refer to it a little later on—Chart 2 of the Pribilof Islands, in the United States Case. If you will turn it with the north from you, the way the map is written, you will see Reef Rookery, Lukannon Rookery, Polavina Rookery.

Lord HANNEN.—Which island?

Sir RICHARD WEBSTER.—I am on St. Paul's Island entirely, the larger of the two. You will find Zapadni Rookery, Tolstoi Rookery, Reef, Lukannon and Polavina. I shall have to refer to that map later on.

They were of course in greatest numbers in front of and near Lukannon, Ketavie and Reef Rookeries, but they extended in an unbroken line from Lukannon to the landing place at the village.—

That, my Lord, is all the way around that point, Garbatch Rookery, right around to the village. The landing place of the village is where Village Cove is written. The landing referred to by Mr. Macoun is at Village Cove—

in places mixed with holischickie, but very frequently there were no older seals near them. At Black Bluff and between Zoltoi Sands and the Village landing place, large bands of pups swam about from place to place or hauled out on the rocks and sand. It does not seem possible or probable that the mother seals should find their own young ones among so many and at such a distance from the breeding ground; and during the whole time I was on the Pribilof Islands I never saw a female seal suckle a young one except on a rookery.

We have got this from the observation of Mr. Macoun, and we have got it from the statement made by Mr. Elliott long before, that from Northeast Point down to Zapadni—You will see, Mr. President, that Northeast Point is up at the extreme end of the island; Zapadni is the westernmost of the rookeries, my Lord, a little to the left of the village; and Mr. Elliott describes the pups that have just learned to swim as having hauled out and swarmed along the whole length of St. Paul's coast from Northeast Point down and around to Zapadni.

It seems to me—I must not put it higher than that—as not an unreasonable suggestion to make, that the pups being born some where between—speaking roughly—the 20th of June and the first week in July. By the beginning of August they are found spread all the way along the coasts of that island. It does not seem to me an unreasonable inference to draw that after that time they are independent of their mothers; and I ask the court to observe that when the evidence shows us that no female seal has ever been seen, according to the evidence, giving suck to a pup except upon a rookery, it is a very strong corroboration of the point which I am pressing upon the Tribunal, that after the pups scatter, are podded out and spread along the islands, they are either wholly, or comparatively speaking independent of their mothers. Would the President kindly follow on to page 141, the next passage:

From the time the pups first go into the water, they are to be seen with pieces of sea-weed in their mouths, and there is no reason for doubt that from this time until they leave the island, at least a considerable portion of their food is composed of sea-weed picked up along the shore or in the waters adjacent to it. Mr. Elliott says that he knows fur-seals feed to a limited extent upon crustaceans and squid, and also eat tender aligid sprouts. Perhaps the seals live upon crustaceans and squid for the first five or six months they are at sea. Squid, as has been shown in another part of this Report, are plentiful near the seal islands.

Now, Mr. President, the proposition which I am contending for is this: that after the first four or five weeks, to put it most against myself, the seals are in such a condition that they are practically inde-

pendent of their mother; and I shall call attention to that later on in connection with the evidence which I have to call particular attention to about the killing of females with milk in their breasts at sea at certain times later in the year.

I want now to make a digression in order to save repetition later on. This is the first reference that I have made to Mr. Elliott. I ask permission of the Tribunal for a very few minutes to let me put clearly before them what are the facts with regard to Mr. Elliott, his position and his reports, for of all things that are astonishing in the conduct of this case the abandonment of Mr. Elliott's report of 1890 is the most astonishing. Sir, there is not the slightest ground in the evidence or in anything before the court for regarding Mr. Elliott as other than a man of impartiality and of accuracy; but I am not going to allow it to remain upon my statement or upon anything which I cannot vouch for from the documents. May I for a few moments before the court adjourns put this matter before them as briefly as possible.

You will remember, Mr. President, that Mr. Elliott was appointed under an act of Congress. He has made statements in his report to which I shall come later on in my argument—statements of fact that are absolutely inconsistent with the United States case. That may be a good reason for suppressing his report or it may be a bad reason. So far as I know upon the whole of this evidence it is the only reason that can fairly be suggested. Now, Mr. President how does the matter stand? There are categorical statements of fact, extending over many days in Mr. Elliott's report, to which I have to call attention later, which are capable of distinct contradiction. He was accompanied on that visit in the year 1890 by not less than four Government agents, Mr. Goff, Mr. Nettleton, Mr. Lavender and Mr. Murray. There was also present on that island during a great part of the time a perfectly independent gentleman, Prof. Palmer. I am quite aware that Mr. Foster has said that they do not agree with Mr. Palmer's conclusions; and I was not surprised, for whenever.—

Mr. FOSTER.—I did not say that.

Sir RICHARD WEBSTER.—I so understood you.

Mr. FOSTER.—I said a great many of them.

Sir RICHARD WEBSTER.—For whenever a statement is made, or evidence is given, I am aware, against the view of the United States, the United States do say that they do not agree with that; and of course they are quite within their rights. But my point is this, Mr. President; and I ask the court to consider this in fairness to the case I am presenting: that of those four gentlemen though they make affidavits on some minor points, to which I shall call attention later on, not one of those four gentlemen has made any affidavit inconsistent with Mr. Elliott's statements of fact. Nay, more; Mr. Stanley Brown was sent to the islands in 1891. Mr. Elliott having made his report in the autumn of 1890. I do not know whether Mr. Stanley Brown had Mr. Elliott's report in his hand or not. We have never been told, and I have no right to assume it; but one thing is certain, he either had it or he had it not. If he had it, he has not contradicted Mr. Elliott on the most important and salient facts, as I shall show later on. If he had it not, I do not think the court will think it was the right thing to send a perfectly independent gentleman to the islands without giving him some information at any rate as to what the report was which had been presented to the Government by their accredited agent. Therefore, the first point that I make with regard to this is that on three separate occasions Mr. Elliott has been put forward by the United States Gov-

ernment as being the most experienced person who could possibly give information with regard to seal life. He has been put forward and chosen with that object; and at no stage, Mr. President, prior to this case have the contents of that report from which I read the extract—I mean the report of 1881—been impeached until the matter came in controversy to-day. You may remember when Sir Charles Russell quoted from that report, stating that he did not understand that to be attacked, my learned friends said they had not referred to it and they must not be understood as agreeing at all in Mr. Elliott's earlier conclusions.

But now, if the court will give me a very few moments with regard to this matter in order to complete it, I am in a position to put before the court that which I certainly had not the opportunity of doing a few days ago. I happen to have before me the report of the debate in the House of Representatives and in the Senate when this gentleman was appointed; and I read from the public Congressional Record.

Mr. CARTER.—Is that in the case?

Sir RICHARD WEBSTER.—It is not.

Mr. CARTER.—Then we object.

Sir RICHARD WEBSTER.—I read from the public document of the Congressional Record of what happened in the Senate when Mr. Elliott was appointed.

The PRESIDENT.—Is that an official paper?

Sir RICHARD WEBSTER.—And I would tell you also that I am going to read from the letter written from the Treasury Department at Washington, an official letter.

Mr. PHELPS.—Will my friend excuse me. If we are permitted to put in evidence from the public documents and elsewhere on the other side of this case when we come to reply, I have no objection to your reading the observations of any member of Congress on this subject.

Sir RICHARD WEBSTER.—Mr. Phelps, I should not object, if it were for me, to any public document being referred to upon this or any other question; because in my opinion

Mr. PHELPS.—We should be glad to read the Secretary of the Treasury's letter that accompanied this report and some other matters. If we are to try Mr. Elliott we had better try him upon the evidence on both sides.

Sir RICHARD WEBSTER.—Yes, I quite agree. Mr. President would you prefer that I should suspend for the present?

The PRESIDENT.—If there is an objection I think it would be better for you to suspend.

Sir RICHARD WEBSTER.—Before we adjourn will you allow me to state that I proposed to read the official letter of the 13th of March.

Lord HANNEN.—That stands on a different footing than the matter to which objection was raised.

Sir RICHARD WEBSTER.—Oh, no.

Lord HANNEN.—I thought you were going to read reports of speeches in Congress, and that I understood was objected to.

Sir RICHARD WEBSTER.—It was not my fault, my Lord, that interposition was made before I had the opportunity of explaining myself fully. I was going to read from the letter of Mr. Bachelor, the Acting Secretary, from the Treasury Department, office of the Secretary at Washington, the 13th of March, 1890. My only reference to it is the Congressional Report. When that letter had been read I did subsequently intend to refer to some of the observations made in the debate. I wish the court to have exactly before them what my proposition is.

The Tribunal thereupon adjourned for a short time.

The PRESIDENT.—Before you proceed, Sir Richard, we should like to have a few words together.

The Tribunal then proceeded to consult for a short time.

Sir RICHARD WEBSTER.—I have had an intimation, Mr. President from my learned friend, Mr. Phelps, who is always courteous in these matters, that may save the Tribunal further trouble with reference to their consultation.

He does not propose to make any suggestion against Mr. Elliott other than can be gathered from the face of the Report itself in the way of criticism, and I do not wish to introduce any extraneous matter with a view of either commenting upon or raising any comment upon Mr. Elliott personally, it being open both to my learned friend, Mr. Phelps and myself to criticize the Report itself. Therefore it is not necessary for me, as there is nothing before the Tribunal, to bring forward any independent testimony with regard to it.

The PRESIDENT.—The Report having been admitted, it is better to proceed on that alone.

Sir RICHARD WEBSTER.—It is very satisfactory to me, because my learned friends have, whatever the objection may have been, met us in a way that is fair, when it was necessary to dismiss or get rid of matters for the purpose of shortening the proceedings. The Tribunal will, of course, see why I was anxious that they should have sufficient information to enable them to judge of the merits of the Report, and I am willing to take it upon the Report itself. Therefore I pass from that. The Report, as you will see, bears on its face matter which may be criticized and also evidence both of great accuracy and obvious veracity, as we shall submit. I am very glad indeed that the occurrence of the incident will enable me to shorten the time of my argument by not having to refer to certain documents which have been put into my hands.

Now, Mr. President, Lord Hannen was good enough to put a question to me, and I apologize for not having the answer ready at the moment, as to whether there was any evidence of the emaciation of females.

Lord HANNEN.—Well, it was rather the other side of it. My question was whether there was any evidence of their having a store of fat like that of the males.

Sir RICHARD WEBSTER.—Well, my Lord, I will not apologize to this Tribunal for not being able to answer any question at the moment it is asked. It is difficult to carry all the facts in one's memory, but my learned friend, Mr. Robinson, has been good enough to remind me of a passage which we should read in another connexion which will be found at page 214 of the British Counter Case from a book of undoubted authority by Professor Allen. I will look at the rest of the book to-night to see if there is any other authority on the matter, but this appears to me bear directly upon Lord Hannen's question.

The habit of prolonged abstinence at the breeding season is well known to be normal among the *Pinnipedia* as a whole; and notwithstanding the number of years over which the habits of seals have been observed, there is no record of food being found in the stomachs of females when killed upon the islands, or any facts that justify the statement that nursing females leave the islands on feeding excursions.

Writing particularly of the eared-seals (or fur-seals and sea-lions), Professor Allen says:

One of the most striking features in their history is that at this period [that of reproduction], both sexes pass weeks, and even months, without food, or without often visiting the water. Arriving at the breeding-grounds exceedingly fat and unwieldy, they seem to be sustained by the fat of their bodies, they finally leave at the end of the breeding season greatly emaciated.

A similar fact has been long known in respect to the walrus, whose period of fasting, however, seems to be shorter than that of the eared-seals.

Then in this Monograph of 1880, Professor Allen writes on the same subject:

The males, during the breeding season, remain wholly on land, and they will suffer death rather than leave their chosen spot. They thus sustain, for a period of several weeks, an uninterrupted fast. They arrive at the breeding stations fat and vigorous, and leave them weak and emaciated, having been nonrished through their long period of fasting wholly by the fat of their own bodies. The females remain uninterruptedly on land for a much shorter period, but for a considerable time after their arrival do not leave the harems.

I will look to see before to-morrow whether there is any other evidence with regard to the sustenance of the female during this period being drawn from the fat. It is plain that Professor Allen in his earlier reference which I cited there refers to the fat of their bodies in the case of both sexes enabling them to fast from the time they do, notwithstanding the strain there is on their system.

This is by no means the only evidence. There are two other branches to which I propose to call attention which are in my submission of very great importance. The first is that speaking of the seals whose bodies have been opened prior to this Case; male and female; speaking of the female particularly, until this case commenced there is no evidence at all of anything being found in their bodies. There is one passage in Mr. Stanley Brown's later affidavit, of 3 female seals being killed at a late date to which I will call attention presently, one of which was found to have food in it. That is the only evidence, but of the fact that the female seals which have been killed in large numbers, for the purpose of examination only, have no food in them, is spoken to by abundant testimony prior to this case. Next there comes the natural fact to which I must refer, though the subject is somewhat unsavoury, and that is the absence on the rookeries of any excrement or any excreta of any sort or kind.

Lord HANNEN.—Upon that may I make a suggestion, simply for the purpose of acquiring information? May not they have habits of cleanliness which would account for it? I am simply enquiring, but may they not go into the water to get rid of any excreta?

Sir RICHARD WEBSTER.—There is no evidence of their doing so.

Lord HANNEN.—It only passed through my mind; that was all.

Sir RICHARD WEBSTER.—And I may say, my Lord, that it was present to our minds too, and we endeavored to see if there was any evidence of that kind, but there is none. It would be a very remarkable incident, having regard to the time that they remain on land, and their general habits if it were so; but the evidence is particularly strong, and it is my duty to call the attention of the Tribunal to it.

Now I would ask the Tribunal to refer to paragraphs 232 to 235 of the British Commissioners' Report.

232. Some particulars are given on a later page respecting the abstention from food of the fur-seals while remaining upon or about the breeding islands. It appears to be certain that the mature males doing duty on the breeding rookeries do not feed at all during the breeding season, and that for some time, at least several weeks, after landing, the breeding females do not leave the rookery grounds in search of food. There is no apparent reason why the "holluschickie," or young males, should not go to sea in quest of fish. Singularly enough, however, though animals of this class have been killed by hundreds of thousands upon the breeding islands under all conceivable conditions of weather, and often within less than an hour of their deportation from their hauling-grounds, the almost universal testimony is to the effect that their stomachs are invariably found to be free from food.

233. With a view to obtain such direct information on this subject as might be possible, the stomachs of seals killed in our presence were examined: and though the results of these examinations, noted below, do not entirely confirm the statement just referred to, they show a remarkable absence of food. The number of seals which it was thus possible to examine was of course small.

Then occur the references to 20 seals killed on St. George, and 18 seals on St. Paul, the result of which is as to the male seals—that no particle of food was found in any of them.

Then:

From the large North rookery on Behring Island, 5th September, an adult male or "seacatch," two females, and an unweaned pup, were driven directly from the rookery ground, about 200 yards distant, and killed, by permission of the authorities, for presentation by us as specimens to the British Museum. The stomachs of all four were completely empty, with the exception of a few worms in those of the three adults. Not only the pup, but the females, and even the old male, were fat and in good condition.

And in this connection I mention, but do not read, Mr. President, paragraph 306, which was read by me yesterday during the Attorney General's argument, which bears directly upon this.

Now I call your attention to paragraph 242.

Perhaps the most notable feature in regard to this food question, and one directly consequent on the prolonged abstinence of the seals from food while on and about the islands, is the entire absence of all excrement on the rookeries and hauling grounds. Captain Bryant appears, however, to be the only author who has specially mentioned this particular and striking fact. He writes:

"The fact of their remaining without food seems so contrary to nature, that it seems to me proper to state some of the evidences of it. Having been assured by the natives that such was the fact, I deemed it of sufficient importance to test it by all the means available".

I hope the Tribunal will kindly follow this a little carefully, because in a later affidavit, contrary to all the other testimony, and contrary to his own testimony before given in this respect, Mr. Stanley Brown expresses the opinion that excrement is to be found on the rookeries. I shall contrast those two statements in order to show that I think he is mistaken in the opinion he forms upon that.

Accordingly, I took special pains to examine daily a large extent of the rookery, and note carefully the results of my observations. The rocks on the rookery are worn smooth and washed clean by the spring-tides, and any discharge of excrement could not fail to be detected. I found, in a few instances where newly-arrived seals had made a single discharge of red-coloured excrement, but nothing was seen afterwards to show that such discharges were continued, or any evidence that the animals had partaken of food. They never left the rocks except when compelled by the heat of the sun to seek the water to cool themselves.

That bears on the question that his Lordship put to me.

They are then absent from the land for but a short time. I also examined the stomachs of several hundred young ones, killed by the natives for eating, and always without finding any trace of food in them. The same was true of the few nursing females killed for dissection. On their arrival in the spring they are very fat and unwieldy, but when they leave, after their four months' fast, they are very thin, being reduced to one-half their former weight.

I cannot help calling attention to this, that this is evidence written by a competent gentleman, a gentleman who is a witness for the United States, and writing independently of any controversy or any question, simply with a desire, no doubt, to tell scientifically what was the actual fact.

Senator MORGAN.—Does the evidence show, or is there any statement of the weight of those females when they arrive, and the weight, when they go out.

Sir RICHARD WEBSTER.—Not comparatively, Mr. Senator, but there is abundant evidence about various ages. There is no comparison. It could not be taken; and there are no statements beyond the fact that they are emaciated and thinner.

Senator MORGAN.—And no statement of what they weigh when they arrive in this condition?

Sir RICHARD WEBSTER.—No.

Mr. Justice HARLAN.—Is there any evidence as to what the females weigh when they arrive?

Sir RICHARD WEBSTER.—No, only at various periods of their life. There is evidence that at the period of three years old they weigh so much, and when four years old they weigh so much.

Mr. Justice HARLAN.—What are those weights?

Sir RICHARD WEBSTER.—Well, unless you wish me to give it now I have it in connection with another part of the case, and I could not exactly give it off-hand.

Mr. Justice HARLAN.—That will do.

Sir RICHARD WEBSTER.—My recollection is that a female that bears young weighs about 80 pounds, I think it is, but I am afraid I must ask the Tribunal to let me correct that if necessary.

Senator MORGAN.—It must weigh more than that.

Sir RICHARD WEBSTER.—I think not, speaking of the female, but do not let it be assumed that I state it positively, because I am not prepared to answer the question at the moment. I have it in connection with another matter.

At page 46 of Mr. Elliott's first Report, it will be seen in one week they are from 6 to 7½ lbs; 6 months, 39 lbs; 1 year, 39 lbs; 2 years, 58 lbs; 3 years, 87 lbs (you see my memory was not very far out); 4 years, 135 lbs; 5 years, 200 lbs; 6 years, 280 lbs; and from 8 years to 20 years, 400 to 500 lbs.

Senator MORGAN.—Those are male seals?

Sir RICHARD WEBSTER.—Both; that is the table showing the weight, growth and size of the fur-seal from the pup to the adult, male and female; and he adds this as to the weight of female seals.

The adult females will correspond with the 3 year-old males in the above Table, the younger cows weighing frequently only 75 lbs, and many of the older ones going as high as 120 lbs; but an average of 80 to 85 lbs is the rule. Those specimens of the females which I weighed were examples taken by me for transmission to the Smithsonian Institution; otherwise I should not have been permitted to make this record of their weight, inasmuch as weighing them means to kill them; and the law and the habit, or rather the prejudice, of the entire community up there is unanimously in opposition to any such proceeding, for they never touch females here and they never set their foot on or near the breeding grounds on such an errand. It will be noticed also that I have no statement of the weights of those exceedingly fat and heavy males which first appear on the breeding grounds in the Spring. Those which I have referred to in the Table above given were very much heavier at the time of their first appearance in May and June than at the moment when they were in my hands in July, but the cows and the other classes do not sustain protracted fasting, and, therefore, their weights may be considered substantially the same throughout the year.

Then at the end of paragraph 242 in page 42 of the British Report there is a statement which I think was read yesterday but the last part of paragraph 243, was not read which is the commissioners own statement.

Though not at the time aware of Bryant's statement, above quoted, the absence of excrementitious matter was one of the first points noted and remarked on by us after landing upon the Pribiloff rookeries, and it is to the absence of such matter alone that the continuous herding together on one spot for several months of so many thousand animals is on sanitary grounds rendered possible.

I remember that it was read.

Now I have read sufficiently from the Counter case and if you will kindly turn to page 144 of volume 1 of the Appendix to the Counter case you will find some very important evidence by Mr. Macoun on that matter.

No visit was paid to any rookery on either St. George or St. Paul without a careful examination of the rookery and hauling-grounds being made, for the purpose of recording the amount of excrement to be seen on them; the matter being of impor-

tance in connection with the question of the feeding or abstinence of seals during the breeding season. Shortly before labour began a female was sometimes seen to void a small quantity of excrement; once only, in addition to this, did I see excrement on rookery-ground that had not been voided by pups. In the instance referred to, Mr. Brown who was with me at the time said that it was probably from a female that had recently come ashore.

That is Mr. Stanley Brown who is referred to there.

In this connection Captain Bryant may be quoted. He says:

I found, in a few instances, where newly-arrived seals had made a single discharge of red-coloured excrement, but nothing was seen afterwards to show that such discharges were continued, or any evidence that the animals had partaken of food.

Mr. Vincent Colyer, in his Report to the Secretary of the Interior, dated 18th February, 1870, likewise says:

The assertion that the fur-seal eats but little food from June to September may be true; certainly, there was little or no offensive excrement even in October, when I believe it is acknowledged that they do get some food from the water.

On the 27th July a large piece of fresh light-coloured excrement, firm, and of cylindrical form, was noticed on the ground where holluschickie had been; a great many worms such as are found in seals' stomachs were mixed with it.

A large harem, the resort of over 300 seals, near the west end of Reef rookery, was visited by me almost daily, and excrement was always carefully looked for. This harem lay just beneath an overhanging bank, and the opportunities for observation were excellent; but, though between twenty and thirty visits were made to this place, no excrement was ever seen either on the breeding-ground, or the slope leading to it, with the exception of very small pieces voided by pups which differs greatly from that of older seals, both in shape and colour. While it is certain that holluschickie go to and from the water at all times, and when the weather is warm quit the land almost *en masse*, there is no satisfactory evidence to show that they feed while in the water. Several hundred stomachs were opened in my presence during the summer of 1892, and no trace of food was found in any of them, though, while struggling together in the killing-ground, some of them voided a small quantity of dark yellowish excrement.

Now the suggestion is made for the first time in the evidence in connection with the United States Counter Case that this absence of this sign is due to the ground being such that the excrement is soaked up. While in the first place the evidence is conclusive as to the dejecta of the animal that it cannot be of that character, you would not expect it to be, and it is not in fact—if the Tribunal desire further information, though no further information is necessary, than that contained in Mr. Macoun's report there is of course the most direct testimony in regard to the matter in the statement annexed to the Supplemental Report of the British Commissioners. I do not at present refer to it because I do not desire to give rise to anything as to which discussion can take place, but if the Tribunal have any doubt I shall ask them to refer to it later on. They can find it out for themselves in Paris without referring to the supplemental Report. I desire to call attention to the character of this; and I would direct your attention to Mr. Stanley Brown's first affidavit when no suggestion had been made at any time, that either on the rookeries or elsewhere, was excrement to be found. This is on page 12 of the 2nd Volume of the Appendix to the United States Case, under the heading "Rookeries":

As a result of the volcanic origin of the islands, their shores are, with few exceptions, either made up of boulder-strown lawldges or covered by jagged fragments of basalt of all sizes, the sharp edges of which are only slightly worn by the seals flippers or more completely rounded by the waves at the water's edge. There are a few true sand beaches, occasional level areas are found at the back of the rookeries, and in some places between the rock masses comparatively smooth interspaces occur, but even the level portions referred to must be reached by crossing a wide belt of boulders of all sizes that have been pushed landward by the waves and by the ice which annually surrounds the islands. It is upon such shores that the seal "rookeries" are located. Of the ruggedness of these shores or of the irregularity "and confusion of the lava blocks that cover them it is difficult to form a picture, but it is in a measure indicated in the accompanying photographs".

And if you will kindly turn and look at that photograph and see the character of the rocks, part of the reef rookery, on St. Paul's Islands and remember the seals remain on those rookeries for weeks after going into the water, both male and female, I do not think it is saying too much when I suggest to you that the idea that the solid and hard *dejecta* and *excreta* of these animals can be soaked up so as to disappear will not commend itself to the mind of the Tribunal so far as it is necessary to decide this point; and yet it is the fact that this absence of excrement and *excreta* was common ground with everybody till the United States Counter Case, and then they do not go to the people who have known these rookeries for years, they do not go to the persons who would have been able to say from the knowledge of 20 years, but they go to Mr. Stanley Brown who, in his later affidavit, says that this absence of it is to be accounted for by it having soaked in to the ground to a certain extent. I think I am not doing an injustice to him when I say that that is scarcely to be credited as an opinion in the face of the evidence to which I have already called attention. In the same Volume will be found Mr. Morton's account of the rookeries at page 66.

Senator MORGAN.—When you say that the seals old and young remain without food on the Islands there for 5 or 6 weeks, do you mean also to say, Sir Richard, the males and females,—do you mean the old and the young females?

Sir RICHARD WEBSTER.—No; I did not mean old and young, if you include pups in old and young. I was speaking of the females and particularly I had in my mind the females whom it is suggested go out to sea for food and come back again during the period of nursing. My contention is this, and it is one upon which I ask the judgment of the Tribunal, that the females do not leave for food substantially, (I do not say that they do not ever go) till the independence of the pup with regard to the mother is practically complete; at that time, they leave to go to sea for food, the necessity of their being there having, practically speaking, disappeared. That is shown by two facts; that very shortly afterwards, that is to say within a few weeks, the pups are to be found at a considerable distance along the shore spread all along, and that at no time during the continued sojourn of the female upon the Island is any *excreta* to be found at any place where she has been. That is my contention, on which I ask your judgment when you come to the evidence.

Now, I was calling your attention to the character of the rookery ground; and in Mr. Morton's affidavit, at page 66, you will see this:

During the seasons of 1877 and 1878, while serving in the capacity of special Treasury Agent, I devoted my best attention and study to this subject. It may be said in the start that the grounds held by the fur-seals are known at the Islands as "rookeries" and hauling "grounds." On the former are found the breeding seals, namely, the full-grown males not less than six years of age, and females of three years old and upwards. The grounds comprising the rookeries slope upward from the sea in a gradual and easy manner, and are characterized by hard dry surfaces of volcanic cement or basaltic rock. They are readily accessible from the water and possess other favorable conditions for occupancy by the seal life.

Now that is the condition of the rookery ground spoken to by Captain Bryant; that is the condition of the ground spoken to by Mr. Stanley Brown; that is the condition of the ground spoken to by Mr. Morton before any question had been raised suggesting that the *dejecta* from these animals might disappear into the soil absolutely impossible—inconsistent with all the known facts. Upon that I ask attention again to the British Commissioners' Report because they examined this matter, because there is no one that would suggest with reference to this

Report, that if Dr. Dawson and Sir George Baden Powell had found the fact of *excreta* on these rookeries they would not have stated it. Every single fact they did discover in this matter, however it told—and there was no reason to think it would tell in their favor at the time they made this Report—they have stated every single fact in the case as it came to their knowledge without bias or colour.

Now at Paragraph 260 they say:

It appears possible to mention only two conditions which have been avoided by the seals in the choice of their rookery grounds: these are mud and loose sand. On muddy ground the fur is doubtless apt to become uncomfortably clotted, and the sand if driven by the wind or splashed about by rain is probably also irritating to them. Shifting sandy ground besides renders the always clumsy locomotion of the seal when upon the land additionally difficult; but it may be noted that sandy beaches appear to be well liked by the seals when they haul out temporarily, and are not actually established for breeding purposes. On most of the rookery grounds, away from the actual beach, the character of the soil is such that it becomes beaten down between the projecting rocks into a hard and nearly smooth floor, a circumstance which depends in part on the incorporation with it from year to year of the felted hair which is shed by the seals themselves during the stacey season.

Then at Paragraph 256 sub paragraph 4, they say:

Reef Rookeries.—Occupying both sides of the outer part of the long promontory known as Reef Point, and facing to the north-west and south-east. The north-western slope, often called Garbotch, is rather steep, and a part of the rookery ground occupied on this side consists of a narrow fringe of rocky shore overlooked by low basaltic cliffs. A narrow ridge, which is worn bare and occupied as a hauling ground by holluschickie in the early part of the season, and is frequented by all classes of seals at a later period, separates the northwestern from the south-eastern side of Reef Point. On the south-east side there is a wide border of flat land but little elevated above the tide, upon which the greater part of the seals of the reef rookeries is found. Almost the whole of the rookery ground of the reef is plentifully strewn with angular masses of rock, though occasional smooth spaces also occur. The higher parts of the Reef Point consist very largely of a bed of volcanic scoriæ, lying compact and much in its original state, and forming a fine hard surface considerably different from that found on most of the rookeries.

So there you have the statement, made from independent sources, that the character of the ground between is either rock, or else it is beaten down hard ground.

Senator MORGAN.—That is in the rookeries proper?

Sir RICHARD WEBSTER.—That is in the rookeries proper.

Senator MORGAN.—How do the holluschickie haul out?

Sir RICHARD WEBSTER.—They haul out on ground practically speaking beaten down by the lying upon it, and which consists to a large extent of seal hair and fibre toughened from the pressure of years and centuries.

Senator MORGAN.—The holluschickie do?

Sir RICHARD WEBSTER.—Yes. It is also hard, although not the same kind of hardness as would apply to the rocky formation of the rookery and it is the fact that upon the rookeries with this abundant opportunity of examination, no trace of anything of the kind has been found.

Now this is what Mr. Stanley Brown says at page 387 of the United States Counter Case. There is nothing in his original affidavits contradicting the universal testimony and no evidence upon this point from persons of experience contradicting what I have stated.

The presence of excrementitious matter upon the breeding rookeries is recognized both by sight and smell. It is of a yellowish color, and though much of it is excreted it is of such a liquid consistency that it is quickly rubbed into and mingled with the soil, and thereafter its existence can only be noticed through the discoloration of the soil and the offensive odour. The latter is readily detected at a distance

of miles when the wind is in the right direction, for the soil on the breeding rookeries is completely impregnated with it. The odour bears no resemblance to that which arises from the bodies of a large number of assembled animals.

The quantity of excrementitious matter present is influenced by the nature of their diet, which, being fish, is largely assimilated, while in their coming and going much of it may be deposited in the water, to say nothing of drenching from rain to which the rookeries (many of which are solid rock) are subjected.

Upon the face of the affidavit, the statements are a little inconsistent. You see the character of the rocks from the photograph which speaks for itself—the rain would not wash it away from the hollows of those rocks. If the statement be supposed to mean that the excreta of the seal are not solid, the whole of the evidence in this case is to the contrary of that. That the females do void something of that character just before the birth of their pup is spoken to by Mr. Bryant. I submit that upon this evidence the testimony is all on one side and in one direction, namely, that there is no evidence of any excreta being voided by female seals at any time when they are upon the rookeries and in attendance upon their young.

Now, Mr. President, I come to a part of the case which again I am happy to say does not require very much argument from me, because I am able to take the evidence almost entirely, if not entirely, from the United States, and that is with regard to there being food round the island.

For a long time it was suggested more than stated—suggested I think in the United States Commissioners Report—that the reason why females went far from the islands was because there was no food near.

Upon the evidence upon both sides it is clear that there is abundance of food far beyond what the seals require, remembering that it is common ground that a very large percentage of those upon the islands do not feed at all. There is evidence on both sides that there is abundance of food suitable for the seals in close proximity to these islands. I suppose it is scarcely necessary for me at present, Mr. President, to prove what the seals feed upon, but if I am challenged of course I will do so. I will state they feed upon cod—they feed upon practically all kinds of fish including herring salmon and halibut. They also feed, to a certain extent upon Squid, but having regard to the enormous amount that seals eat in the day, they must have something much more substantial to live upon than simply the squid which they can collect. However, the evidence in this case, on both sides, is that when food has been discovered in the stomachs of seals, it is found to be largely consisting of cod, and largely consisting of other kinds of fish, but among their most suitable food is the cod.

Now the evidence with regard to food near the Islands can be put shortly, but it must not be overlooked. I call attention first to paragraph 231 of the British Commissioners Report in which they say.

That the fur-seal is essentially a pelagic surface feeder, is further shown by the fact that it is not known to resort habitually to the best fishing banks in Behring Sea, such for instance, as the Baird bank, and that fish, such as the cod and halibut inhabiting water of some depth and feeding along the bottom, are often found in considerable numbers, not only near the breeding islands of the seal, but even in the immediate vicinity of the breeding rookeries of these islands. Such fish are actually caught at various seasons by the natives of the Pribilof Islands within 1 or 2 miles of some of the largest rookeries on the south side of St. Paul Island, and not more than 2½ or 3 miles off the rookeries on the north shore of St. George Island. On one occasion, while at anchor for a short time within less than half-a-mile from the largest rookery on Behring Island, at Cape Yushin, over twenty cod, with some other fishes, were caught from our steamer with two or three hand lines, in water not more than 6 or 7 fathoms in depth.

Then in Vol. 1 of the Appendix to the British Counter Case, pages 138 and 139, you will find, Sir, very important and very strong evidence with regard to this presence of food. This is what Mr. Macoun says:

When I landed at the village on St. Paul Island on the 30th June, cod and halibut were hanging before many of the natives' houses. In answer to my enquiry as to where they had been caught, I was told that they had been taken less than 3 miles from St. Paul Island, and between it and Otter Island.

Up to the 12th of September, the date of my final departure from the Pribilof Islands, natives went out fishing every fine Sunday, and, in fact, every day they were not engaged on work for either the Government or the Company, and good catches of fish were invariably made.

When on St. George Island the 17th July a great many cod were seen hanging up to dry, and at dinner that day I asked the United States Treasury Agents and the officers of the Company why they had not fresh fish on the table. I was told that they could be had in abundance whenever wanted, but that they were all tired of fish.

"H. M. S. Daphné", while I was on board of her, was anchored during the forenoon of the 21st July in 18 fathoms of water, one-third mile off Dalnoi Point, St. George's Island, and cod, small halibut and sculpin were caught in great numbers at this time.

A holiday was given the natives on St. Paul Island on Saturday, the 13th August, and many of them spent the day fishing. Their boats were in sight all day between 2 and 3 miles off Lukannon rookery. They returned late in the afternoon with their boats half full of fish; there were many more cod than halibut, though the latter were much the larger fish.

I asked the natives how far they went out for fish later in the season; they replied that they never had to go more than 5 miles from land to get all the fish they wanted, and that it was only in September that they went that far. I was taken to southwest Bay, St. Paul Island, by a crew of natives, on the 23rd August. During the brief time I was ashore they fished about half-a-mile off Zapadnie rookery catching two halibut and seven cod. These men told me that the fish were always very plentiful near the island, but that until 1891 they had never had time during the summer months to catch them, when they were not driving or killing seals, there were the skins to salt and re-salt, the Company's ship to load or unload, and coal and provisions to be brought from the landing-place to the storehouses.

The next day salmon were seen in the lagoon near the village.

Then the next paragraph relates to Behring Island. I need not read that. Then it goes on:

Mr. Baldwin, who has been on St. Paul Island several years, told me that small squid are very numerous close to the islands, and Mr. Townsend—

that is the United States gentleman—

Who has for several years been employed as a naturalist on the "Albatross" in Behring Sea, said more than once in my hearing that there was no part of Behring Sea that did not abound with them.

It is thus evident that should seals, whether males or females, require food during the time they resort to the islands, (which has not been proved) it is to be had in abundance close to the rookeries, while it is further apparent that the natives with the exercise of but ordinary diligence on their own part are in no way dependent on the slaughter of seals for food.

Now, Mr. President, it must not be forgotten in this connection that *ex concessis*, as I have said more than once to-day, the large proportion of the animals during a considerable portion of their stay on land do not require to catch fish—that is to say the bulls, the holuschikie and the females,—until such time as they are minded to go out again to sea.

Now let us look at the United States evidence upon this point. I refer to the evidence of Captain Tanner and I will ask the Tribunal kindly to turn to it. It will be found at page 374 of volume 2 of the Appendix to the case of the United States.

He says:

Seals killed in Behring Sea after the birth of the pups are largely mother seals and the farther they are found from the islands the greater the percentage will be. The reason for this seeming paradox is very simple. The young males, having no family responsibilities can afford to hunt nearer home where food can be found if sufficient time is devoted to the search. The mother does not leave her young except

when necessity compels her to seek food for its sustenance. She cannot afford to waste time on feeding grounds already occupied by younger and more active feeders; hence she makes the best of her way to richer fields farther away, gorges herself with food, then seeks rest and a quiet nap on the surface.

Well Sir, there is a very great deal of romance in that affidavit. I cannot help thinking that it would not have been undesirable to have had an opportunity, if the Treaty had permitted it, of testing such a statement by cross-examination—that the mother seal knows that there are fish in the neighborhood of the island, but knows that the young males, who have not got family responsibilities, are hunting themselves, therefore passes those fish by on the chance of catching others by and by, and goes out a greater distance to seek food. Not having time to take fish near at hand, she has time to travel great distances on the chance of other fish. There were other reasons given, for instance, which I will not fail to deal with, but to get, over that which the gentleman is by implication obliged to admit, namely the existence of a very large quantity of food in the immediate proximity to the islands, knowing that a very large proportion of the seals on the island do not require food—he has to write a little romance of the female seal who knows that the male seal has got no family responsibilities, therefore goes straight through, past the fish, in order to get to a richer feeding ground.

At page 504 of the first volume of the Appendix, is a statement by Captain Hooper, made quite indirectly, without reference to this point, which will be found very strongly corroborative:

Male seals remain upon and around the islands until the ice appears. The natives say the codfish also disappears with the first appearance of the ice.

The natives, of course, can only be those who live upon the islands. They can only speak from what they know, from their no longer being able to catch the codfish, which would have to be in the neighborhood of the islands during the time they would be able to catch them.

The statement made—no doubt correctly made—by Captain Hooper in regard to that matter is that the fish disappears with the appearance of the ice, in other words, the codfish remain there in the neighborhood until the ice comes. I therefore ask the Tribunal to allow me to assume, only for the purpose of my argument at present, not to repeat myself, that I have established the fact that there is an abundance of food around the islands, which, if it were the question of the immediate necessity of getting food and going back to its young, would be preyed upon by the female seal.

The PRESIDENT.—There is no information about the migration routes of the cod and halibut and those other fish?

Sir RICHARD WEBSTER.—None whatever; but we know Mr. President, that cod largely frequent the same waters constantly. I do not know that you remember, Sir; but I called attention to that in connection with the argument upon property, referring to the report of the United States Fishery Inspectors in regard to this matter. We know that cod come back to the same place continually. They are found upon some banks and in other places, and it is known that they return there continually.

Lord HANNEN.—Do they not depend on other fish, herrings for instance?

Sir RICHARD WEBSTER.—I do not know whether cod feed on herring, except this—that the herring is said to be fed upon by every fish from the sillock to the whale. The sillock is a little tiny fish, Mr. President, that is caught in Scotland, and which feeds upon the herring.

Mr. GRAM.—In my country we have the experience that cod come every year to the same places for breeding.

Sir RICHARD WEBSTER.—Yes. I believe the experience upon both coasts of America, where the cod fishing is very great; I believe the experience on the east coast of England and on the coast of Europe, is that codfish do come back to the same place year after year; but for my point, Mr. President, it is not very important, because there is abundant evidence that the cod are found, practically speaking, in all parts of Behring Sea.

The PRESIDENT.—And during the season when the seal is on the islands?

Sir RICHARD WEBSTER.—During the season when the seal is on the islands. I would call attention, Mr. President, as you have been good enough to put that question to me, to Captain Coulson's report, at page 235 of the Counter Case:

At every station where the vessel was stopped, codfish were taken. In some localities they were abundant; at others only a few were caught.

I merely mention that for the purpose of showing that it is not, as far as we can gather from the evidence, a case of there being quantities of codfish distances away from the island, but as far as I can judge from the evidence and the evidence only, these cod appear in very considerable numbers, practically speaking, all around the islands.

But it may be said, "That is perfectly true; but you cannot deny that female seals, which we call nursing females, are found and killed at great distances from the island." Mr. President, it is no part of my case to deny it, and I never have, in any observation that I have made, intentionally denied that at times, at distances from the islands greater than the distance I have mentioned of twenty or thirty miles, seals with milk in their breasts have been killed. But I ask the Tribunal in considering this matter to be good enough to look at the whole question and not to look at the question from the narrow point of view, closing their eyes to all we know about natural history, which is the attitude that has been assumed by my friends upon the other side. I do not in any way want to exaggerate or put their case unfairly against them. But I must remind you that Mr. Coudert actually argued in this court, solemnly, before you, that inasmuch as the pups were found with milk in them in the month of November, that therefore it must be assumed that the pups were dependent upon their mother right up to the month of November. Well, of course it is an absurdity Mr. President.

That pups may occasionally suck as late as this, is extremely probable; but we have got to consider what is going to happen. These animals are going in the next day or so right across the sea, hundreds and thousands of miles, to find their own living; and nobody suggests that they go on sucking the mother then. It would be contrary to all the experience of every other animal known, to imagine that it is dependent upon its mother up to within four or five days of the month of November and then suddenly becomes independent. What is the ordinary rule you expect to apply? Be it long or be it short, weaning takes place gradually, either at a longer or a shorter period; and weaning takes place, at times, by the pup podding and wandering away from the rookery, being able to support itself, not being dependent upon the mother, so that the mother does not have to find it out and feed it. But there is another most important incident in connection with this matter which the United States advocates are obliged wholly to overlook. They entirely forget that it is common knowledge now ever since we have

known anything about the fur-seal that a very considerable—when I say considerable I mean a large number—of these pups are actually killed by killer whales in the months of August and September on the very shores, when they begin to swim, and that a certain other number of these pups are killed by ordinary accidents of life, due to the stampedes upon the rookeries, the conduct of the bulls themselves, and other natural causes. We also have a substantial body of evidence of pups not infrequently dying from sun-stroke and from other causes of this kind; and that therefore there must every year be present in the waters of Behring Sea a large number of seals which have got milk in their breasts, milk which is drying off, showing seals that have given up suckling, seals whose pups are weaned or have died, this is certain, without any argument; and I challenge contradiction upon it.

What does it mean? We have at present no direct evidence of the time it takes for the milk to disappear entirely from the glands. We know they are very large glands. We know that a very large portion of the body of the seal is covered by the milk producing glands. You will remember, Sir, there is a photograph in one of the books of a seal that was cut open by the United States for the purpose of examination, and we further know that there are four of the mammae or teats, to each of which the milk goes. Some of us have some experience from other animals; but I admit that kind of experience is of no real value for the purpose of what I may call a quantitative estimate. But I do say this: it would be no exaggeration to suggest that milk would be present, must be secreted, got rid of and ultimately dried up for a period of two or three weeks in the bodies of these animals; and therefore my learned friends are obliged to assume this position, in order partly to introduce what I cannot help thinking is to a certain extent prejudice, and in order to indicate that injury is done to the seals upon the islands that the evidence does not warrant. Every seal that is taken, every female seal that is killed, is a crime. Every female seal that is killed, either she herself and the unborn pup in her—I am dealing now with seals that have delivered their young on the Pribilof Islands—is to be regarded as being lost, and therefore that two seals are lost, and if there is a pup upon the island, three.

Does the evidence warrant it? With very great deference, Mr. President, and only inviting the candid and severe criticism of this Tribunal upon my arguments, I submit the evidence does not warrant it at all; and I submit that when the evidence is examined there is nothing to show that any substantial number of females would be killed in Behring Sea by vessels that are pelagically sealing at distances outside thirty miles from the islands. Of course, Mr. President, it must not be put upon me that I am advocating pelagic sealing within ten or fifteen miles of the shore. I have said distinctly that I do not advocate it. It must not be put upon me that I am justifying pelagic sealing in Behring Sea during the months of May and June, when the females are gravid. That is another matter which I have disclaimed, and which I am going, of course, to come to later on when I deal with the supposed injury to gravid females. I am dealing now entirely with the injury to nursing females.

As I have said before, to make my note complete, I will merely mention in connection with this subject to form a starting point, sections 303 to 308 of the British Commissioners' Report. I do not wish to read them now, because I read them yesterday; but I want my argument to be self-contained, and therefore I call attention to them, that the Tribunal may have in one passage, so to speak, of my argument, all the references that bear upon this.

But now occurs some very important evidence on page 55, section 310 of the British Commissioners Report, which I read without comment, except to say by anticipation again that you will see whether the Commissioners have excluded any evidence that might tell against them:

310. In the Report on the fur-seal fisheries of Alaska (1889), Mr. W. B. Taylor states that the cows go out every day for food to a distance of 10 or 15 miles, or even further.

Of course if that means every day after they go on shore, that is obviously wrong. If it means every day after they have begun to feed, it may be true or it may not. I do not wish to tie anybody to the distance of "10 or 15 miles, or even further". I do not of course wish to dispute that if it be a matter of calculation.

Mr. P. F. Ryan states that the main feeding grounds of the seal during the summer stay upon the islands, and to which the cows are continually going and coming, are to be found, 40 to 70 miles south of St. George Island.

That, at any rate, does not look like suppressing anything which was against them; but I mention that for the purpose of pointing out that we have no means of judging on what information Mr. Ryan made that statement, or where that particular place is.

Mr. G. R. Tingle, in the same Report, says that the seals probably go twenty miles out in some cases in search of food

Mr. Tingle had been of the United States Agents or Treasury Agents. All these men that I am quoting from are Treasury Agents of the United States:

312. The following is a summary of the evidence personally obtained in 1891 from those supposed to be most capable of giving an opinion on the subject:

Mr. G. R. Tingle stated that he believed seals from St. George went to feed, for the most part, about 30 to 40 miles to the southward or south-eastward of that island. From St. Paul he was not aware that they went in any particular direction.

Mr. J. C. Redpath did not know of any special place or places to which the seals go to feed, but believed that the females go from 10 to 15 miles from the islands for that purpose.

Mr. D. Webster thinks that seals go from St. George Island, when feeding in the autumn, about 60 miles southward; he believes that there is a favourite feeding ground in this vicinity, because he has seen numerous seals there when on his way from the islands to Ounalaska.

Mr. Fowler stated that he believed there was a favourite feeding ground of the seals about 30 miles off north-east point of St. Paul Island. This was not from personal knowledge, but depended on statements that seals had been seen in abundance there.

Natives of St. Paul informed us that the females from the rookeries went only 3 or 4 miles to sea to feed, always returning to their young on shore the same day. When questioned as to the classes of seals seen further out, as for instance, midway between St. Paul and St. George Islands, they stated that all kinds of seals might be found there, but added again that the females usually do not go far from the rookeries.

I will leave Mr. Grebnitzky for a moment, and will come back to him.

Mr. Tillman, the Agent of the Russian Government, in charge of Copper Island, where he has been for two years, thinks that the females go as much as 2 to 4 miles off shore to feed, but return to the rookeries every night.

Mr. Kluge, who has been for twenty-one years in the service of the Alaska Commercial Company on several different islands, agreed in this point with Mr. Tillman, and added that he knows from close personal observation, which he was able to make on Robben Island, that the females return every night, as stated.

Snegiloff, the native foreman on Behring Islands, thinks, on the contrary, that the females may leave their young for several days, and may go as far as 10 miles from land to feed.

Now Grebnitzky, whom I passed for a moment:

Mr. N. Grebnitzky, Superintendent of the Commander Islands, stated, as the result of his own personal observation and long experience, that the females went out to

sea while suckling the young, but not further than half-a-mile or a mile from the shore. Most of the natives, he added, thought that the females did not feed during this period, but in this he believed them to be mistaken.

It is not an unfair comment to say that this is a striking instance of how little we really know accurately. I call attention to it in order that the Tribunal may see that upon the evidence which was there collected, of a number of witnesses of equal credit, a number of witnesses of equal experience, all Treasury Agents, and therefore whose interest it would be to tell the truth and not to suppress the matter, some of them say they do not go more than 10 or 15 miles, others think they go farther. But it is extremely important to notice we are dealing for this purpose only with the period when from the wasteful point of view it may be suggested that you ought not to kill the female because the life of her pup depends upon it; for in so far as it referred to the killing of females on whose life a pup's life did not at the moment depend, I protest that there is not only no reason for interfering with it, but it would be contrary to all the rules which have governed similar matters to interfere with the killing of a female simply because it is a female.

It is not unimportant, and that is why, Mr. President, I postponed the reference to Mr. Grebnitzky, to remember that Mr. Grebnitzky made a further affidavit for the United States on the 26th of November—8th December, 1892, and that they sent that to St. Petersburg from Washington in order to have certain corrections made in the affidavit that it might be an affidavit which would go as far as Mr. Grebnitzky could go in support of the United States Case; and I ask you just to let me read what he says upon this at page 366 of the Counter Case of the United States:

Consequently when the mothers, who after the birth of their pups leave the rookeries in search of food (travelling sometimes considerable distances, I do not know exactly how far), and fail to return their pups must necessarily die.

Those words "considerable distances" were inserted in the affidavit after the affidavit had been sent to him, no doubt properly sent to him, from Washington, that the further correction might be inserted.

Mr. FOSTER.—It does not so appear.

Sir RICHARD WEBSTER.—Well, I think it does so appear. If it is not the fact, by all means, if you say it is not the fact I will accept that. I think it does appear in the papers that it is so.

Mr. FOSTER.—I will state what I understand the fact to be, if you desire it.

Sir RICHARD WEBSTER.—I was merely dealing with what appears upon the face of the affidavit; but my point is that Mr. Grebnitzky, who was previously stating that he did not think they went farther than half a mile or a mile says in the revised affidavit, "considerable distances" but he does not know how far.

We know, Mr. President, that the result of the combined knowledge on the Russian islands—and Mr. Grebnitzky comes from the Russian Islands,—demonstrates that they are rarely to be found outside 10 miles except in the particular case of a particular place which it is considered some seals go to in connection with some island.

Mr. FOSTER.—I have no idea that you wish to make any statement that is not consistent with the facts. If you will observe the date of the corrections, you will see they are of the same date as the original affidavit, December 8th. The fact is that the errors in copying were corrected by the Consul-General at St. Petersburg.

Sir RICHARD WEBSTER.—If you, Mr. Foster, say they are errors in copying that removes, of course my observation.

Mr. FOSTER.—The date shows it.

Sir RICHARD WEBSTER.—It may not; but I have the information somewhere. However, I will not rely any further upon the statement after what you have stated. It is not a matter of any great importance.

But now, Mr. President, I come to the evidence of specific experiments or examinations made by the United States in order to support this matter; and I want to call particular attention, and I ask for the attention of the Tribunal, to two affidavits, or two tables, one of Mr. Alexander and the other of Capt. Hooper. Mr. Alexander's table will be found at page 242 of the United States Counter Case. It is the United States evidence in the year 1892. Now, let us just see, Mr. President, whether or not this supports the theory that the seals go out for the purposes of food. You will notice, sir, that there were killed between the 6th and 26th of August seven seals. I am very sorry, Mr. President; I ought to have remembered what the actual distances from the islands are.

I will supply them to-morrow morning and have them written on the table for you. I have got them somewhere upon my note, and I thought I had them in my head, but unfortunately I have not remembered them. Of course I could give the latitude and longitude, but I would rather give the actual distance. One distance is stated as 110 miles, but I will give you the others to-morrow morning. Of those seals six were females and one was a male. What was the condition of their stomachs? "empty", "empty", "fish-bones", "empty", "empty", "fish-bones", "fish-bones and a small cod". Now I ask whether that is the slightest corroboration upon which any Tribunal would come to the conclusion that these seals were to be regarded as going out for food. It is extremely probable at those later dates, certainly on the 23rd of August, when "fish-bones and a small cod" were found in the stomach of the female, at 110 miles that there was nothing to show or even to suggest that they were in search of food. If you will kindly look at the fourth column from the end, the only nursing females are those of the 6th of August, the 21st of August and the 23rd of August. Now what possible reason is there for coming to the conclusion that a seal found with milk in its breast on the 23rd of August, 110 miles from St. Paul's Island, has got a pup dependent upon her upon the island and that therefore the killing of that seal is to be considered as something which ought to be restrained by law. I ask the opinion of every member of this Tribunal who has ever had to deal with this question from a practical point of view. Of the two so called nursing females on the 6th of August and on the 21st of August, their stomachs were empty. But of the three nursing females the position is that two have nothing in them, the third has fish-bones and a small cod, on the 23rd of August, 110 miles away. And what is meant by nursing females for this purpose? The only way they can judge is that the milk is not dried up. There was no observation as to whether that milk was in the course of drying up or was not.

Now I call attention to Captain Hooper's table at page 217, and I want first to call attention, with all respect, to the absurdity of the argument that is based upon this table of Captain Hooper. I say "absurdity" with all respect, because one is accustomed to taking out averages and knows how averages should be taken. It is not a case of a man sealing and killing as many as he could, but it is the case of a man who killed a certain number of seals to get certain information.

Now what do they suggest within the 10 mile zone? You will notice they killed One old male, two young males, three nursing cows and three virgin cows and they calculate the percentage from that. Then take the 20 mile zone, one young male eight nursing cows and one virgin cow. That again might be a sufficiently large number, but still it is a very untrustworthy guide for the purpose of percentage. It is remarkable, at any rate that a very large percentage, if you are to rely upon the table at all, of nursing cows are found within the twenty mile zone.

Now we come to the 30 mile zone. What they find is one young male, and they put down 100 per cent for that. It is ridiculous to calculate it from that. Then the 50 mile zone was 1 young male, 1 nursing cow; and they put down the percentage of nursing cows at 50 per cent, because they happened to have shot not as many as they could shoot, but two only. Then the 100 mile zone, 1 young male and 1 nursing cow, and again they put down 50 per cent.

Then the 150 mile zone, 2 young males, one nursing cow; and the 200 mile zone 3 young males, 8 nursing cows, and 3 virgin cows; and from that table you are supposed to be able to form some sort of idea or estimate as to what is the percentage of these animals that are shot. Well, Mr. President, I speak with great deference to the mathematical ability and ingenuity of my learned friends. All I can say is that if they can deduce a reliable percentage from such a table as that, the United States has gone very, very far ahead of the Old Country in the matters of mathematics because nobody who has had anything to do with statistics in connection with animal life, or anything else, would think of calculating the percentage from such a number of killings or examination of the animals that were found.

Now let us come to the table as regards the food. That is at page 219, within 10 miles from the Islands all three are found without food. These are the nursing females only.

Lord HANNEN.—What are you referring to here?

Sir RICHARD WEBSTER.—The table opposite page 219, my Lord. Of course, I shall have to pick out each one for you if I have actually to find them; but perhaps I can give you the substance of the table and then I can test any one that is necessary. Within 10 miles from the Islands they found three nursing females. That you will find, my Lord, by turning back for a moment to page 217. Within 10 miles from the Islands they found three nursing females, all of them without food. Within 20 miles they found eight nursing females, all of them without food. If that proves anything at all—I do not think it does prove anything at all to be fair, it would prove the eight nursing females could get the food within 20 miles, but there is nothing to show if it was going or coming, and from the point of view of this grand statistical operation, it affords no guide. Between 20 and 30 miles they found no nursing females. At 50 miles they found one nursing female without any food, and if that is any proof at all, it is all the nursing females in that area did not require food, which would be absurd. Then 100 miles off they found one nursing cow without food; 150 miles they found one nursing cow with food, and within 200 miles they found eight nursing cows five with food and three without.

In all seriousness I ask the Tribunal if they had to draw any conclusion from such figures as those would anybody risk the life of a rat from any conclusion that could be drawn from them. Perhaps a rat's life is worth nothing, but take the life of a dog would anybody risk the life

of a dog upon the conclusions that could be drawn from such percentages as these. It is obvious unless you have information with regard to the actual condition of the seal itself and knew where it came from, and if it had a pup, or not or if the milk was drying up, you cannot.

If I were to argue upon certain isolated cases I could prove to demonstration they could within 20 miles get the food without going out, and further that only a certain proportion outside succeeded in obtaining food.

The whole argument is I submit untrustworthy, because you have not and nobody can get from the fact of shooting a seal here and there what I may call quantitative or qualitative information upon the points which the percentage are supposed to prove.

Now I ask to go to the body of the testimony, and I will take it from the United States abstract of evidence—the body of testimony supposed to prove this killing of nursing cows; and I desire to repeat and substantiate to the best of my ability the statements by the Attorney General which I believe are strictly true without exception, that there is no single witness who proves time, place or number of nursing females killed in Behring Sea, so as to enable you to form a quantitative estimate of what the amount of so-called destruction by that operation is. Would the Tribunal kindly turn to page 45 of the abstract of testimony. Of course I am not going to read the whole, though I am prepared to. I will read as many as are necessary, and I will begin, if you please, at the top of page 453 where it is taken more shortly.

We entered the Behring Sea through the Muckawa Pass about the 1st of July, and commenced hunting seals wherever we could find them, among which were a great many cows giving milk, which we killed from 30 to 150 miles from the Islands.

I need not point out there again you do not have numbers given at all, and the sole statement is, "Cows giving milk." You do not know if it is drying up or not. I hear, General Foster laugh. All I can say is that any-body who has any knowledge of this matter must know that the milk takes some weeks to dry up in these animals, and, therefore, there was no reason why the observation should be for the moment treated with derision.

A great many cows giving milk which we killed from 30 to 150 miles from the Islands.

Then the next is.

I have no exact information as to the proportion of male and female seals killed by pelagic hunters.

That does not carry it a bit further. Now.—

And when in the Behring Sea, we take seals from 10 to 120 miles from the Seal Islands.

Then the the next man.—

And the large proportion of the seals killed in Behring Sea are also cows. Have killed cowseal with milk in them 65 miles from the Pribilof Islands.

No statement when it was, or what number. If one were to judge fairly, one would think that was an exceptional case.

We came out of the Behring Sea in the latter part of August, and had caught about 1,700 seals between the Pribilof Islands and Unalaska. We caught them from 10 to 100 miles or more off St. George Islands.

How that bears on nursing-females, it is difficult to say. Then the next is.—

The seals caught along the coast after 1st of April are mostly pregnant females, and those caught in Behring Sea were females that had given birth to their young. I often noticed the milk flowing out of their breasts when being skinned, and have seen them killed more than 100 miles from the Seal Islands. I have seen live pups cut out of their mothers and live around on the decks for a week.

For all we know, and for all the affidavit tells us, that may apply to Behring Sea in the month of May; that may apply to Behring Sea in the month of June, that may apply to the catching of females in Behring Sea within a few miles of these Islands; neither date nor distance is given.

I was in the Behring Sea in 1889 on the schooner "James G. Swan", but did not use shot-guns. Most all the seals we caught were cows giving milk.

Again, no statement of place, and no statement of number.

We entered Behring Sea in the middle of May, and captured 300 while in there. Most of those were mother seals with their breasts full of milk.

Why, Mr. President, if this had been something done close to the islands, within 5 or 10 miles off, and they were the seals that had gone out, as the evidence shows clearly they do go out from time to time, to play in the water near the islands, it would be nothing remarkable, and would prove nothing.

We did not capture any gravid seals in the Behring Sea. Nearly all the seals taken in Behring Sea were cows in milk. We captured a few young seals, in the sea, of both sexes.

Then

I hunted in Behring Sea in 1889, that being the only year I ever went to that sea and hunted seals with spears, about 70 miles south-west off the islands, and our catch was nearly all cows that had given birth to their young and had milk in their teats.

No statement of how many they caught, and no statement of when it was. I would read every one of these extracts if necessary.

THE PRESIDENT.—Some of them have a statement as to dates.

SIR RICHARD WEBSTER.—There is none that I have passed. I have read consecutively, and none combine all three elements of date, number and place.

THE PRESIDENT.—There is Niels Bonde.

SIR RICHARD WEBSTER.—I read that I think.

The seals caught along the coast after the 1st of April are mostly pregnant females, and those caught in Behring Sea were females that have given birth to their young. I often noticed the milk flowing out of their breasts when being skinned, and have seen them killed more than 100 miles from the seal islands. I have seen live pups cut out of mothers, and live around on the decks for a week.

Neither date nor number given I have not intentionally passed any one; I thought I read the whole of that page. I have only one or two more observations to make upon this head, and, as I do not want to trespass unduly upon the Tribunal, perhaps they will keep till to-morrow.

LORD HANNEN.—I understood you to say that you passed Niels Bonde, and said it had nothing to do with it?

SIR RICHARD WEBSTER.—Well, if I did, my Lord, I did it unintentionally. What I did mean to say was, that Niels Bonde had nothing to do with it so far as pregnant females were concerned. Perhaps I read it too fast; I did not know that I had passed it—I had no inten-

tion of passing it; I meant to read every one. What I meant was, those caught in Behring Sea have no date given, no distance given, and no number given.

As I have some more observations to make on this particular Table, and it is an important summary of the evidence and tells very strongly in support of the view presented by my learned friend, Sir Charles Russell, and myself perhaps you would allow me to continue this to-morrow morning.

The PRESIDENT.—Certainly.

[The Tribunal then adjourned till Thursday, the 15th of June, at 11.30 o'clock.]

THIRTY-NINTH DAY, JUNE 15TH, 1893.

Sir RICHARD WEBSTER.—I promised, Mr. President, to give you those distances the first thing this morning. On page 242 of the United States Counter Case, the distances from the Islands to those seals referred to in Mr. Alexander's tables were taken; the first two on the 6th of August which are female seals, one nursing and one virgin, which were taken empty, were within the 20 mile radius; the next one on the 12th of August was distant about 40 miles from the Island, that was a virgin female with fish bones in it; the next one on the 13th of August, also a virgin female, empty, 180 miles from the Island; the next two, which are on the 21st of August, empty and fish bones, 90 miles from the Island; and the last one is stated in their own statement to be 110 miles.

Mr. President, I was referring last night to the collated testimony which is put forward for the purpose of showing the amount of females in milk killed in Behring Sea. I had finished page 453, and I am not going to read every extract; I will simply remind the Tribunal again of my point and will read any extracts that seem to bear on that or will, of course, deal with any if any are called to my particular attention. Our point is, it is impossible from this table or from the affidavits themselves to gather how many seals were killed in milk, the place they were killed, or the times when. Many of the affidavits are defective in two out of three particulars, and, so far as we have examined them, no one contains them all.

I will read a few specimens and then I will pass to one or two that are more important in our submission. Take page 454 of the collated testimony Thomas Brown:

We entered the sea along about the first May and caught between 600 and 700 seals from 30 to 50 miles off the seal Islands and 4 out of 5 were females in milk. I saw the milk running on the deck when we skinned them.

I call attention to the date which so far as it is of any importance will support an argument which I have already addressed; that is somewhere "about the first of May." Then Charles Campbell:

Have killed cows with milk about 60 miles off the Pribilof Islands.

Then John Cantwell:

80 per cent of the seals shot in Behring Sea from July first to September 15 are females most of which have given birth to their young and are mostly caught while feeding at various distances from land.

Charles Challall:

At least 7 out of 8 seals caught in Behring Sea were mothers in milk.

Then Circus Jim, I suppose he is an Indian:

While in the sea I caught a great many cow seals that were giving milk. Most all seals we caught in the sea were giving milk.

You will notice neither date nor place nor number given.

Now I want to call attention to Claplanhoo because I have to make an observation about him, and I desire to read Claplanhoo's evidence,

and make an observation which applies to a good many witnesses in this case, that is with reference to the absence of cross-examination. This is the first Indian I have read I believe, I mean at any rate the first that I have noted, and he says.

In 1887, about the 1st of June, I went into the Behring sea in my own schooner, the Lottie, and hunted about 60 miles off the islands, and secured about 700 seals, most of which were cows in milk. These cows had milk in their breasts, but had no pups in them. I returned to the Behring Sea in my own boat, the Lottie, in 1889, and also in 1891, and sealed all the way from 100 to 180 miles from the St. George and St. Paul Islands the catch of these two years were of about the same character as those caught in 1887, and were mostly females that had given birth to their young, and were in milk.

I again note, in no one of these questions does attention seem to have been drawn to the question whether the milk was drying up or not. These are Makah Indians, and I need not remind the Tribunal that a great deal depends on the intelligence of these men and the way the questions are put, and what is now written down in a consecutive affidavit may not really represent the actual meaning he intended to convey, but requires to be tested. That being known I will ask the Tribunal to turn to page 176 of the second volume of the Appendix to the Counter Case.

The PRESIDENT.—It appears that this Indian was the owner of a schooner.

Sir RICHARD WEBSTER.—He was the owner of a schooner. I did not mean to note that in passing, but it has an important bearing on a matter which has been referred to.

The PRESIDENT.—You mean on the Indian sealing.

Sir RICHARD WEBSTER.—Yes, on the Indian sealing. There are many instances of Indians owning the schooners and going out in them. Therefore, it is quite a mistake to suppose that they are persons who only hunt in canoes. I merely refer to this in order that I may at once tell you what passed in reference to the cross-examination of witnesses like this, and I therefore call your attention to page 176 of the second volume of the appendix to the British Counter Case.

That is the evidence of Mr. Belyea, and he says:

That on the 29th day of November last I went to the Indian village of Neah Bay, in the State of Washington, United States of America, on the Dominion of Canada steamer "Quadra", for the purpose of securing the evidence of the Indians there for use before the Arbitration on the Behring Sea Fur-seal question.

That I took with me as an interpreter one Andrew Laing, and immediately upon arrival at Neah Bay I sent Laing on shore to enquire of the Indians whether they were willing to give the evidence. On his return to the "Quadra", he informed me that the Indian Agent there had forbidden the Indians to give any evidence to the British side without his permission, and that the Indians were willing to give evidence if the agent would permit them.

That I immediately went on shore and called upon the Indian Agent, one John P. M. Glynn.

Mr. John P. M. Glynn was the gentleman who witnessed the greater proportion of the affidavits that had been sworn by the Indians on behalf of the United States.

I told him what I wanted. His reply in effect was that the Indians had an idea that the sealing on the coast would be stopped and would not say anything to me as it might injure them. I told him I understood that to be one of the objects of the American Government, and if the Indians wished to prevent it they would be acting in their own interest to give me their views. He then said the Indians had already given evidence to the officers of the United States Government for use on the Arbitration, and he did not consider it fair to either the Indians or the United States Government to have them examined by the British. I told him I was willing to take the statements of the Indians in his presence, and he then said he refused under any circumstances to allow the Indians of his Agency to give me any evidence about

seals or seal-hunting. He further said that he did not intend to subject the Indians to an Examination by the British side as they might stultify themselves. He said the Indians were easily misunderstood, and quite as easily induced to say things that were not true. Finding it useless to prolong the interview, I left him, and went up to the Indian village.

And then he refers to a conversation which is not important with the Indian who indorsed that which has been stated, that he could not give evidence or answer any questions without the permission of the Agent. That is confirmed by Andrew Laing, the interpreter in paragraphs 3 and 4 of his affidavit.

That I went back to the "Quadra" and told Mr. Belyea what Peterson said.

Peterson was one of the Indians.

Mr. Belyea at once went on shore and saw the Indian Agent, one John P. M. Glynn. I went with him and was present and heard all that passed between him and the Agent, except for a few minutes at the close of their conversation. I have read what Mr. Belyea says took place then, and it is true. I remember the Agent telling Mr. Belyea that he would not allow the Indians under any circumstances to give evidence to the English. This was in reply to an offer of Mr. Belyea to take the evidence in Agent's presence.

That and the declaration of General Jackson on the next page bears upon the same matter, but I only mention it in order to respectfully caution the Tribunal, though I do not suppose any caution is necessary, against accepting on any questions of per centage or statements of this kind, affidavits taken not only with no opportunity of cross-examination, but when cross-examination by a respectable gentleman, a member of the Bar sent out for the purpose has been refused. I am only suggesting the Tribunal will do that which every Court would do for itself, having the matter brought to its notice—accept any such testimony with extreme caution and except in so far as it was obviously corroborated, would not consider it entitled to special weight.

The PRESIDENT.—Do you lay any responsibility on the United States for the behaviour of these Agents.

Sir RICHARD WEBSTER.—Well, I do not suppose that the United States representatives would wish that a thing of that sort should for a moment take place. I was only referring to the evidence, and I hope you will understand that I make no charge of any sort or kind against the United States. I do not suppose for a moment they knew anything about it, but what I do say, is, and what I think I am justified in saying, is, that evidence taken under such circumstances is or should be of very slight weight before any Tribunal.

We are dealing, you must remember, with very uneducated men. They are speaking in a language not their own, which must have been interpreted in a great number of cases. They are not able to read or write; a large number make their mark, and it is taken in the presence of Mr. McGlynn, who objects to them being questioned. I say no more than that.

The PRESIDENT.—Would it not have been wise of the English Government to apprise the American Government that they were sending a man out for the purpose of cross-examination?

Sir RICHARD WEBSTER.—Well, Sir, that was not our contention; I am obliged to you for that suggestion. We had not seen these affidavits. They were only disclosed to us in September, 1892.

The PRESIDENT.—And this is in December, 1892.

Sir RICHARD WEBSTER.—Well, this gentleman, not knowing about the particular people, simply goes there for the purpose of getting evidence, that is to say of seeing Indians. He does not know the partic-

ular individuals, but all the Indians who are there have been examined by Mr. McGlynn, or in his presence, and this objection is taken. Of course, it is entirely for the Tribunal, but I do not think this ought to be made in any shape or form a charge against the United States Government, and I hope you will understand that I make no such charge; but I do say that, when we have to weigh the value of the testimony, it is a circumstance that the Tribunal will take into consideration, and I press it no further than that. Mr. Tupper reminds me that we had not the slightest reason, till Mr. Belyea got there, to anticipate that there would be any difficulty. The United States had examined the Indians on the British Columbian coast all along, and no hindrance had been put in their way to examine any Indians; and when this happened it was a complete surprise to Mr. Belyea, and it would not have been possible to make any effective remonstrance. But I must not be misunderstood, Sir, and I am sure that the Tribunal will not misunderstand me; I ask them to take it from me that my criticism only goes to the weight of the testimony, and I am entitled to use it for that purpose and I am sure the Members of the Tribunal who are acquainted with those matters will entirely agree.

The PRESIDENT.—Was this Indian, Claplankeo, who had a schooner of his own, a British or a United States Indian?

Sir RICHARD WEBSTER.—I think he was a United States Indian. It is true that his affidavit is not one that Mr. McGlynn took; but the very next one on page 383, if the Tribunal will look at the United States Appendix beginning at page 377,—that is volume 2 of the Appendix to their Case, and I am only digressing to answer your question, Mr. President, and to dispose of the matter if I can,—you will see that the first affidavit is by Bowachup. He was a marksman, and the witnesses were McGlynn and Gay. The next is by Peter Brown, who also makes his mark, and McGlynn was the witness. The next is by Landis Callapa, also a marksman; you know the meaning of that, of course, Mr. President:—That is, that he cannot write and naturally cannot read this language. Mr. John McGlynn witnesses that. Then, on page 380, he witnesses Circus Jim. He does not witness Claplankeo; probably I should to have made the observation with reference to Circus Jim. Then Frank Davis, also a marksman, is witnessed by McGlynn; Jeff Davis does not appear to be Ellabush, on pages 385 and 386, is also a marksman, a Makah Indian, and is witnessed by McGlynn. Alfred Irving, another witness, witnessed by McGlynn. Ishka, page 388, also witnessed by McGlynn. Selwish Johnson, page 38, also witnessed by McGlynn; James Lighthouse, page 390 also witnessed by McGlynn; Osly, page 391, also witnessed by McGlynn; Wilson Parker, page 392,—I only refer to these who are marksmen,—witnessed by McGlynn; John Tysam, page 394, also witnessed by McGlynn; Watkins, page 395; Charlie White, page 396; Wispoo, page 397; Hishyulla, page 398; and Thomas Zolnoks, page 399.

Now the language that those Indians are supposed to have used is of course language not their own—their actual words cannot be, and I do not suggest that it is not a true representation but of all testimony or evidence that desires to be and ought to be tested by cross-examination that is the class of evidence to which the test can be most usefully applied.

I mention that because it is not to be assumed against us, the whole of this evidence would remain as it is, if the opportunity had been afforded of finding out what these men's real meaning was. The evidence taken by another group of Indians, which I think was in Van-

couver Island, was tested. It was not taken by Mr. McGlynn and when a representative of Great Britain did come to examine those witnesses it is found, and is found in the Appendix in a very remarkable way that they go back from their previous statements. I only bring that before the Tribunal in order respectfully to impress upon them the importance of receiving *ex parte* testimony of these men, uncross-examined too, with a great deal of caution. I go back to pages 335 and 336. If the Tribunal indicate that I ought to read the whole of these, I will, but I think I have sufficiently indicated my criticism. I should like to refer to the journalist, because Mr. McManus was a gentleman quoted by Mr. Coudert as a witness whose testimony might have been of some weight, I call attention to it because it is obviously put in a sensational and a journalistic way.

Tuesday the 25th August rain in morning. Boats and canoe out at half past 9 o'clock; out all day (returning to dinner): Result: first boat, two seals reported, wounded and lost five; seals said to be shy and wary, and not so numerous as formerly; attention called to cow seal being skinned (which I had taken for a young bull). The snow white milk running down blood-stained deck was a sickening sight. Indian canoe, one seal, total, 3 seals; 2 mediums and 1 cow. Wednesday 26th August, cloudy morning, seals floating round schooner. Boats and canoe out all day. Result: first boat, 1 seal; second boat, none; Indian canoe, 10 seals; total, 11 seals; 8 cows in milk and three medium Skipper in first boat blamed the powder. Second boat said it was too heavy and clumsy for the work skipper reported having wounded and lost 7, and the men in second boat 9 ditto, 16 in all. Skipper said seals not so numerous as formerly, more shy; also blamed the powder. Evidently a great deal of shooting and very few seals to correspond. Thursday 27 August, seals to all appearances very scarce, species being exterminated, so to judge from the skipper's remarks. Weather fine and clear. Boats and canoe out; returned at noon, consequence of rough sea. Result: first boat, 1; second boat, none; Indian canoe, 2 seals; total, 3 seals. Again in favour of Indian spear. Powder blamed again. Tired of such excuses. So far have not found one word of truth in anything I've heard previously about open sea seal-hunting.

Friday, 28 August, rain and heavy sea in morning; cleared in afternoon; boats and canoe out in afternoon; returned at 6 p. m. No skins although a great deal of shooting going on first boat reported having wounded and lost three seals; blamed powder. Poor powder. It takes judging from the number of shots fired, about a hundred to secure one seal.

Saturday, 29th August, ship's cook brought down from deck a large cow seal at 40 yards rise. Boats and canoe out all day; fine, clear, balmy weather; Aukatan Island in sight. Result: first boat three seals; second boat, three seals; cook, from deck, one; Indian canoe, ten; total catch, seventeen seals, greater proportion cows in milk; horrid sight, could not stay the ordeal out till all were flayed. A large number reported as wounded and lost. According to appearances slaughter indiscriminate.

It is quite clear that Mr. McManus is recording this in the way in which journalists record these things, putting a very considerable amount of colour into it, but I want to call attention to the fact that no attention is paid to what was the actual condition of these females on the 29th August from the point of view of seeing whether in the glands themselves though there was milk in the breast, the milk was drying up. I do not suggest it was untrue and have never done so, but I point out from the point of view you have to consider which is that of *necessity*, the incident referred to in this kind of language in order as far as this witness was concerned to produce prejudice, does not guide you or enable you to form a judgment.

Then this evidence goes on at page 93, and I say that desiring to read it as fully against myself as it can be read I submit that it affords no guide at all from which any quantitative deduction can be drawn as to the number of nursing females and the females with pups dependent upon them that are taken in any given season or from any given

amount of killing. Would you look to page 93 almost the middle of these entries.

W. H. Williams. Thousands of the female seals were captured by the pelagic hunters in Behring Sea during the season of 1891, the most of which had to be secured quite a distance from the rookeries, owing to the presence of armed vessels patrolling the sea for miles round the Islands, and that the slaughter of the seals were mostly females was confirmed by the thousands of dead pups lying on the rookeries starved to death by the destruction of the mothers.

I am sure the Tribunal as they already know the importance of it will not fail to notice that passage in connection with the inference drawn by a gentleman who concludes at once from the fact that a large number of pups being found dead in 1891, that their death was occasioned by the mothers being killed at sea.

Now I pass from that criticism on that evidence and again repeat if it were thought necessary I would certainly go through the whole of these pages though I trust I have sufficiently brought my point before the Tribunal, and I would now ask them to look at testimony which shows that this question of the condition of the milk in the breast is one of considerable importance. I would ask them to take the 2nd volume of the Appendix to the British Counter Case at pages 22 and 23. I cannot help thinking that this is just one of the matters upon which the information before the Tribunal is by no means as full and accurate as it ought to be for the purpose of coming to what I call a final conclusion upon the matter. In the summary at page 22 I find:

Statement relating to the taking of Female seals in milk J. D. Warren says: Up to the latter part of July I got a few Seals [in Behring sea] showing signs of milk when skinning them. I do not think these females had ever been on the islands, but had lost their pups at sea. I never saw a female killed in the sea having much milk in them.

Micajah Pickney, master of the *Heurietta*, seized in Behring Sea in 1892, States that of 420 seals taken by him about one-fourth were females who had had their pups and the milk had dried up. This was between the 3rd August and the 4th September.

W. O. Hughes, when in Behring Sea in 1891, got after the 1st August hardly any cows that showed signs of milk. He believes they had pupped on the island and that the milk had dried up.

Mr. Justice HARLAN.—Do the original depositions show the locality?
Sir RICHARD WEBSTER.—I will look.

Mr. Justice HARLAN.—I would not have you stop to do that.

Sir RICHARD WEBSTER.—It is not stopping at all, Sir, because I have them all noted. It is page 100. Hughes was a fur seal hunter.

In 1891 I was master of the "*Katherine*", and in 1892 I was master of the "*Carnolite*".

Last year in the "*Katherine*" I got about 1,500 seals, of which 191 were got on the coast, and the remainder in Behring Sea.

Last year the coast catch was about half females, and of these one half were with pup. In Behring Sea I got most of my catch about 100 miles westward of St. George Island. Over half the catch in the sea were females, none with pup; but in the month of July about one third of the females were breeding cows showing milk. After the 1st August hardly any cows got showed signs of milk. I believe they had pupped on the islands and the milk had dried up.

And then he goes to the next year, 1892, and he thinks on the coast—I am coming to that later on—less than half of the females this year were with pup. You will notice that he was sealing from the 25th April to the 10th May, and that was outside Behring Sea. I think that which I have read gives you all the information you require. Then I go back to page 22.

Joseph Brown states that after the 15th July a few cows in milk were got in Behring Sea, but as the season grew later very few of these were got. "In the sea we cannot tell whether a cow is barren or not".

James Stiteman found in Behring Sea that about two-thirds of the females taken were breeding females showing milk—some times only a trace, nearly dried up—others with a good supply.

It cannot be said that that is not evidence which is given fairly. Some statements tell, of course, against my contention, but I call attention to all that have a bearing on this.

Then.

Captain George Scott has taken in Behring Sea many females in which the milk had just about dried up.

Michael Keefe states that his vessel the "Beatrice" got 900 skins in Behring Sea in 1890, between the 20th July and the 24th August. Two fifths of these were females "not with a supply of milk, but a good many showing milk dried up". In 1891 his vessel got 500 seals in Behring Sea, of which nearly half were cows. Most of the cows showed dried milk in their breasts.

Of course, you are aware it is no part of my Case to deny that a large proportion of the seals killed are females. It must be so I am going to deal with that part of the case when I argue in answer to the contention, that which I respectfully say is an unwarranted contention, that it is a crime moral and illegal to kill the female seal. I will show the justice of that when I deal with that part of the Case by itself. I merely note in passing that these witnesses state in one point of view that which may be said to be against my contention, that a large proportion, some of them a half, and some not so many—say two-fifths were females. If it be a moral sin to kill females, why these witnesses prove it, but my learned friends need not think that I am afraid of the contention that they put forward. I protest, having regard to what we know about seal-life, and having regard to what we know must take place, that it is beyond all reason to contend that it is a crime to kill female seals in the way in which my learned friend, Mr. Coudert in very exaggerated language described it.

John Coburn says that in Behring Sea in the early part of the season some of the females would be in milk, but later on the milk would be dried up.

George Wells was in Behring Sea in 1890 and 1891; about two-thirds his catch were females, of which a few were in milk, but the most were dried up. After July all the cows are dry of milk. It is only in the first three or four weeks in July that cows in milk in any noticeable quantity are got.

I should like to see, if I can, when that man sealed. It is at page 107. He says 40 or 45 miles from the Pribiloff Islands, in one year, in 1890—I do not think he states what distance he was from the Islands in 1891. There is a case on which the evidence would correspond with what you would expect from natural causes; during the earlier time there might be more females with milk in them, and after that time, for a considerable period, the milk would be drying up for two or three weeks.

Then.

William F. Roland states that of the females taken by him in Behring Sea, more than half were in milk of varying quantities, from a good supply to a few drops in cows about dried up. It is only in the early part of the season in Behring Sea we get cows in milk, and before the end of the season they are about all dried up.

Arthur M. Roland says that in the first part of the season of 1891 he got a number of cows in milk, but that after the 1st August the cows were nearly all dried up.

John Matthews took in Behring Sea, in 1891, a very few cows in milk; some of them nearly dry.

Andrew McKil says: up to the 1st August [in Behring Sea] the hunters get cows with milk in them, but after that date the milk cows began to disappear, and very soon none are got in milk. By the 20th August the milk in the cows had all dried up.

James Gandin states that females taken between the 25th July, and the 25th August in Behring Sea were nearly all dry, as if they were through suckling their pups.

The next three refer to the coast catch, and, therefore, do not have a bearing upon what I am now dealing with. Then the last but two:

George Dishow: In Behring Sea I never got any cows with young. A few cows there would be in milk.

Otto Buchholz. In 1890 I sealed in the Behring Sea in July. I got a few female seals in milk. We sealed 35 to 50 miles from the Pribilof Islands.

Now, of course, if my learned friends are correct in the contention in respect of which we are told by Mr. Phelps that we are going again to hear arguments in respect of—that on general principles the whole of this vast area is to be reserved for the United States, this argument bears out their case; but from the point of view of showing you that a large proportion of seals nursing their young are killed outside the radius of 30 or 40 miles, I submit, for the reasons which I hope the Court will be kind enough to take into their consideration, that that evidence offers no satisfactory test or guide. I must remind the Tribunal, without repeating it, of the remarkable evidence as to the female seals remaining on the rookeries for a very considerable time, and to the utter absence of the ordinary signs of food, (and I go as far as saying, putting it from a naturalist's point of view, it is utterly inconsistent with the females taking any substantial amount of food while they are nursing)—you have no excrement of any sort or kind on any of these rookeries; and I put it, after you know from overwhelming testimony that, from the beginning of July, or the middle of July, I will put it, down on the east side, the pups are spreading away along these islands, it seems to me strongly to corroborate the view that the pups after that time cannot be dependent upon their mothers, and I shall not fail to draw attention incidentally to one or two important facts bearing on that contention.

The PRESIDENT.—You suppose these seals were taken fishing and feeding, and would not return to the islands.

Sir RICHARD WEBSTER.—As I have already called to your attention with regard to those who were examined, a very small proportion only of them had any fish in them, and there is no evidence therefore, or very little evidence—I ought to put it more correctly that there is only evidence that a few of these were actually feeding. With regard to those that are to be found after the 20th of July and through August, my contention is that they are females that have, practically speaking, done with the islands, and that are not going back to them. Again with regard to those taken within short distances, it is possible they have pups dependent on them, but in order to be satisfied of that you must have some satisfactory solution with regard to the other circumstances, and the condition of the rookeries, which I respectfully pressed upon the attention of the Court yesterday. The piece of evidence to which I referred, with reference to that which is supposed to be conclusive, is in the Counter Case only, in Mr. Stanley Brown's evidence, at page 387.

You will remember that reading yesterday from page 386 I reminded you that qualifying his evidence of the previous year—I had not mentioned that fact before—Mr. Brown, when he made his affidavit in 1891 stated that the females left within a few days, and I say this as I have said on previous occasions, I am sure Mr. Brown, as far as he observed anything, would tell it accurately, if he thought it material, but at page 15 of the second volume of the Appendix to the Case, in his first affidavit, Mr. Brown had stated.

For the first few days, and possibly for a week or even ten days the female is able to nourish her young, or offspring, but she is soon compelled to seek the sea for food.

It is no disrespect to Mr. Brown to remind the Tribunal that till his visit in 1891 to these Islands, he knew nothing about the seals at all. In 1892, he makes a further affidavit, and he says.

I was able to satisfy myself that females begin to go into the water from 14 to 17 days after first landing.

It is a remarkable extension of the previous opinion showing how untrustworthy first impressions are, because the "week or ten days" has become "from 14 to 17 days". The point is, the first going into the water.

The next fact to which Mr. Brown speaks is to be found at the bottom of page 386:

The movements of females can also to a certain extent be well observed by their appearance after giving birth to their pups, after fasting, and after gorging themselves with food. After the birth of the pup, and after remaining upon the rookeries even for a few days when the period of coming from and going into the water has been entered upon, the mother has a very decidedly gaunt appearance, in strong contrast to the plumpness of pregnancy or fall feeding. After feeding at sea they come ashore again well rounded out. So marked is this that I have repeatedly been misled by mothers in such a condition, mistaking them for pregnant cows, and have discovered my error by seeing her call her pup and suckle it. If I had any doubt in my mind as to the cows feeding at sea it was dispelled by an examination of three cows I shot at Northeast Point on July 25th, 1892. Two "sunburnt" cows were first killed and their stomachs were found to be empty.

Not an unimportant fact, that as late as the 25th of July, 1892, two sunburnt cows, by which he means cows frequenting the Rookery, were killed in order to try to solve this question, and were found to be empty.

Another was shot just as she came ashore and her stomach was gorged with half digested codfish, which was identified by Mr. C. H. Townsend, an expert of the United States Fish Commission. A dissection was made of this seal, and the udder, which extends as a broad thick sheet at the centre, but thinning out towards the edges, over the entire abdominal portion of the cow and well up to the fore flippers, was so charged with milk that on removing the skin the milk freely flowed out in all directions, and previous to skinning it was possible with but little effort to extract a sufficient amount to enable me to determine its taste and consistency. A large supply of food is necessary to furnish such an abundant amount of milk. I have no doubt that a well-developed mother seal could yield between a pint and a quart of milk in the first 24 hours after landing from a feeding expedition, and with such rich fountains to draw upon it is no wonder that the voracious pups increase during their residence upon the island not less than four times their weight at birth. And it is equally certain that without such a constant supply of nourishment it could not make such a rapid growth as it does.

With all deference to Mr. Stanley Brown's opinion, I do not wish to discount it unduly, he is a geologist, and I have no doubt the study of that enables him, to a certain extent, to follow out the matter closely; but, when we have to deal with this opinion and the facts proved, it amounts to this, that there was one seal, as late as the 25th of July out of three,—two being killed with no food and one that had some (whether the seal had a pup or not upon the Islands, we are not able to tell),—but it is obvious that Mr. Brown could not ascertain every fact about it. It is not a matter which is in any way sufficient to enable this Tribunal to upset and disregard the body of testimony to which I called attention in regard to this matter yesterday.

Now, I come to that to which I ask the close attention of this Tribunal, and that is a petition which I have never made unsuccessfully yet. The United States believed, in 1891, that they had conclusive proof that pelagic sealing caused the death of the seals, and accordingly they stated that the death of the pups in 1891, to the amount of several

thousands on the rookeries, was due to pelagic sealing. This is a part of the case touched upon only in outline by my learned friend, the Attorney General, but is of so much importance, and admitted by the United States Case to be of so much importance, that I do not make any apology, for bringing it to the attention of the Court.

The facts are these. In 1891, upon two certain particular rookeries, an extraordinary and abnormal death of seals occurred. In 1892, when there was no pelagic sealing in Behring Sea, and at a time when the same cause could not have produced the same effect, a greater death of pups on the same place is discovered,—on particular spots on the Island; and, if I establish that, I submit to this Tribunal, and subject to any argument that may be heard on the other side, that the statement on which the United States Advocates have pinned their case is completely demolished; I will use no stronger expression than that.

Now, first, that you may kindly follow me, would you be good enough to take the Chart n° 2 of the United States Case. You will notice there St. Paul's Island and, beginning at the top, there is the Northeast Rookery; then there is the Little Polavina Rookery; then the Polavina Point Rookery; then Lukannon Rookery; then Ketavie Rookery; then Garbatch Rookery; Reef Rookery; Lagoon Rookery; Tolstoi Rookery and Zapadnie Rookery,—(I may say on St. George's Island, there are the Great East, the Little East, the North Rookery, the Starry Arteel, and the Zapadnie):—in all 8 or 9; by far the largest being the Northeast Point Rookery. The only places in which the excessive mortality of pups on the Rookeries occurred are at Tolstoi Rookery, both in 1891 and 1892, which is just to the left of the village, a little above and Polavina Point Rookery, which is the one underneath Little Polavina.

If I am not asking the Tribunal too much, I will ask them to put a mark against those two places. They will find that the testimony upon both sides, both the United States and the British, is that the Rookeries upon which an abnormal quantity of dead pups were seen in either 1891 or 1892 are those two; and they were seen in the same places in the two corresponding years. I have said, and my words may be presently criticised, I will prove this from the United States Case as well as our own.

I will also mention—and I should like it to be noted now, you will see just above the words "Reef Rookery" a little bay I shall be able to show you by testimony also coming from the United States that some seals killed by surf evidently were observed in the year 1890 by Mr. Palmer in 1892 in another bay outside Zapadnie by Mr. Macoun just by the South-West bay it is called, and I shall show you that that, has nothing to do with this extraordinary mortality upon the rookeries.

Now if I make my point good, nobody will deny it is of very great significance with regard to this argument. I will only remind you of what Williams says in his affidavit. He stated that large numbers—thousands, had been killed at the sea, the mothers having been killed, and that was proved by the dead pups found in 1891, he drawing the conclusion from what he believed to be, I have no doubt, the facts at that time. First, I ask, if this is true, is it not sufficient in itself to dispose of the contention that pelagic sealing could have been the cause. Does anybody suggest that the action of pelagic sealers would differentiate between Ketavie Rookery or Polavina or Lukannon and Polavina Point or Garbatch, or in fact the seven or eight other rookeries in many cases for the largest is the North East extending for some three miles all the way round and admitted upon the United

States statement to be the largest of the rookeries—can anybody suggest any reason why, if it was pelagic sealing, those pups should have died on those two rookeries alone and in those two places?

Senator MORGAN.—You mean the abnormal death.

Sir RICHARD WEBSTER.—Of course, I do not deal with the normal death.

Senator MORGAN.—Not with the normal death at all.

Sir RICHARD WEBSTER.—I will point out what the normal death is.

Senator MORGAN.—We get then half of the abnormal death.

Sir RICHARD WEBSTER.—Yes, because what happened in 1891, everybody agrees is something entirely abnormal. It is suggested after this case began for the first time that this abnormal death of pups had been noticed gradually increasing from 1884 to 1891. I shall ask the Tribunal to come to the conclusion that that is not only the fact, but can be shewn to be so from the United States own evidence. Be it as it may, it will make no difference to my point: it will be as good to me to show that pelagic sealing cannot have been the cause of the abnormal death of pups to which I am referring.

That I may not have to go back to the map, you will follow that argument with reference to the Island of St. George about one-third or one-fourth of the size, having regard to the seals killed in reference to its importance. It is, of course, as you already know, common ground that no abnormal death of pups has ever been noticed on the Island of St. George. The argument which I have addressed to the Tribunal pointing to the selection of rookeries on St. Paul Island applies equally as between St. Paul and St. George, and I only mention it for the purpose of enforcing what I have said. Now the otherside knew perfectly well this was a most important point. It was made so in the original United States Case. It was made so in the British Case. It was made so in the British Counter Case; and I will not leave any reference untouched as far as I can. How has this been dealt with up to the present time? I read from page 706 of the Shorthand Note of my learned friend Mr. Coudert's speech.

Now with regard to the question of dead pups the learned Tribunal will find that considerable space is devoted to the examination of that question and the origin of their death. Of course, these animals will die, as all animals will, and a certain portion of them would perish under the best circumstances, but when there is a large loss, and that loss is coincident with the death of the mothers, I do not think that we need to go into any careful examination or balancing of testimony. If we find a man with a bullet through his brain lying on the ground, even in the hot sun of July, we assume that he was killed by that bullet, and not by the sunstroke.

That is very fine, but it does not seem to me with deference to have much bearing on the point.

And so when we find, at a certain period of the year, that a large number of pups die on the islands, that they are emaciated, and when they are opened there is nothing in their stomachs, or nothing but a very little milk; and you are shown at the same time that the mothers upon which they depend for sustenance have been killed—unless something can be shown that *prima facie* appears to account for the death outside these natural causes, we must assume that they die of starvation, and that is what the testimony undoubtedly shows.

And that is the whole argument that has been addressed to this Tribunal upon a matter which is vital and has been made vital in both the printed Cases in relation to this question of the death of pups.

Now will the Tribunal, as I have asked them already follow me somewhat carefully in regard to this matter. The case now made by the United States is that there had been a gradual, but observed, abnormal increase of dead pups right away from 1884 to 1891—culminating in 1891, and they have produced 4 or 5 affidavits all taken in the year

1892 of people who were resident upon the Islands in the years 1885 and 1886 to say that they noticed the increase of dead pups. They do not give the place. They did not localize where these pups are found. They make no connection of any sort or kind between the two particular rookeries to which the evidence is most particularly addressed on both sides: they simply make the statement *ex post facto*, their affidavits being taken in April 1892, that they remember that during the years 1884 to 1890 they found that there were more of these dead pups than usual. You will find that collected together in page 466 of the Collated Testimony. The first is Clark:

Dead pup seals which seem to have starved to death grew very numerous in the rookeries these later years.

That is up to 1889.

And I noticed that driving the batchelor seals for killing, as we started them up from the beach, that many small pups half starved, apparently motherless had wandered away from the breeding grounds, and became mixed with the killable seals. The natives called my attention to these waifs saying that it did not use to be so, and that the mothers were dead, otherwise they would be upon the breeding grounds.

That is an affidavit made in the May of 1892.

Then Hansson who made his affidavit on the 30th April says:

There were a good many dead pups on the rookeries every year I was on the island.

He was there from 1886 to 1891.—

And they seemed to grow more numerous from year to year. There may not, in fact, have been more of them, because the rookeries were all the time growing smaller and the dead pups in the latter years were more numerous in proportion to the live ones.

Then Mr. McIntyre:

The seals were apparently subject to no diseases; the pups were always fat and healthy and dead ones very rarely seen on or about the rookeries prior to 1884. Upon my return to the islands, in 1886, I was told by my assistants, and the natives that a very large number of pups had perished the preceding season, a part of them dying upon the islands and others being washed ashore, all seeming to have starved to death. The same thing occurred in 1886 and in each of the following years to and including 1889. Even before I left the islands in August 1886, 1887, and 1888, I saw hundreds of halfstarved, bleating emaciated pups wandering aimlessly about in search of their dams and presenting a most pitiable appearance.

Then Morgan is the last of them:

But facts came under my observation that soon led me to what I believe to be the true cause of destruction. For instance during the period of my residence on St. George Island, down to the year 1884, there were always a number of dead pups, the number of which I can not give exactly, as it varies from year, to year and was dependent upon accidents or the destructiveness of storms young seals do not know how to swim from birth, nor do they learn how for six weeks or two months after birth, and therefore are at the mercy of the waves during stormy weather, but from the year 1884 down to the period when I left St. George's Island—

I hope the Tribunal will notice this because it is agreed that there is no abnormal pups in St. George's Island in 1891 or 1892—

there was a marked increase in the number of dead pup seals amounting perhaps to a trebling of the numbers observed in former years, so that I would estimate the number of dead pups in the year 1887 at about five or seven thousand as a maximum I also noticed during my last two or three years among the number of dead pups an increase of at least 70 per cent of those which were emaciated and poor, and in my judgment they died from want of nourishment, their mothers having been killed while away from the island feeding, because it is a fact that pups drowned or killed by accidents were almost invariably fat. Learning further through the London sales of the increase in the pelagic sealing, it became my firm conviction that the constant increase in the number of dead pups and the decrease in the number of

marketable seals and breeding females found upon the islands during the years 1885, 1886 and 1887 were caused by the destruction of female seals in the open sea, either before or after giving birth to the pups. The mother seals go to feeding grounds distant from the islands, and I can only account for the number of starved pups by supposing that their mothers are killed while feeding.

The next gentleman C. W. Price, whose evidence is not of much importance, but I will read it

visited the Pribilof Islands in 1890 and made a careful study of the conditions of seal life in those Islands. I discovered late in the season a large number of dead pups lying upon the rookeries which had the appearance of having been starved to death.

That was an affidavit made in 1892. The gentleman is a fur merchant. Senator MORGAN.—What Island does he speak of?

Sir RICHARD WEBSTER.—I will look; I think he speaks of St. Paul, if I remember rightly, no he only says the Pribilof Islands. He is a furr-dresser and an examiner of raw fur-skins.

I have been engaged in the dressing and examining of fur-skins about 20 years, and I am an expert in that business. I have examined and handled large numbers of fur-seal skins both of the American and Russian side, and can easily distinguish one from the appearance of the skins,

and so on.

Then he says:

I visited the Pribilof Islands in 1890, and made a careful study of the conditions of seal life on those Islands. I discovered late in the season a large number of dead pups lying upon the Rookeries, which had the appearance of having been starved to death.

That Affidavit was made in April, 1892. Now, I do hope I can make my meaning clear to the Tribunal in this respect; if this evidence is true, there must have been in 1890 a very large and abnormal number of dead pups either on the same Rookeries or upon other Rookeries. It is the fact (we have the Reports) that of every Government Agent who was there from 1884 to 1891, not one makes the slightest reference to any increase in the number of dead pups, or to any abnormal number of dead pups; and what is more important perhaps than anything is this; in 1890 Mr. Elliott goes to the Island, and I shall be in a position, when I come to Mr. Elliott's Report, to point out to you the position he held, the undoubted authority he possesses, and the obvious weight that must be given to his personal observations; but he was accompanied on that Island by four gentlemen, Captain Goff, Captain Lavender, Mr. Murray and Mr. Nettleton, and all four of them make Reports, and from day to day they were all over that Island. There is not a trace or suggestion in one of their Reports of there being any abnormal death of pups from any cause. People, who have had no connection with the Island for years, make affidavits in 1892 that they noticed the death of pups in 1885, 1886, 1887 and 1888; but people whose duty it was to observe it, or record if anything occurred, noticed nothing of the matter. When I call attention to the extraordinary character of the personal investigations made from day to day and written down from time to time with reference to each of these Rookeries by Mr. Elliott in 1890 and attended by these very Treasury Agents in the pay of the United States Government, it is impossible to come to the conclusion that this story of there having been an abnormal death of pups in the year 1890 can possibly be true. Mr. Goff was the Agent for the Treasury on the Islands in the year 1890; he makes his Reports in the years 1889 and 1890, which are printed in the documents and which are before the Tribunal.

I will call attention to the 1889 Report, which is in the 1st Volume of the Appendix to the British Counter Case, at page 84. It was produced

on notice by General Foster, and it will save the Tribunal a little trouble if I tell them at present that my references are negative to show that they make no reference to this matter. I shall have to refer to these Reports later on in another connection. Mr. Goff made his report to Mr. Windom on the 31st of July, 1889; and there is not the slightest reference to any abnormal death of pups. There is a reference to the cause of decrease which I must not be tempted to read now; otherwise, I shall be open to the complaint of reading the same thing twice. In 1890 (the reference will be found in the 3rd Volume of the Appendix to the British Case, third part, page 15), Captain Goff again makes a Report, and I call attention to what Captain Goff knew with regard to what was going on.

He writes on the 31st July, 1890.

PROFESSOR H. W. ELLIOT your recent appointee as Treasury Agent, has spent the season here, dividing his time between the two islands, and giving his entire attention to the state of the rookeries and the methods used at present in driving and killing the seals, and his report will, no doubt, be of the utmost importance, and of great value to the department.

Mr. William Palmer, a representative of the Smithsonian Institution, has, by your permission, spent the season on St. Paul collecting specimens of various birds and animals, and his incessant labours have been abundantly rewarded.

I know it is the line of the United States to belittle the experience and observations of these men. That is their attitude to-day; but I at present call attention to the fact that there was a careful examination being made, with the knowledge of these Treasury Agents, in 1890, by independent gentlemen, and had it been true that upon these very rookeries there was, as the later affidavits say, evidence of an abnormal quantity of dead pups, it must have been observed.

I will not read any further passages from that. Mr. Murray the Treasury Agent from 1889 to 1892 made a Report in 1890. It will be found at page 18 of that same third part of vol. 3 of the Appendix, and Nettleton's will be found at page 48, and Lavender's at page 52, and not one of these gentlemen makes any suggestion of any dead pups there in 1890. But what is more remarkable—and I trust the Tribunal will follow this is, three of these gentlemen make affidavits for the United States as well—Mr. Goff, Mr. Murray and Mr. Nettleton, and two or three—I think three, but certainly two—have made affidavits which, if it had been the fact that these pups were observed dead in 1889 and 1890, it must have come to their knowledge, and their affidavits are absolutely silent with regard to the matter. Mr. Lavender the fourth agent had been active in getting affidavits for the United States, but makes none himself in support of this. It does not stop there. There are three Company's agents on the Island, and I need not tell you that the Company's interest would be to tell any fact that showed that their industry had been interfered with by pelagic sealing. It is the interest of the Company to bring those facts before the United States. The first of the affidavits is Mr. Fowler's, who has been on the Islands since 1879. It will be found at pages 25 and 26 of Appendix to the United States Case. He refers to the death of the pups in 1891, and does not suggest that it ever occurred before that year.

Now there is the Agent on the Island of the Company referring to the fact in 1891 as supporting their case and making no reference to what is now suggested by other people who had not anything like his experience—that something of the same kind had been going on from 1884 to 1881, and they now use it to show that pelagic sealing was the cause. Redpath, a witness not unfrequently referred to both in the

argument and in the Case by the United States swore an affidavit which is given at page 152 of the same Appendix—the 2nd Appendix to the United States Case, and he refers to it in this language:

In 1891 the rookeries in St. Paul Island were covered in places with dead pups, all of which had every symptom of having died of hunger, and on opening several of them the stomachs were found to be empty. The resident physician, Dr. Ackerley examined many of them and found in every instance that starvation was the cause of death. The lowest estimates made at the time placing the number of dead pups on the rookeries as 25,000 is too high.

I ask you in all fairness, and I ask those in the habit of considering evidence, if this were possible, if this were true, if this were a gradually increasing occurrence of dead pups on these rookeries, these gentlemen could have been possibly ignorant of it, and, yet they are making affidavits on the part of the United States and are in the position of knowing, and had it been the fact they must have spoken to it.

Mr. Daniel Webster—he has been on the Islands since 1870—makes an affidavit at page 183 of the same second volume, and he refers to the fact of the death of seals—the mothers who had left pups on the rookeries. He refers to that fact as being a cause of the death of the pups, and there is not a suggestion made that prior to the year 1891 this abnormal death of pups occurred. He, Mr. President, was the Superintendent on St. George's Island during that very year when the Witness Morgan states, contrary to everybody else in this case, that in the year 1889, I think it was, (I read it this morning), he noticed 5,000 or 6,000 pups dead in an abnormal manner upon St. George's Island. Now, quite apart from any testimony coming from my side, quite apart from any testimony in respect of which it may be said that it is British testimony or British witness, can you have anything stronger than that; all the Government Agents during that series of years, from 1884 to 1891, and that the Company's Agents on the Islands during that time, have never breathed the suggestion that from 1884 up till 1890 there had been noticed a gradual abnormal death of pups on the Rookeries, which they could only attribute to pelagic sealing? I say that it does not impress one with the care that has been taken in connexion with the obtaining and preparing the evidence in this case that such should be the state of the matter.

Now, Sir, at page 84 of the same volume there is a witness of the name of Dr. Noyes, and no doubt, a gentleman of position. He had been upon the island, if I remember rightly, a great many years—I am not quite sure—from 1880. He was partly on St. George and partly on St. Paul, and he says:

The epidemic theory was urged very strongly in 1891, when the rookeries were found covered with dead pups; but a careful and technical examination was made on several of the dead bodies without discovering a trace of organic disease; while starvation was so apparent that those who had examined them decided that it was the true cause of their death. Had sickness or disease attacked the seal herd, it is only reasonable to suppose a few grown seals would be found dead where so many young ones had died so suddenly; but the most diligent search has failed to find a grown seal dead upon the islands from unknown causes.

It is scarcely to be believed that a gentleman of his position observing upon this abnormal death of pups in 1891, resident in the island the whole time, would, if it had been true that this fact had been gradually increasing and attracted the attention of the residents of the island one of these witnesses actually says when he went back the natives told him they had observed large numbers in the years 1885 and 1886—well, I have sufficiently indicated to the Tribunal that if I relied on the United States testimony alone, it would negative the sug-

gestion that there had been a gradual increase of these dead pups extending over the time when, according to the contention of my learned friends they suggest pelagic sealing had been becoming a formidable factor in the case.

Now I must ask the Court to be good enough to notice what is our testimony with regard to this matter. I will first read the United States case upon it. Page 213 of the United States case says:

Professor Dall, who visited the rookeries in 1880, says: "There were not in 1880 sufficient dead pups scattered over the rookeries to attract attention, or form a feature on the rookery". Captain Bryant, who was on the islands from 1870 to 1877, says: "A dead pup was rarely seen". Mr. J. H. Moulton, who was on St. George Island from 1877 to 1881, says: "There were practically no dead pups on the rookeries. I do not think I saw during any one season more than a dozen." Mr. H. G. Otis, Treasury agent on the islands from 1879 to 1881, states that "it was a rare thing to find a dead pup." Mr. H. A. Glidden, the Government agent from 1882 to 1885, says:—"During the time I was on the islands I only saw a very few dead pups on the rookeries, but the number in 1884 was slightly more than in former years."

Then comes the allegation to which I have called attention that from 1884 up to 1891, the United States' Case alleges that there had been a gradual increase of these dead pups without specifying the particular rookeries, and that this death of pups was occasioned by pelagic sealing.

Now I call attention, if you please, Mr. President, to the British Commissioners Report, paragraph 344, where they say:

In the season of 1891, considerable numbers of dead pups were found in certain places upon the rookery grounds or in their vicinity, and various hypotheses were advanced to account for this unusual mortality. As some of these have special bearings on the general question of seal preservation, it may be well to devote a few words to this particular subject.

In order to exhibit the circumstances surrounding this fact and to arrive at a probable explanation of its true meaning, it will be necessary in the first instance to give in summarized form the observations and notes bearing upon it made on the ground by ourselves.

When visiting Tolstoi Rookery, St. Paul Island.

That is the one I pointed out to you Sir.—

On the 29th July, we observed and called attention to several hundred dead pups which lay scattered about in a limited area, on a smooth slope near the northern or inland end of the rookery ground, and at some little distance from the shore. The bodies were partly decomposed, and appeared to have lain where found for a week or more, which would place the actual date of the death of the pups, say, between the 15th and 20th July. Neither the Government Agent who was with us, nor the natives forming our boat's crew at the time, would at first believe that the objects seen on the rookery were dead pups, affirming that they were stones; but when it became clearly apparent that this was not the case, they could suggest as causes of death only over-running by bulls or surf along the shore, neither one of which appeared to us at the time to be satisfactory. Mr. D. Webster, interrogated on the subject some days later on St. George Island, offered merely the same suggestions, but a few days still later, both Whites and natives on the islands were found to have developed quite other opinions, and to be ready to attribute the deaths to the operations of pelagic sealers killing mothers while off at sea, and leading to the death of pups from starvation consequent on such killing.

Now nobody will accuse the British Commissioners of giving otherwise than an accurate record of what their recollection is as to what occurred. Is it conceivable that if this took place it should be true that the natives—the agents—the people upon the island—had been observing this thing gradually going on from 1884 on this rookery or on any rookery?

Then the British Commissioners say:

347. Believing the matter to be one of considerable importance, however it might be explained, particular attention was paid to it on subsequent visits to rookeries. On the 31st July and the 1st August the rookeries of St. George were inspected, but

no similar appearances were found, nor was anything of the same kind again seen till the 4th August, on Polaviua rookery. St. Paul Island, where, near the southern extremity of the rookery, several hundred dead pups were again found by us, here also covering an area of limited size, which we were able to examine carefully without disturbing the breeding seals. It was estimated that the pups here found had died between ten days and two weeks before, which would place the actual date of death at about the same time with that of those first referred to.

348. On the following day the extensive rookeries of North-East Point were visited and examined, but very few dead pups were anywhere seen. Mr. Fowler, in charge of these rookeries for the Company, was specially questioned on this point, and fully confirmed the negative observations made by ourselves at the time. It may here be mentioned that the vicinity of North-East Point had been the principal and only notable locality from which, up to this date, sealing vessels had been sighted in the offing, or had been reported as shooting seals within hearing of the shore.

349. On the 19th August, after a cruise to the northward of about a fortnight's duration.

I ask the Tribunal to note the dates—the 15th, 20th and 31st of July; the 1st August and the 19th August.

On the 19th August, after a cruise to the northward of about a fortnight's duration, we returned to St. Paul, and on the same day revisited Tolstoi Rookery. On this occasion the dead pups previously noted were still to be seen, but the bodies were flattened out and more or less covered with sand, by the continuous movement of the living seals. There were, however, on and near the same place, and particularly near the angle between Tolstoi Rookery and the sands of English Bay, many more dead pups, larger in size than those first noted, and scarcely distinguishable in this respect from the living pups which were then "podded out" in great numbers in the immediate neighbourhood. Messrs. Fowler and Murray, who accompanied us on this occasion, admitted the mortality to be local, and the first-named gentleman stated that in his long experience he had never seen anything of the kind before, and suggested that the mothers from this special locality might have gone to some particular "feeding bank," and have there been killed together by sea sealers. On the same day we visited the Reef Rookery again, and a search was made there for dead pups, which resulted in the discovery of some of approximately the same size with those last mentioned, but probably not more than an eighth, and certainly not more than one fourth, in number as compared with the inner end of the Tolstoi Rookery ground, and proportionately in both cases to the number of living pups.

350. While making a third inspection of the St. Paul rookeries in September, on the 15th of that month, the Reef and North-East Point rookeries were again specially examined. The rookery ground of the south-eastern side of the Reef Point was carefully inspected area by area, with field-glasses, from the various rocky points which overlook it, and from which the whole field is visible in detail save certain narrow stony slopes close to the sea-edge, where dead pups might have been hidden from view among the boulders. Subsequently, the north-eastern sloping ground, named Gorboch on the plans, being at that date merely occupied by scattered groups of seals, was walked over. The result of the inspection was to show that there were on the south-east side a few dozen dead pups at the most in sight, while on the opposite side perhaps a hundred in all were found in the area gone over, being, probably, the same with those seen here the previous month, and in number or contiguity not in any way comparable with those seen at the inner end of Tolstoi.

351. On the same day a final visit was made to the North-East Point rookeries, then in charge of three natives only. Two of these men went over the ground with us, and were questioned on various subjects, including that of dead pups, through our Aleut interpreter. They would not admit that they had seen any great number of dead pups on the North-East Part this season, and did not seem to be in any way impressed with the idea that there had been any unusual mortality there. The ground to the north of Hutchinson Hill was, however, carefully examined by us from the slopes of the hill, and a few dead pups were made out there. Again, at a place to the north of Sea-lion Neck of the plans, and beyond the sand beach upon which holluschickie generally haul out, a slow advance was made among a large herd of females and pups, though part of these were necessarily driven off the ground in so doing. An occupied area of rookery was thus walked over, and the dead pups which appeared at this spot to be unusually abundant were counted with approximate accuracy. A very few were found scattered over the general surface, but on approaching the shore edge, an area of about 20,000 square feet was noted, in which about 100 dead pups were assembled. Some of these lay within reach of the surf at high tide. Most appeared to have been dead for at least ten days and several were broken up and mangled by the movement of the living seals on and about them. This particular locality showed a greater number of dead pups to area than any other seen

at this time either on the North-East or Reef rookeries, but in number in no respect comparable to that previously noted at Tolstoi, or even to that on the south part of Polovina.

Then the Report refers to the examination of the bodies which was done under the knowledge of Mr. Stanley Brown, but from the point of view of number it is not material.

Now Mr. Stanley Brown refers to this same occurrence in the year 1891. I am dealing, entirely, Mr. President, with dead pups upon the rookeries. At the bottom of page 18 of the Second volume of the Appendix to the United State case, Mr. Stanley Brown makes a statement, and I ask whether it is possible if it were true that what was discovered in 1891 was only the development of what had been going on in 1887, 1888, 1889 and 1890, it would be possible that Mr. Stanley Brown's Affidavit could have been what it is?

Now this is what he says:

In the latter part of July, 1891, my attention was called to a source of waste, the efficiency of which was most startlingly illustrated. In my conversations with the natives I had learned that dead pups had been seen upon the rookeries in the past few years in such numbers as to cause much concern. By the middle of July they pointed out to men here and there dead pups and others so weak and emaciated that their death was but a matter of a few days.

By the time the British Commissioners arrived the dead pups were in sufficient abundance to attract their attention, and they are, I believe, under the impression that they first discovered them. I procured a number of these pups, and Dr Akerly at my request, made autopsies, not only at the village, but later on upon the rookeries themselves. The lungs of these dead pups floated in water. There was no organic disease of heart, liver, lungs, stomach, or alimentary canal. In the latter there was but little and often no fecal matter and the stomach was entirely empty. Pups in the last stage of emaciation were seen by me upon the rookeries, and their condition as well as that of the dead ones left no room to doubt that their death was caused by starvation. By the latter part of August deaths were rare, the mortality having practically ceased. An examination of the warning lists of the combined fleets of British and American cruisers will show that before the middle of August the last sealing schooner was sent out of Behring Sea. These vessels had entered the sea about July first, and had done much effective work by July 15th. The mortality among the pups and its cessation is synchronous with the sealing fleets arrival and departure from Behring Sea.

If I had to criticise that, Mr. President, from the actual dates, it would not be found to be strictly accurate, but I do not want to pause to discuss a point which is not of such great importance; because what I am going to call attention to later on, makes all criticism attempted to be founded on the dates of vessels in Behring Sea become of no importance at all.

Now at page 101 of the same book—the second volume of the Appendix to the United States Case—will be found the evidence of Mr. Barnes, who says this:

One day, during the latter part of August or fore part of September last (exact date forgotten), Col. Joseph Murray, one of the Treasury Agents, and myself, in company with the British Commissioners, Sir George Baden-Powell and Dr Dawson, by boat visited one of the seal rookeries of that Island, known as Tolstoi or English Bay. On arriving there our attention was at once attracted by the excessive number of dead seal pups whose carcasses lay scattered profusely over the breeding ground or sand beach bordering the rookery proper, and extending into the border of the rookery itself. The strange sight occasioned much surmise at the time as to the probable cause of it. Some of the carcasses were in an advanced stage of decay, while others were of recent death, and their general appearance was that of having died from starvation.

There were a few that still showed signs of life, bleating weakly and piteously, and gave every evidence of being in a starved condition, with no mother seals near to or showing them any attention.

Dr Dawson, while on the ground, took some views of the rookery with his Kodak; but whether the views he took included the dead pups I could not say.

They did, and they are here, Mr. President, if the Court desires to see them. Then he says.

Some days after this—cannot state exact date—I drove with Mr. Fowler, an employé of the lessees, to what is known as Half Way Point, on Polovina rookery.

That is the other one I mentioned.

Here the scene was repeated, but on a more extensive scale in point of numbers. The little carcasses were strewn so thickly over the sand as to make it difficult to walk over the ground without stepping on them. This condition of the rookeries in this regard was for some time a common topic of conversation in the village by all parties, including the more intelligent ones among the natives, some of whom were with Mr. J. Stanley Brown in his work of surveying the island and brought in reports from time to time of similar conditions at substantially all the rookeries around the Island. It could not, of course, be well estimated as to the number thus found dead, but the most intelligent of the natives—chief of the village—told me that in his judgment there were not less than 20,000 dead pups on the various rookeries in the island and others still dying. Dr. Ackerly, the lessees' physician at the time, made an autopsy of some of the carcasses.

And so on. Now I note in passing that the Report on the face of it is obviously not in accordance with the facts because there was an examination made by Professor Dawson, Sir George Baden Powell and Col. Murray, of the actual condition of the other rookeries, and it will be found in the United States papers that they also put the mortality at the same place—namely Tolstoi and Polovina.

Now Mr. President I call attention if you please to the fact, if you will kindly look at the Appendix to Mr. Elliott's Report of 1890, that he is day by day visiting these rookeries in the year 1890 and making his field notes. For instance, this particular rookery is called "Tolstoi". It was visited—(I am reading from page 240), on the 12th June; the 21st June; the 23rd June; the 24th June; the 27th June; the 30th June; the 1st July; the 7th July, and the 10th July. And the next one—the Polovina rookery—is visited on the 3rd June; the 4th June; the 25th June; and on the 3rd July; and you will find in later parts of the same record, careful notes taken of the condition of these rookeries on a number of later days to which I shall have to call attention in connection with another part of the case. I have already told you on many of these occasions he was accompanied by these Treasury Agents.

It is quite impossible to come to the conclusion that if there was in 1890 anything corresponding with this, it would not have been seen. But we have a very remarkable indirect corroboration of this. Professor Palmer was there. He too knew nothing about seals till he went there in the year 1890, and the United States have printed at page 291 of their Counter Case that part of Professor Palmer's Report which the British Commissioners had not annexed to their Report because it did not bear directly upon the particular point that they were discussing and for which they were citing Professor Palmer's Report. But on page 291 it will appear that Professor Palmer, a stranger to the island, had his attention called to the death of the seals—that is to say, seals killed by the surf, and himself noticed seals killed in the same way that Mr. Macoun noticed in that bay to which I called attention, called Zoltoi Beach—killed as we know seals frequently were killed by the surf—and yet there is not a reference in the whole of Professor Palmer's paper from beginning to end, to any abnormal occurrence as to the seals either at Tolstoi or Zapadnie or any other rookery in the island at all.

MR. CARTER.—Do you mean that he imputes the death of them to the surf?

SIR RICHARD WEBSTER.—I say what Mr. Palmer describes is undoubtedly the death from surf.

Mr. CARTER.—If you will read it, it will be a little more definite.
Sir RICHARD WEBSTER.

The number of pups about the shore of St. Paul began to attract my attention about the middle of July, last year. On August 2nd I stood on Zoltoi Beach.

Zoltoi Beach is the place that I showed the court when I was calling attention to this.—

And counted dead pups within ten feet of me, and a line of them stretched along the beach many of them starved to death on the rookeries, but by far the greater number sunk in the deep water along the margin of the rookeries.

Mr. CARTER.—You did not begin quite high enough.

Sir RICHARD WEBSTER.—I began at any point that refers to observing the seals. Where do you wish me to begin, Mr. Carter?

Mr. CARTER.—If you want to get what he imputed as the cause of it, you should begin a sentence or two higher.

Sir RICHARD WEBSTER.—I beg my friend's pardon. I was not in any way referring to that. I was calling attention to the fact that Mr. Palmer, observing these matters does not suggest that either on Tolstoi nor on the other rookery, Polavina, to which I have called attention, there was any abnormal death, and I am calling attention to it for the purpose of showing that every person who was there in the years 1890 and up to that time proved by their statements that that state of things which the United States in their reply suggest cannot possibly have existed.

Now I come, if you please, to the year 1892; and the Tribunal will find that the condition of things referred to in the year 1892, in the first volume of the Appendix to the British Counter Case. Before I read this, Mr. President, may I remind you of certain admitted facts. It is admitted that the total pelagic sealing in Behring Sea, the whole of Behring Sea, in the year 1892, was under 500. I will first make that good before I read from page 145 of the Counter Case.

Mr. CARTER.—You say it is admitted?

Sir RICHARD WEBSTER.—I said admitted.

Mr. FOSTER.—If you say the eastern part, we will accept it.

Sir RICHARD WEBSTER.—I was not aware that from this point of view it was important. Mr. Foster is perfectly accurate. It is so very far away. Mr. President, that I may be pardoned for having spoken of it as Behring Sea. What Mr. Foster desires me to point out as a limit is a reference to the killing in what they call United States waters. You know what I mean, Sir—to the east of the line of demarcation. Perhaps somebody will show the line of demarcation on that map.

Mr. Justice HARLAN.—We can see that.

(Mr. Tupper here indicated on the map the line of demarcation.)

Sir RICHARD WEBSTER.—At page 93 of the United States Counter Case, it is stated in this way:

In consequence of the zealous and efficient efforts of the naval vessels charged with the protection of the seal herd and the enforcement of the *modus vivendi*, few sealing vessels entered the eastern half of Behring Sea in 1892, and those waters were practically free from open-sea hunters. If the cause of the mortality of 1891 among the pups was any of those advanced by the Report, it is a remarkable and, for the opinion of the Commissioners, an unfortunate circumstance that with the decrease of sealing in Behring Sea dead pup-seals have decreased likewise.

You will not fail to note the fact that they argue that the alleged decrease of dead pups in 1892 shows that the view taken on behalf of Great Britain, that it could not have occurred from pelagic sealing, is refuted. The actual certificate is given on page 156 of the first Volume

of the Appendix to the British Counter Case, to which I am about to refer. It is by Captain Parr, who is the chief officer in charge of the watching fleet:

With reference to the possibility of any other sealing-schooners having been taking seals in the neighborhood of the Pribilof Islands besides those captured, I have heard it stated that one vessel claimed to have done so to the extent of some 100 skins, but I think even that is doubtful. If the total number of seals killed in Behring Sea by sealing-schooners is taken at 500, I should say that it would largely exceed the mark.

I have etc.

(Signed)

A. A. C. PARR.

Therefore we have got this common ground, that pelagic sealing in the eastern waters of Behring Sea was practically non-existent in the year 1892.

Let me call attention, Sir, if you please to the actual observations made by Mr. Macoun in the year 1892 upon the island, corroborated, as I shall show you presently, by Mr. Stanley Brown's affidavit. I shall read from both the United States testimony as well as from Mr. Macoun's report. I now read from page 145 of the first volume of the Appendix to the British Counter Case:

During the months of July and August a great many females were watched as they came from the water, and although in a few cases they were seen to go to the extreme back of the occupied rookery-ground, none were seen to go beyond it.

(b) Many pups lose their lives when stampedes occur, and many others when bulls dash among the breeding females and their young to prevent the escape of a female from the harem.

The scattered dead pups that are to be seen on all rookeries have been destroyed in either of these ways.

(c) A few pups probably lose their lives in the surf, or by being dashed upon rocks, but the number must, under ordinary circumstances, be very small. As early as the 18th July, and on many occasions afterwards, pups were watched while in the water close to the shore, and though they were often thrown with great force against the rocks, no pup was ever seen to receive the slightest injury. These causes of death to young seals were noted by me, but are obviously insufficient to account for the great mortality among the pups on Polavina and Tolstoi rookeries.

While standing beside the camera at Polavina rookery on the 22nd July I counted 143 dead pups; they were of the same size as the living pups near them, and exhibited no sign of having died of hunger, nor did it appear that they had been crushed to death in a stampede, as those that could be seen were at or near the limit of the rookery-ground. No estimate could be made of the number of dead pups that were lying on this rookery as the seals lay so closely together on its southern and eastern slopes that but a small part of the breeding-ground was visible. Professor Evermann (a naturalist on United States Fish Commission steamer "Albatross"), who was with me at this time, and who counted 129 dead pups, thought, with me, that if so many were to be seen at the outer edge of the rookery-ground, the whole number must be very great, and about a month later (20th August) I had ample proof that this was the case.

I pause, Sir, to note that the United States have printed Mr. Everman's report of this very day, the 22nd of July; and he, at page 271 of the Counter Case of the United States, referring to this rookery, exactly confirms what Mr. Macoun had said. He gives the number of pups which he saw from that place as 129, the same number given by Mr. Macoun.

I now come back to Mr. Macoun:

I revisited Polavina rookery on this date with a native, Neh-an Mandrigan. This man speaks and understands English very well, and was at this time on his way to North-east Point to take charge of the guard-house there. A great many dead pups were lying at the south end of the rookery, nearly or quite as many as were to be seen on Tolstoi rookery. They were lying on a sandy slope between the water and the rocky ledge that separates the lower from the higher parts of this rookery-ground, and were rather more grouped together than at Tolstoi, from 10 to 100 lying quite close together, with spaces from 5 to 10 yards square between the groups. There were individual dead pups scattered everywhere over the rookery as on all others, but on that part of it referred to above the number was very great, and the

ground on which they were lying was quite deserted by living seals. They extended as far as could be seen along the rookery, but as only the front sloping to the south could be seen, the number beyond the point to the northward could not be estimated. It was at the south end of this rookery that the British Commissioners report having seen a few hundred dead pups in 1891. Photographs taken the 5th August show this ground with the breeding seals still upon it, but many dead pups may also be seen. The native Neh-an Mandrigan was asked how he accounted for so many dead pups; he replied that he thought they had been killed when the old bulls were fighting; but a few minutes later said that he was mistaken, that their mothers must have been killed at sea, and the pups have died for want of food.

You will notice, Mr. President, that that is exactly the same answer that was given in the year 1891, after consideration.

He at this time told me that he had never seen so many dead pups on any rookery before. He had seen those on Tolstoi rookery in 1891, but had not visited that place in 1892.

Dead pups were first noticed by me on Tolstoi rookery the 19th August, though photographs taken by Mr. Maynard on the 8th August, while I was on St. George Island, show that at that date there were nearly, if not quite, as many of them on this rookery as there were ten days later.

At the time I first noticed the dead pups I counted over 4,000, but they lay so closely together that it was impossible to judge what proportion of the whole number was seen. I was told by the Treasury Agents on the island and have no reason for disbelieving their statements, that when this rookery was carefully examined late in 1891, as many or more dead pups were found among the rocks or other parts of the rookery as were on the open space, and seen and specially remarked upon by the British Commissioners in 1891. This being so, it is reasonable to assume that such would be the case again this year. The dead pups noticed by me were on the same ground on which those seen last year were lying, but were scattered over a larger area, and in much greater numbers.

I accompanied the British Commissioners when they inspected Tolstoi Rookery in 1891, and the date of my visit to that rookery this year coincided with their visit to it last year. Depending upon my memory alone, I had no hesitation in deciding that there was a greater number of dead pups at that place in August this year than at the same date in 1891, and a comparison since my return from the islands of the photographs taken during the two seasons proves that this is undoubtedly the case.

We have here, Mr. President, the photographs of the same place in each of those two years, 1891 and 1892.

The pups when I first saw them appeared to have been dead not more than two weeks, and nearly all seem to have died about the same time. Very few were noted that were in a more advanced state of decomposition than those about them, and the dozen or so that were seen were probably pups that had died at an earlier date, and from some other cause than that to which this unusual mortality among the young seals is to be attributed.

The photographs taken on the 8th August show that at that time there were several groups of seals hauled-out on ground on which the dead pups lay, but on the 19th August it was almost entirely deserted by the older seals. This rookery was revisited on the 21st August, and at this time an estimate was again made of the number of dead pups. A large band of holluschickie on their way from the water to the hauling-ground at the back of Tolstoi rookery had stopped to rest on the ground on which the pups were lying and hid a part of them so that on this occasion a few less than 3,800 were counted. On the 23rd August I again visited Tolstoi rookery in company with Assistant Treasury Agent Ainsworth, Mr. Maynard, the photographer, and Antone Melavedoff, who is the most intelligent native on St. Paul Island, and has charge of all the boats and store-house belonging to the Company. This native acted as boat-steerer at the time the British Commissioners visited Tolstoi rookery in 1891, and that I might learn his opinion regarding the relative number of dead pups for the two years 1891-1892, I asked him to accompany me on the occasion referred to above. When asked whether there were as many seals in 1892 as in 1891 he replied: "More; more than I ever saw before". I, at the same time, asked Mr. Maynard to pay particular attention to what was said, and he has since made an affidavit to the above effect, which is appended to this Report.

These dates, Mr. President, are very important, because they extend practically over the same time, rather longer than in 1891, and correspond for all practical purposes with it.

My last visit to Tolstoi Rookery was made on the 11th September. No living seals were to be seen on that part of the rookery-ground on which the dead pups were, and it was now apparent that they extended further to the left than is shown in the photographs taken of them; that is to say, a part of the ground on which seals are shown in these photographs had dead pups on it which at that time could not be seen; this would add several hundreds to my former estimate of their number. No pups that had died recently were to be seen anywhere. It seems reasonably certain that all the dead pups seen on this part of Tolstoi rookery died at about the same time, and I would include with them all, or nearly all, that were lying on the beach. These were doubtless thrown up by the sea, but there is no evidence that they were killed by the surf. The shore is sandy, and there had not been a heavy sea breaking upon it for more than a month previous to the date the dead pups were first seen. It seems possible that the mortality among these young pups was the result of an epidemic that ran its course in a few days, and attacked only a small portion of the young pups. That their deaths were not caused by starvation was very evident, as they were, with few exceptions, large and well developed, not small and emaciated, as is almost invariably the case with those that are known to have wandered away from the breeding grounds and died of starvation. It is usual for young seals that are hungry to congregate at the water's edge and there await the arrival of females returning from the sea to the breeding-grounds. I have on many occasions noted young pups whose continued cries were evidence that the little creatures were in want of food, and invariably pups in this condition were the most persistent in their endeavors to take milk from the breasts of cows as they landed, and would follow them for as great a distance as their strength would permit, returning slowly to the water's edge when the cow was lost sight of. Had the dead pups seen on Tolstoi and other rookeries died of starvation, they would without doubt have been found in masses near the sea, not scattered over all parts of the breeding-ground, and were it possible that they had been killed by the surf they would have been lying in windrows, as was the case at South-west Bay, where on the 23rd August, 133 dead pups were found lying among sea-weed at different distances from the water. Bare spaces from 10 to 30 yards in width, on which no dead pups lay, separated these windrows of sea-weed showing that the highwater mark had changed from day to day. The pups at this place were in all stages of decomposition; a few had died within a day or two, while little remained of others but their bones, with fragments of skin attached. Pups are constantly swimming across South-west Bay from Upper to Lower Zapadnie rookeries, and it is probable that these lying on the beach represent nearly all that had been drowned, or had from any cause died in the water in the immediate vicinity of this small bay, as the shore is steep and rocky on both sides of it, and anything floating about is almost certain to be thrown up on this sandy beach.

At North-east Point, on the 20th August, all the rookery ground visible from Hutchinson Hill was carefully examined with a field glass.

Hutchinson Hill is in the middle of that North-east Rookery, up at the north end.

A few dead pups were to be seen here and there on all parts of the breeding-grounds, and in one place, at no great distance from the water, but on higher ground than could be reached by the sea, at least 500 were visible from Hutchinson Hill. The ground on which they lay much resembled that on which dead pups were at Tolstoi and Polavina rookeries, but was not of nearly so great an extent. They lay scattered about as at Tolstoi, not in groups as at Polavina. A careful examination was made by me of all the rookeries on St. George Island, both before and after the dead pups had been noted on St. Paul, but none were seen there with the exception of a very few scattered ones, such as are to be seen on all rookeries.

Whites and natives on the islands were unanimous in saying that the mothers of the pups found dead on the rookeries had been killed at sea, and that their young had then starved. During the months of July, August and September I had frequent opportunities of conversing with the officers of nearly all the ships stationed in Behring Sea, both those of the United States and of Great Britain, and all agreed that it was not possible for a schooner to have been in and out of Behring Sea in 1892 without being captured (see statement in Appendix (C) of Captain Parr, the Senior British Naval Officer stationed at Behring Sea.) The cruizes of the various ships were carefully arranged by Captains Parr and Evans, and so planned that no part of Behring Sea to which sealing-vessels were likely to go was left unprotected. H. M. S. "Melpomene" and "Daphne", and United States ships "Mohican" "Yorktown," "Adams," "Ranger" and "Corwin", were engaged in this work. No skins worth taking into account were found on the small vessels that were seized, and most of those they had on board were doubtless taken outside Behring Sea, so that to whatever cause the excessive mortality among these young seals is to be attributed, sealing at sea can have had nothing to do with it in 1892.

Without fully indorsing what Bryant says on this subject, he may be quoted. He writes: "When the sun shines for two or three hours and the rocks become heated, there are occasional deaths among the beachmasters and very young pups from sunstroke, the symptoms being a nervous jerking of the limbs, followed by convulsions and death. Fortunately the occurrences are rare, and it was only in 1874 that any appreciable number were lost from this cause. That year young seals died about the 1st August.

Were sunstroke suggested as the probable cause that led to the death of the pups found on St. Paul Island in 1891 and 1892, the positions in which they were found and the nature of the ground in which they lay would favor this theory. Were the sun to shine for even a few hours upon the smooth hard ground of the rookeries, it would become so hot that serious injury or death to the young seals might be the consequence, as it is well known that even the old seals dislike and are seriously affected by heat.

Special inquiry was made by me at the Commander Islands during the first week in September as to whether young seals had been found dead in 1892 in larger numbers than usual, and several of the oldest natives were questioned by me on this point.

I was told by them that none had been seen there but a few that had been killed by the surf or had wandered away from the rookery-grounds and yet there were many schooners sailing from United States ports sealing in the vicinity of these islands during the whole season, and in July and August a great many schooners came from the American coast and sealed in Asiatic waters; many thousand skins were taken there, probably more than in any season on the American side of Behring Sea, but no increased mortality was noticeable in the number of dead pups on the rookeries. The skins of the dead pups that die on the Commander Islands are taken off by the natives and a small price is paid for them at the Company's store. The men examined by me had been recently at the rookeries for the purpose of procuring such skins and reported that they had got no more than usual, and the agent of the Company corroborated their statements.

I remind you, Mr. President, just before I break off, that now you have got what Mr. Macoun had not, because it did not exist. We have got now the report from the Russian Government that there had been a large amount of pelagic sealing close in—so much so that wounded seals and dead seals were picked up in territorial waters, and were washed ashore; and yet there is not a suggestion by anybody that there had been a death of pups on the Commander Islands in 1892 from that cause.

Senator MORGAN.—Sir Richard, I wish to ask you, please, does any witness speak positively of the fact that the surf ever killed a pup seal?

Sir RICHARD WEBSTER.—Oh yes; several.

Senator MORGAN.—From personal observation?

Sir RICHARD WEBSTER.—Elliott, Allen, Bryant—I think all the authorities who studied seal life during the last twenty years, referred to the fact of pup seals being killed by surf upon the beach, when they are caught.

Senator MORGAN.—I have heard that, but I have not yet heard any statement from a witness who was able to say upon his own knowledge that a pup seal was killed by the surf.

Sir RICHARD WEBSTER.—I think I am right in saying that Elliott spoke from his own knowledge, for he studied the subject intimately on the islands for some years; but I will look, Senator. I believe there is also evidence of it.

Senator MORGAN.—I would like to know.

The PRESIDENT.—Sir Richard, I believe you suppose that this extraordinary disease which carried off a number of seals from this place was the reason of this great mortality in 1891. Is there any information about what that disease might be?

Sir RICHARD WEBSTER.—No. It is very strange. In the first place, it is purely local, which is in itself remarkable. When I come to deal

with the real cause of decrease of seal life in these islands, I shall suggest to you—I merely mention it now by way of anticipation—that it is by no means impossible that the depreciation in the male life may have had something to do with it; but I am not bound to take, nor do I take, any burden of responsibility of affirmative proof in regard to this matter. It ought not to be put upon me. You will remember, Sir, I read to you the paragraph of the United States Case, but a few moments ago, in which they state that the depreciation of the death of the pups in the year 1892 shows that the death of the pups in the year 1891 was due to the pelagic sealing and they cite the fact of the alleged less death in 1892 as showing that pelagic sealing was the cause in 1891:

If the cause of the mortality of 1891 among the pups was any of those advanced by the report.

That is by the Commissioners' Report—

It is a remarkable, and for the opinion of the Commissioners, an unfortunate circumstance, that with the decrease of sealing in Behring Sea, dead pups have decreased likewise.

I shall show you now presently, as soon as I come to it, from the United States affidavit, that even up to the beginning of August, the date upon which Mr. Stanley Brown left, that even up to the beginning of August he had noticed that there was an abnormal number of dead pups there, more than there ought to be; and I shall show you that Mr. Stanley Brown left and made his last examination at an earlier date in August, whereas the examination with regard to the whole subject had to be continued, and was continued by Mr. Macoun right through up to the 11th of September, as I have shown you. I think it is scarcely necessary to read it. I ought probably to have read to you Mr. Maynard's affidavit, Mr. President, on page 156, to which Mr. Macoun refers:

1. That during the latter part of the month of July, and for nearly the whole of the month of August, I was employed in taking photographs on the Pribilof Islands.
2. That on the 23rd day of August, 1892, I visited Tolstoi rookery, on St. Paul Island, in company with Lieutenant Ainsworth, Assistant Treasury Agent on St. Paul Island, Mr. Macoun, an Agent of the British Government, and Antone Melovedoff, chief boatman in the employ of the North American Commercial Company.
3. We walked to the part of Tolstoi Rookery on which dead pups were lying in great numbers, and while we were all standing within a few yards of the limit of the ground on which these dead pups were, Mr. Macoun asked Antone Melovedoff whether he thought there were as many of them as there were last year, to which he replied, "More; more than I ever saw before. I was asked by Mr. Macoun to particularly note what was said, and did so."

I respectfully submit to this Tribunal that in the face of what I have already read—I will show the corroboration when the court reassembles—the argument put forward in the United States Case is turned against themselves; because if the cause of the death in 1891 was as they themselves say the pelagic sealing in the eastern side of Behring Sea in that year, so, the cause stopping, the result should also cease. I have shown you upon testimony which it cannot be suggested is testimony otherwise than honest, of what was seen, that according to that testimony, there was that same mortality in those particular places in 1892. And again it passes the wit of man to suggest why it was more abnormal because confined practically to Tolstoi and Zapadnië on St. Paul and should not affect the other rookeries.

The PRESIDENT.—You think it strange that it did not affect both islands?

SIR RICHARD WEBSTER.—Of course, if it is due to similar causes. I do not know, Mr. President, whether you have studied the subject of epidemics. It is perfectly well known that epidemics will come back to the same place and the same house. I speak of smallpox particularly, which I have had to study very closely. It is well-known that after an interval of 10 years the epidemic will come back to the same place though there is no apparent reason for it, and though every measure was taken to prevent its coming back to that place. It may be due to atmosphere, it may be due to the damp or something else of that kind. All I point out is this that two rookeries are picked out by death in 1891, and the same two rookeries are picked out in 1892.

THE PRESIDENT.—I beg to observe that when mortality befalls young animals in general the most common feature is disease in the bowels, and then of course excreta increases and is observable. I am rather struck by the circumstance, which is not admitted on the other side, that there are no excreta to be found on the island at all.

SIR RICHARD WEBSTER.—On the rookeries.

THE PRESIDENT.—Yes; on the rookeries. Well, I suppose the young ones, the pups, must have excreta and especially in times of disease.

SIR RICHARD WEBSTER.—It is not of the same character as that of the grown up animals. It naturally would not be the same kind, as they have been living only upon milk. I again point out to you, Sir, with great deference—I am only agreeing with what you say—that of course we know very little indeed about the diseases of seals. Indeed I do not know that we know anything about them.

LORD HANNEN.—You refer to your knowledge of animals. I think I am right in supposing that you have knowledge of the grouse. How is it as to disease of the grouse?

SIR RICHARD WEBSTER.—It comes back, to the very same places.

LORD HANNEN.—I wanted to know, as far as you could tell. And it is local?

SIR RICHARD WEBSTER.—Local in the most extraordinary way, particularly on the moors in Scotland. Side by side one moor will have no disease upon it and the other will be visited at every periodic occurrence of the disease.

As far as I know, Mr. President—I wish to give the Tribunal information—I believe it is impossible to predict beforehand until the thing has been really examined what is the cause that brings back disease to particular places; but my task today is to show that in this particular respect the argument of the United States is not supported by the facts which are brought before the Tribunal.

SENATOR MORGAN.—Has anybody said that these seals have diseases of any kind?

SIR RICHARD WEBSTER.—No; but I do not think anybody will say they are free from disease. I know no fish even that is free from disease.

SENATOR MORGAN.—I supposed some of these experts or dissectors would have observed the disease.

SIR RICHARD WEBSTER.—If they knew anything about it; but I do not think they suggest themselves that they do know very much about it. We have it, of course, in some cases the bodies are emaciated and in others we have it stated distinctly that they were not. They were apparently in ordinary condition of health. That is spoken of by Mr. Macoun. The Tribunal will, I hope, not put a greater burden upon me than I can bear. I am not here to discuss the matter from a scientific point of view. I am here in order that the Tribunal may not be misled by inferences incorrectly drawn and by allegations as to facts not justified by the Evidence before the Court.

(The Tribunal here adjourned for a short time.)

SIR RICHARD WEBSTER.—Mr. President, in leaving the British evidence upon this question of the dead seals, I think it right to say that, while it is perfectly open to the United States Counsel to criticize any opinions put forward by Mr. Macoun or the British Commissioners, I think it only fair to say, in justice to the evidence I have been reading from Mr. Macoun's Report, in every case that I have read it is not a case of mere assertion, but the reasons are given whereby the Tribunal themselves can criticize and form a judgment whether his opinion has been formed on sufficient data.

Now, I come to 1892; and I read first Mr. Stanley Brown's affidavit, at page 388 of the United States Counter Case. It is important to remember that Mr. Stanley Brown left on the 14th of August, and that in so far his evidence is not so complete as Mr. Macoun's. At the beginning of the deposition, you will observe that he was between June the 9th and August the 14th upon the Islands of St. Paul and St. George. I do not pause to consider which part of the time he was on St. Paul and which on St. George; I will take it he had practically a continuous opportunity of observing between those dates. Now, turning to page 388, this is what he says:

Dead pups were as conspicuous by their infrequency in 1892 as by their numerousness in 1891. In no instance was there to be noted an unusual number of dead pups except on the breeding grounds of Tolstoi.

That is the same rookery as that which he had spoken of with reference to the prevalence in 1891.

Here the mortality, while in no way approaching that of the previous season was still beyond the normal as indicated by the deaths upon the other breeding grounds.

I pause again to note that they must be confined to Mr. Stanley Brown's observations before the 14th of August, and entirely independent of subsequent observations taken after the 14th of August and in September.

Any surreptitious killing of the mothers cannot be charged with it, for such killing either there or anywhere else on the island would have become the gossip of the village and readily detected by the attempt to dispose of the skins. Disease or epidemics are not known among the seals; and I have never seen cows dead from sickness upon the islands. There are no hauling grounds so close to the breeding areas that the driving of the young males could cause consternation among the females during the breeding season. Stampedes or disturbances cannot account for it, for not only are the breeding grounds in this particular case of Tolstoi one-fourth of a mile away from the hauling grounds, namely, at middle Hill (the nearest point to that breeding ground from which seals were driven in 1891 and 1892), but it would be practically impossible to stampede this breeding ground by any disturbing cause save of such magnitude as to be the subject of common knowledge on the islands, and I know that no cause for such a commotion occurred.

Now if you will turn to the top of page 389—perhaps the learned Senator will let me call his attention to this. Mr. Stanley Brown seems to me to give a reason, and we will attempt to consider it, though it seems to me, with deference to be an insufficient one.

The true explanation of the deaths upon Tolstoi this year is not readily found, and must be sought in local causes other than those indicated above, and I am confident that to none of those causes can be justly attributed the dead pups of 1891 and 1892. The following explanation based upon my acquaintance with the facts is offered in a tentative way: a glance at the map will show that the location and topographic character of this rookery have no counterpart elsewhere on the island. The rookeries upon which death are infrequent are those which are narrow, and upon the rear of which are precipitous bluffs that prevent the wandering of the pups backward. The larger part of Tolstoi, as will be seen from the map, extends far back, and has great lateral dimensions. Much of it is composed of drifting sands, and it has rather a steep inclination down to the sea. The shore is an open one, and the surf,

either gentle or violent, is almost constantly present. As the time for learning to swim approaches the pups find it easy to come down the incline. They Congregate in large numbers upon the sandy shore, and begin their swimming lessons. This is at a period when they are still immature and not very strong. The buffeting of the waves exhausts them, and, coming ashore, they either wander off, or struggling a certain distance up the incline, made more difficult of ascent by the loose sand of which it is composed, lie down to rest and sleep, and are overlooked by their mothers returning from the sea. I have seen mother seals go up the entire incline seeking their pups.

Now whether this be right or wrong, it is utterly inconsistent with the explanation that the mothers were killed at sea, because the pelagic sealers would not know whether the mothers had come, from a rookery where the rocks were bluff and the physical conditions were such that the pup would be found by its mother, or whether from a rookery under different conditions, and, therefore, Mr. Stanley Brown's explanation as to these conditions in 1891 and 1892, which he gives in 1892, is inconsistent with the death of the mother seal at sea.

I have seen mother seals go up the entire incline seeking their pups. I find nothing in the history of dead pups upon the islands which does not confirm my belief that the great mortality of the season of 1891 was due to pelagic sealing in Behring Sea. Had it not been so there is no reason why the deaths in 1892 should not have been as widely distributed and as great as they were the previous year.

Mr. President, if Mr. Stanley Brown had had occasion to stay, and had stayed till the middle or the end of September, and had seen what Mr. Macoun saw, I am satisfied with his honesty he would have stated the facts in accordance with what Mr. Macoun saw. I call attention to this that knowing he had some thing abnormal to explain in connection with 1892, he explains it upon grounds connected with the physical position of the rookeries—grounds which have no connection at all with pelagic sealing.

The only other affidavit is Colonel Murray's to be found at page 378, but most unfortunately it is of no value to the Tribunal as it gives no date at all. He does not say when he examined the rookeries, and it is impossible to form any conclusion as to the time he is speaking of when the large numbers occurred. He says on page 378:

I went over the rookeries carefully, looking for dead pups. The largest number on any rookery occurred on Tolstoi; but here as to the rookeries generally, but few of them were to be seen as compared with last year. This was the first time in my four seasons' residence on the islands that the number of dead pups was not more there than could be accounted for by natural causes.

Therefore he does not agree with Mr. Stanley Brown, who says he saw more dead pups than was normal—more dead pups than would be accounted for by natural causes, and gives us no evidence at all as to the dates when he examined the rookeries. I do not want to occupy time by taking upon myself a burthen that does not rest upon me; but the learned Senator was good enough to ask me if I had any suggestion to make in regard to this matter, and I think perhaps that the killer whales ought not to be put out of sight altogether, and I will tell the Court why I think they ought not to be put out of consideration. It may be that the character of the beach in those localities might make the seals more liable to attack from killer whales at that place than others, and certain numbers of mothers might be killed in the water while bathing off the rocks. It used to be supposed that the killer whale never came there till September; but if the Tribunal will turn to page 311 of Mr. Elliott's last Report, there will be found a number of instances of killer whales coming much earlier in the year, and no doubt our knowledge on this matter is being extended.

In 1882 they were there on the 9th of May, in 1886 they were there on the 5th May, in 1888 they were there on the first of July, and it was so important that Captain Lavender, one of the Agents of the United States wrote to Mr. Elliott on the subject of the killer whales in these terms on page 312. He says:

That he is now stationed on St. George Island as Treasury Agent and not having been long enough on the island to be a competent judge as to the number of seals destroyed annually by these monsters, he has asked the opinion of gentlemen who have spent every season for the last ten years here and the answers to all my inquiries have been that this species of whale must be destroyed or the seal rookeries will be something of the past in a short time; they also informed me, that during the month of October when the pups first take to the water they are killed by the thousand and that the water along the shore of the rookeries is red with the blood of young seals which fall easy victims to these monsters, having no fear of them. . .

He closes with the following sensible recommendation:

The next Congress should make an appropriation sufficient to furnish two whale boats and crews with all the modern improvements for the killing of whales and to station one boat and crew on each island during the ensuing year with orders to patrol the islands daily if possible, and destroy this whale wherever an opportunity is afforded. These boats should be in charge of experienced whalers from some part of the New England states where this whale and other similar species exist in large numbers, there would be no trouble in obtaining men who were well versed in this kind of whaling, and it is my opinion at the end of the year it would be found that killers were very scarce and would not come near the shore while their appetite for seal and seal-pups would be changed so much, that cod fish and other similar varieties would be good enough for them. I shall endeavour to write more fully on this subject in the near future when I have had a little more experience on the islands as I consider it one of great importance.

That rather bears upon the question put by Lord Hannen very early indeed to Mr. Carter, I think, whether any steps had been taken to interfere with these killer whales. This was a recommendation by the Treasury Agents suggesting that the authorities should in some way interfere with killer whales and it also appears that they destroy many more than they eat—that is to say they kill them, as many animals of that kind do, from sheer mischief. The fact of the killer whale preying upon the seals in large numbers as mentioned in page 62 of Mr. Elliott's first report and at the Commissioners report, page 59, paragraph 334:

Killer whales (*Orca rectipinna*) are among the more active enemies of the fur-seal. Mr. D. Webster, who, because of his long experience on the Pribilof Islands, has already been frequently quoted, states that these whales usually come to the islands from the north early in September, and stay about them as long as the seals do. They kill many seals, particularly pups, and wantonly kill, apparently in sport, many more than they actually devour. Captain Lavender, in his Report for 1890, mentions the occurrence of large schools of killer whales in pursuit of young seals about the islands on the 30th October in that year, and Lieutenant Maynard mentions a case in which a single killer whale was found to have fourteen young seals in its stomach. The Aleuts at Onnalaska further stated that they have often seen killer whales pursuing and catching fur-seals, not alone the young, but also the adults.

And Mr. Bryant at page 407 says:

When the season arrives for the young seals to enter the water the animals are seen near the islands creating great consternation among the seals both young and old.

Senator MORGAN.—Is not that an inducement for sending out excursions to destroy killer whales, if the fur-seals are to be subject to another enemy, *hostes humani generis*.

Sir RICHARD WEBSTER.—I do not think that bears directly upon my argument, and of course I must not criticise it. You are aware of the view for which I have to contend and I have argued that I am not representing the *hostes humani generis*.

Senator MORGAN.—I speak of the duties of Congress which Mr. Elliott seems to think incumbent upon them.

Sir RICHARD WEBSTER.—It was not Mr. Elliott, it was Capt. Lavender, but it would not be becoming on me to comment upon what you have said. I must not depart from my position but simply submit what I think is fair on behalf of her Majesty's Government in this respect.

I pass now to another subject, and that is the body of testimony to show a large number of these seals never go near the Islands at all. More than once it has been put to me by a Member of the Tribunal, is there not evidence that a seal must go on land at some period of the year in connection with its peltage? That led me most carefully, together with those who assist me, to examine the whole of the literature again, so far as it was possible to do so having regard to our other duties, and, as far as we can discover, not only is there no evidence that every seal must go to the land, but there is very strong evidence to show that a large proportion of seals every year do not go to the land. It appears to stand in this way; the bulls go to the land when they have the desire and capacity to command a rookery. Many of the "holluschickie" go to the land certainly from the time that they are three years' old possibly younger and haul out; but there is no evidence that every young male goes to the land; and, as I have said, there is strong evidence the other way. There is no evidence that the females go the land at all till they come to be delivered of their first pup. There is abundant evidence in the Appendix, Volume II, pages 33 and 34, of the British Counter Case,—a very large body of testimony showing and pointing indisputably to the fact that impregnation may take place at sea, and there is no evidence whatever in this Case of any virgin cows, in the sense of being cows of one or two years' old, being upon the Rookeries or being in connection with the males upon the Islands.

The evidence is really uncontradicted that every cow that comes to the Islands, so far as it can be traced, is either going to have a pup or has a pup upon the Island. I do not take the British testimony alone at all, but the testimony upon both sides whether or not the virgin cow who has not had a pup frequents inland waters, there is no evidence to show and could be none except that a certain number of virgin cows have been killed within the 8-mile distance and the 20-mile distance, and still further out; but there is absolutely no evidence of the virgin cows going ashore.

In that connexion I would pass from that reference on page 33 of the 2nd volume of the Appendix to the Counter Case. The affidavits should be examined by anyone who wishes to see if the evidence is trustworthy; and I only say this, that reading it for the purpose of seeing whether they were speaking to what they saw or what was merely surmise when you look at these affidavits there can be no doubt, if the men are telling the truth, impregnation takes place at sea.

Lord HANNEN.—There are 38 men who state they were eye-witnesses.

Sir RICHARD WEBSTER.—And there are the natural matters mentioned which leave it beyond all doubt. Assuming we had not this very strong fact, that no cow without a pup has ever been seen on these rookeries from the time she was born, that is a very strong corroboration that the first instinct of the cow to go to the Island is to be delivered of her pup.

Now at page 139 of the first volume of the Appendix to the Counter Case this matter is dealt with:

While on the Pribilof Islands in July and August of 1892 I endeavored carefully to note everything that might throw light on the question as to when the virgin females first receive the males, and during that time did not see one female seal that was

not either still carrying her young, or whose size did not show that she was of sufficient age to have already had a place on the breeding grounds. In other words, I never saw a virgin female upon the breeding islands. Every female of small size that was seen moving about the rookeries or leaving the water was watched, and was without exception found either to go at once to some harem where she was plainly at home, or by her manner it was evident that she had young somewhere on the rookery. Very often, too, if watched until they lay down, it could be seen that their breasts were swollen as if full of milk, though this was by no means always the case. Not one cow concerning which I was left in doubt was seen on any rookery, and I feel certain that no virgin cow came ashore at these places.

Mr. J. Stanley Brown, who had been on the islands for some weeks before I reached them, told me (8th July).

Will the Tribunal remember the United States Case is, and our Case is that the cows have practically all, though not absolutely all come by the end of June—the 20th June is the date nearest fixed.

Mr. J. Stanley Brown, who had been on the islands for some weeks before I reached them, told me (8th July) that he had been carefully watching a number of harems as they grew, and was certain that not one virgin cow had yet come ashore. He told me at this time that he was quite sure that these young females did not haul out with the "holluschickie", but spent the early part of the season in the water in front of the breeding-grounds and came out on them later on and were then served either by the old bulls or by younger ones near the water.

This explanation can hardly, however, be the true one, as were the virgin cows really in considerable numbers in front of the rookeries, they would be seen there at all times; but often, when the day was cold and cloudy, hardly a seal was to be seen in the water near the islands though at other times it was black with them. Where are the young females when few seals are seen in the water?

Were it true that the young females are not served until late in the season, they would be either much later in bringing forth their young than the older cows, or they must carry their first young for a much shorter time than those of following years, which is scarcely credible.

I do not think it will be suggested—we have heard of a great many curious laws mentioned, but a shorter period of gestation in the earlier years will scarcely be suggested.

But two other solutions of the question seemed to be possible: one that females do not come to the breeding islands, unless in very small numbers, until they arrive there to give birth to their first young; the other that these two or three-year-old females haul out with the holluschickie, and are served by the older bachelors among them. Mr. Brown in August appeared to come to the latter conclusion, and even pointed out to me small seals among the holluschickie, which he asserted to be females. Though asked by me to shoot one or two of these small seals (as females had been shot by his orders a few days before at North-east Point for the purpose of determining whether they had been feeding), he declined to do so. Had this been done, these questions might at once have been decided.

Then at the bottom of the page is stated, and the authority of Mr. Bryant is given, that the young three or four-year-old males met cows in the water as they came from the rookeries; and he refers to the virgin females.

It seems then probable that at best the greater portion of the virgin cows are first served at sea. Bryant speaks of its being a common thing for young three and four year old males to meet cows in the water as they come from the rookeries and there perform the act of coition; and though these cows were probably ones that had young ones on the rookeries many hunters and captains of sealing-schooners with whom I conversed at Victoria and elsewhere assured me that they had often seen seals copulating in the water and had shot both male and female while they were in the act. The female in majority of cases was one that had not yet had a pup, though in some instances they were barren cows with milk in their breast.

Then Mr. Stanley Brown, at page 13 of the second Volume of the Appendix to the United States Case, says:

The time of the arrival of the virgin cows is not easy to determine, but from my observation my present conclusion is that they arrive with the cows and for a while spend their time in the water or on the land adjacent to the rookery margin.

That is a present opinion formed by Mr. Stanley Brown after one year's experience of the Islands. It obviously affords no affirmative testimony in favour of the idea; and, on page 16 of the same book, he says:

Up to the 20th of July the breeding grounds present a compact, orderly arrangement of harems, but under the combined influence of the completion of the serving of the females and the wandering of the pups, disintegration begun at that date rapidly progresses.

I wish I had remembered that paragraph when I referred to the pups leaving the Rookeries.

It is at this time that the virgin cows of 2 years of age, and not older than 3 mingle more freely with the females and probably enter the maternal ranks, for the unsuccessful males and maturer bachelors, no longer deterred by the old males, also freely wander over the breeding grounds.

Well, of course the statement of what may *probably* happen is not of any great value for the purpose of forming a definite conclusion.

But now having called attention to that matter the fact of no virgin cows going at all—I now desire to show that there is very strong evidence that a large number of seals never go to the island at all.

Lord HANNEN.—I suppose you mean there is a large number of them that do not go to the island in a particular year?

Sir RICHARD WEBSTER.—Exactly.

Lord HANNEN.—They go at some time or another.

Sir RICHARD WEBSTER.—It is not a matter of necessity that every seal goes to the island every year—that is what I meant, my Lord, exactly.

Now the first matter which I will discuss in this connection, is that which has more than once called forth questions from the Tribunal with regard to what “Stagey” seals mean, and when they are found. Now the “Stagey” period is perfectly well known—it is from the 1st of August to the end of September; and in the 10th Census Report, at page 46—the Standard book of the United States upon Seal Life, prior to the 1890 Report, it is mentioned in this way:

Mr. PHELPS.—This is Elliott's report.

Sir RICHARD WEBSTER.—Yes. Elliott's 10th Census Report, published again in 1881.

About the 15th and 20th of every August, they have become.

That is speaking of the seals on the land.

They have become perceptibly “stagey”, or, in other words, their hair is well under way in shedding. All classes, with the exception of the pups, go through this process at this time every year. The process requires about six weeks between the first dropping or falling out of the old overhair, and its full substitution by the new. This takes place, as a rule, between August and September 28.

Now having fixed the date—I am going to fix it by other evidence as well—I ask the Tribunal to understand that my case is that during that period seals are continuously taken at sea, showing that it is not required for the animals to be out on land during such a period; and, further than that, upon the evidence, prior to the year 1892 there is no suggestion of a “stagey” seal ever being found in the pelagic catch. The United States in their Counter Case have endeavoured to give some evidence with regard to the year 1892, to which I will call attention before I leave this branch of the subject; but my case is that the “stagey” season is from the 1st of August to the end of September—the 28th September; and that during that time seals are continuously taken at sea in the non-stagey condition.

Now Allen, at page 404 of the Monograph of North American Pinnipeds, says:

A diversity of opinion exists on the island as to whether or not the fur is shed with the overhair. I have given close attention to the subject and find that all the evidence is against the opinion that the fur is shed. The great quantity of overhair annually shed by this immense number of animals cover the ground like dead leaves in a forest. It is blown by the winds around the rocks, and becomes trodden into the soil, so that when the earth is dry if a piece be taken and broken the whole mass is found to be permeated with it like the hair in dried plaster. The difference between the fibres of the overhair and the fur is plainly apparent to the eye. I have, however, gathered parcels of it at all times during the shedding season and subjected it to microscopic examination, but have always failed to detect the presence of fur in sufficient quantity to warrant the belief that any of it is shed naturally. The shedding of the overhair begins about the middle of August, and the Seals are not fully clothed with the new coat until the end of September, and it does not attain its full length before the end of October. The first indications of shedding are noticed around the eyes and fore flippers and in the wrinkles or folds of the skins.

General FOSTER.—That is Bryant quoted by Allen.

Sir RICHARD WEBSTER.—I really was not sure, General Foster; I am very much obliged for the correction.

General FOSTER.—It is very important.

Sir RICHARD WEBSTER.—It makes no difference from the point of view of authority. It is quoted by Allen—I think General Foster is right. It is Bryant's language but it is quoted in Allen's book. It is quoted as an authority to which Allen has given his approval.

I am not quite sure that it has not been suggested by the Tribunal, but it seems to me there may be not a natural solution of this matter. It seems to me it is quite possible that the coat may change while the seals are in the water more gradually without the seal actually becoming "Stagey" or in that condition; because it is clear that there does occur a difference in the appearance of the coat when the seal has been out sometime upon the land.

Now the British Commissioners Report upon this contains some statements which will be of assistance to the Tribunal; and I call attention, first, to Paragraph 134, where they say:

With seals killed at sea, the skins are never found to be in a "Stagey" condition as has been ascertained by inquiries specially made on this point, and there is, therefore, no naturally definite close to the time of profitable killing, such as occurs on the islands. The markedly "stagey" character of the skins at a particular season appears to be confined to those seals which have remained for a considerable time on the land.

I also call attention to paragraph 281.

About the middle of August, most of the seals found upon the Pribiloff Islands become what is known as "stagey", in consequence of the shedding of the hair and under-fur. This condition appears to continue, more or less definitely, for about six weeks. The fact, elsewhere mentioned, that practically no "stagey" skins are ever taken at sea, appears not only to show that the change in pelage is rendered definite and well marked by prolonged resort to the land, but also that during this period the seals frequenting the islands do not go to any great distance from their shores.

I also call attention to paragraphs 631 and 632.

631. No loss occurs at sea from the taking of seals with "stagey" or unmerchantable skins. All those familiar with pelagic sealing who were questioned upon this point agreed as to the fact that "stagey" skins are practically never got at sea, not even in Behring Sea at the season at which the seals upon the islands are distinctly "stagey". The skins taken in the earliest part of the sealing season, in December and January, are sometimes rather inferior, but they do not fall into the general category of "stagey" skins.

632. It would thus appear that the distinctly "stagey" or "shedding" condition of the fur-seal supervenes after a sojourn of some length on shore, and that such sojourn results in a general change of pelage which does not occur in the same

marked way when the animals remain at sea. The same circumstances has further some bearing on the question of the possible excursions of the seals from the breeding islands, and on the interchangeability of the seals remaining on or about the islands with those of the general sea-surface, which thus seems to be exceptional, during at least the later summer and early autumn, which is the "stagey" season ashore.

Mr. President, the pelagic sealing has extended right away through the months of August and September, and up till the year 1892, no suggestion has ever been made that skins in a "stagey" condition form part of the pelagic catch.

Now I wish to give you what is the United States evidence in support of the theory that "stagey" skins may be found at sea. Will the members of the Tribunal be good enough to take the Counter Case of the United States before them and turn, first, to page 412. There will be found a trade report incorrectly called a catalogue. The number of skins are too small to make this document of any use. They might be raided skins.

I am not sure that this is ever actually referred to in the United States Counter Case itself. If it is, I will supply the reference, but this is the only evidence.

TITLE PAGE OF A LONDON CATALOGUE OF FUR-SEAL SKINS. C. M. LAMPSON AND CO.

Those you know, are the agents of the lessees.

LONDON, 31st March, 1892.

AT THE SALES OF SALTED FUR-SEAL SKINS

THIS DAY

C. M. LAMPSON AND CO.

Skins.

632. N. W. Coast, etc., part stagey (low).....	} Sold the same as in January last.
472. Cape Horn	

GOAD, RIGG AND CO.

1,519. N. W. Coast, part stagey (low)	} Sold the same as in January last.
1,969. Cape Good Hope.....	

Now at page 357 of the same book, is the evidence of Mr. Charles J. Behlow. He has made a number of affidavits. I shall have to say in connection with another matter—I will not pause to prove it now—that Mr. Behlow's testimony is open to very serious criticism with regard to his accuracy. This affidavit is made in November 1892. He says:

I find that all fur-seals taken both in Behring Sea and on the islands therein, from about the 10th of August until the end of October, are what is known to the trade as stagey, meaning the animal is changing its coat, during which period its skin is very inferior in quality; in fact, almost unmerchantable.

Now on page 376 of the same volume, will be found the affidavit of Mr. Walter E. Martin made in November 1892. These are made in connection with the Counter Case. He says:

I have, as therein stated, handled large numbers of fur-seal skins of all kinds, including Northwest Coast skins, or those of animals taken in the water, and I know from personal experience that a certain number of "stagey" skins are always found amongst them. Whether or no skins taken in the water are "stagey" will depend on the month in which they are taken. The staginess does not begin until after the middle of August, and as most of the skins secured before the seals enter Behring Sea are taken previous to that date the percentage of "stagey" skins amongst this class is insignificant. But among the skins taken in Behring Sea after August 15th will always be found a certain percent of stagey ones.

I call attention to a catalogue which will be exhibited now, of the sales of skins for years; and up till 1892 no suggestion of any skins being so described is to be found—

Lord HANNEN.—I suppose, Sir Richard, I must have missed something: what is the importance of this? If “stagey” seals are found at sea, it proves that they do not need to land to become “stagey”.

Sir RICHARD WEBSTER.—I suppose it is in order to meet the case which the British Commissioners believed to be the true case—(and our evidence would seem to support it)—that “stagey” seals are not found to any great extent, my Lord, at sea. However, there is only one other reference which seems to me to give the clue to the whole thing. I am reading from the affidavit of Mr. Thomas F. Morgan, at page 377 of the same volume, where he says:

Filth, grease, and oil make skins come out of kench flat, and such skins are classed as low when sold.

Now that shows that the classing of the “low” skins, which was the other name given for these so called “stagey” skins in 1892, is due to filth, grease, and oil, when the skins come out of the kench (which I believe is something to do with the mode of treatment); and therefore the piece of evidence which has been supplied by the United States in this regard we submit is of no substantial value to rebut the statement that “stagey” skins are only found where the animals have been a long time upon land.

Lord HANNEN.—It would appear from the furriers’ statement that there is a difference between “low” and “stagey”.

Sir RICHARD WEBSTER.—Well, I should have thought not.

Lord HANNEN.—I should infer that from the way it is entered. Some of them are called “stagey” and some “low”.

Sir RICHARD WEBSTER.—But in the catalogue, my Lord, which is exhibited by the United States, page 412, I read the word “low” to be a synonym for “stagey”. Perhaps you would not mind looking at it again.

Lord HANNEN.—Certainly; what is the page?

Sir RICHARD WEBSTER.—412. It is put in brackets. This is the only evidence. We have to draw our own conclusions in regard to it.

The PRESIDENT.—“Low” is generally of inferior quality, I believe?

Sir RICHARD WEBSTER.—So I understand it.

The PRESIDENT.—And stagey skins are always “low”, though “low” ones are not always “stagey”.

Sir RICHARD WEBSTER.—They mean by that use of the word “stagey” that they are not in good condition. That is what I read and understand that extract to be. I think it is not an unfair thing to say, Mr. President, when this evidence is produced in the Counter Case, and when there is prior to the period of the United States Counter Case no evidence at all of stagey seal being found at sea during that time, I think it will be some warrant for the argument I am using.

Mr. CARTER.—You observe the date is 1892.

Sir RICHARD WEBSTER.—I so stated. I stated 1892.

Mr. CARTER.—That was before the Counter Case was prepared.

Sir RICHARD WEBSTER.—I beg my friend’s pardon.

Mr. FOSTER.—It was the 31st of March, 1892.

Sir RICHARD WEBSTER.—My friends must not misunderstand me. I am not suggesting that the catalogue is not genuine, or anything of that kind. They misunderstand me. My point is that desiring to get

the best evidence they could to support the view of stagey seals being found at sea. when they are preparing their Counter Case, they find this catalogue, and put it in. My criticism is not that they are guilty of improper conduct, but that from the facts in regard to the matter, there is warrant for my argument. They will have a chance to rebut my argument when the times comes for them to reply.

My strong point is this, which I have mentioned already: that during the whole time the seals are stagey on land, they are being taken at sea in ordinary condition, so far as we can tell. I have had put together an abstract which I will hand to my friends and to the Court, taken from the affidavits, of exactly the same character as that Mr. Couderc used in reference to one part of his case. I think it was about the percentage of females. This will save the court a good deal of trouble in looking up references. All the references are from volume II of the Appendix to the British Counter Case. This bears, Mr. President, upon both points. Perhaps I had better state it once more. It bears upon the point that during the time seals are upon the island, both previous to the stagey time and at the stagey time, they are found at sea, large distances from the island under circumstances which would indicate that they have no immediate connection with the island.

I will ask Mr. Macoun to indicate on the map, as I read, the various places mentioned:

Seals not frequenting the Breeding Islands.

C. F. DILLON, p. 47.—In 1888 I came south from Behring Sea, about latitude 175—west, and caught seals there. This was in the latter part of August. In 1886, late in August, we killed seals 30 or 40 miles south of 172nd Pass. Between Unimak Pass and Saanak Island, in 1887, I saw seals quite abundant in the latter part of July. In 1889 we got seals about Kadiak, off and on, all summer. In 1890, late in August, I killed a sleeping seal off the Shumagin Islands, and saw others.

CHARLES J. HARRIS, p. 51.—In August 1890 I saw seals about 300 miles from Kadiak, and in August, 1891 I saw seals about 250 miles from Kadiak. I have seen seals as far south as Queen Charlotte Islands in August.

R. O. LAVENDER, p. 55.—Coming home from Behring Sea this year I saw four sleeping seals off Cape Flattery, the 21st July; one was shot. It was a barren female.

ABRAHAM BILLARD, p. 56.—Last year the "Beatrice" crossed Behring Sea from east, starting from a point 35 miles north of St. Paul Island. I saw seals all the way over to the Copper Island grounds, and got two seals on the line between the Russian and American sides of the sea.

W. T. BRAGG, p. 57.—In August 1888 I saw sleeping seals in the water near the Scott Islands, that is within 20 miles from the said islands, and have heard other sealhunters make statements that they had also seen seals there.

ALFRED R. BISSETT, p. 60.—From my experience and observation I believe that immense numbers of the seals that go up this coast never enter Behring Sea. I know that all through the summer and early fall seals are scattered over the North Pacific, north of Vancouver Island, and as far as the 165th meridian east.

WILLIAM DEWITT, p. 62.—In 1891 the "Viva" crossed Behring Sea from about 20 miles north of Amnka Pass to the Copper Island grounds. I saw seals scattered all the way over. This year the "Sea Lion" went over outside the Aleutian Islands. I saw the seals in about the same way all the way over.

GEORGE FRENCH, pp. 66, 67.—Last year, 1891, when the "City of San Diego" was crossing Behring Sea from Amnka Pass to Copper Island, we passed small bands and bunches of seals travelling rapidly north-easterly; this took place on three different days. The last lot we met were about 150 miles from Copper Island. These seals were the same kind of seals we got at Copper Islands, and I am fully satisfied they were crossing Behring Sea to the Pribilof Islands. This was between the 5th and 12th July, 1891.

EMILE RAMLOSE, p. 72.—Other years I have seen seals,—large seals,—in July outside of the 172nd Pass, and in August between Unimak Pass and the Saanak Islands.

ERNEST LORENZ, p. 73.—Last year I got female seals in milk off Queen Charlotte Islands in July.—I know from my own experience that seals remain off the coast of Vancouver Island all the year round, as well as off Queen Charlotte Islands and Southern Alaska.

GEORGE McDONALD, p. 77.—One year,—in the month of August, on the “Lily”,—I got seals 200 miles south of the Shumagin Islands.

JOHN WILLIAMS, p. 84.—About the 25th June the “Brenda” left the vicinity of Kadiak Island for the Copper Island sealing-grounds, at which we arrived on or about the 24th July. On the voyage over, when off the Rat Islands, about 90 miles south, I saw numbers of seals travelling towards these islands.—When the “Brenda” was about 40 miles south of Attu Island I saw seals; the weather was too rough to hunt.

W. O. HUGHES, p. 101.—About the 23rd June last I left Tonki Bay for the Copper Island grounds, at which I arrived on the 10th July. Between the 172nd Pass and the western islands of the Aleutian group, from 30 to 60 miles off south shore, I saw scattering seals.

G. C. GEROW, p. 11.—I do not know cows go to sea to feed when they have young on the islands, but far to the westward cows in milk are seldom taken; *the seals there are young females and males.*

GEORGE WEBSTER, p. 120.—In travelling from the American to the Asiatic side of Behring Sea from the middle of June to the middle of July I have seen seals all the way across on fine days.

W. O. SHAFTER, p. 125.—In crossing from the American to the Asiatic coast in July we saw seals more or less every day.

LEE J. THIERS, p. 127.—In coming back from the Japan coast this year we left, Skotan about the 24th June, and followed the “great circle” track for Victoria where we arrived about the middle of July, and in the passage across I saw seals every day.

WARREN F. UPSON, p. 127.—In crossing over this year to the south of the Aleutian group, going to the Commander Islands, during the month of July, I noticed seals more or less in the passage.

F. J. CROCKER, p. 129.—In crossing from the American to the Russian side I have noticed seals more or less every day during the passage; this would be about the month of August.

H. J. LUND, p. 131.—On the way home this year (from Asiatic side) during the month of July, on the “great circle” track, we saw seals every day—some days as many as twenty.

NOTE.—These notes are included under the heads “Intermingling of fur-seals in all parts of the north Pacific,” and “Occurrence of fur-seals south of the Aleutian Islands during the summer months,” (in vol. II B. C. C. App.) where many additional references will be found. Only those in which the month is mentioned are included in the above synopsis, though all referring to the crossing from American to Asiatic side of Behring Sea might properly have been included.

The Makah Indians at the bottom of this page 8, who as it happens, speak to the seals about Cape Flattery, certainly give very important testimony in this respect:

Many of the Makah Indians whose testimony appears in the United States Case (Appendix II) state that the seals remain in the vicinity of Cape Flattery until July. Among these the following may be mentioned as the most important:

LANDIS CALLAPA, p. 379.—Middle of July.

JAMES CLAPLANHO, p. 382.—Middle of July.

FRANCK DAVIS, p. 383.—As late as July.

ELLABUSH, p. 385.—Middle of July.

ALFRED IRVING, p. 386.—Middle of July.

JAMES LIGHTHOUSE, p. 390.—Middle of July.

OSLY, p. 391.—Last of June.

WILSON PARKER, p. 392.—June and July.

JOHY TYSUM, p. 394.—Middle of July.

WATKINS, p. 395.—Middle of July.

CHARLEY WHITE.—10th July.

WISPOO.—In July nearly all the seals have disappeared.

HISH TULLA.—Not all gone until in July.

THOMAS ZOLNOKS.—In July all are gone.

The above dates should more properly be taken as those at which seal-hunting is discontinued by the deponents. As Charles Hayuks says, “We continue taking them (at Barclay Sound) until June, but there are seals about all summer. (British Counter Case, Appendix, vol. II, p. 146.)

Mr. President, would you just conceive for a moment what the importance of this is? The case that the United States make, in justification of their claim for a regulation giving them more than the property

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claim would have given them, must be, if it is worth any thing at all, in connection with some idea that every seal has got such connection with the Pribilof Islands that they are entitled to have it given to the United States. That is their case.

Now, take the end of June and the beginning of July. What is going on then? Breeding upon the islands. That is to say, the impregnation, and birth of the young. If the case were that the seals must be at those islands at that time, the Pacific Ocean would be empty of seals; and the rest of Behring Sea would be empty of seals, during these important months, when, according to the contention of the United States, every seal must be upon the islands, it is the fact that thousands of miles away from these Pribilof Islands, these seals are found at this period of the year.

Then take the stagey season. Many of the dates which I read referred to the time when, according to the hypothesis suggested for our consideration, the seals must be upon land in connection with their pelage. My respectful suggestion is that for the Court to act upon any assumption in the face of the testimony to which I have called attention would be to disregard the conclusions that ought to be drawn from evidence, in the ordinary sense of the term, and in the absence of any contradiction, if it can be contradicted, or in the absence of any suggestions as to how it is that these seals are found at these great distances from the islands at a time when, according to the United States hypothesis, they ought to be upon the islands, you are to come to the conclusion that every seal must go to the island at some time of the year or another. There are only two causes suggested, Mr. President. The one cause is the sexual instinct. The other cause is pelage. One relates to a limited time, between what I may call the beginning of June and the beginning of July, and the other relates to a limited time from about the first of August to the 28th of September.

Senator MORGAN.—You make no reference at all to the interruption that might possibly occur in the journey up to the Pribilof Islands from the seals being hunted and shot at and wounded and driven off their course in consequence of those things.

Sir RICHARD WEBSTER.—Of course, Mr. Senator Morgan, it is a perfectly fair observation to be made, if there was any reasonable evidence to suggest that the millions of seals which, according to the United States Case, must be there in order even to approximate to the quantity which they are able to kill every year, could all be so dispersed or diverted by their natural enemies.

Senator MORGAN.—Not at all. It is very few, as I understand it, that are dispersed and prevented from going to the islands.

Sir RICHARD WEBSTER.—I should not have thought—I am addressing the Tribunal—that it was a satisfactory criticism of the evidence that I have read to refer to those seals as being few. There is a large number of witnesses and a large number of different voyages during June, July, August and September; and in the aggregate I should have submitted with confidence that, looking to the length of the voyages, and looking to the length of the distances, it means a very large number of seals, and not a few.

But under any circumstances, frightening the mother could not prevent the seal going to land for staginess. In fact, I should rather have thought they would prefer to go to the land if they were frightened at sea. Of course if the mother is killed, she will not go to the island. She goes to the bottom of the sea or into the boat; but how killing the mother can prevent another mother from going to the island, seems to me difficult to understand.

Senator MORGAN.—There must be, according to the evidence in this case, a large number of seals that are wounded, as the skins show it.

Sir RICHARD WEBSTER.—The skins that go to the islands. That the skins show by the animals going to the islands and the shot marks being found in them.

Senator MORGAN.—It is not to be supposed that all of them arrive in due season.

Sir RICHARD WEBSTER.—Of course a romance or suggestion is extremely valuable for the purpose of endeavoring to solve this; but surely is it not an unfair argument in reply to the suggestion to point out that as far as the individual seal is concerned that seal is killed.

Senator MORGAN.—It is not a romance that if there are seals wounded and killed at sea by pelagic hunters they do not reach the islands.

Sir RICHARD WEBSTER.—Have I ever suggested the contrary of that, Sir? I am only entitled to have my argument considered, as I am sure it will be considered by every member of this Tribunal, in the sense in which I wish it to be understood. I have never said they were not wounded. I have never said that seals wounded do not subsequently recover; and may be for the time being impeded in their course going to the islands. But I submit upon the evidence to come to the conclusion that this wholesale distribution of seals all across the coast remaining down off Vancouver Island.

Lord HANNEN.—All across the ocean.

Sir RICHARD WEBSTER.—All across the ocean and remaining down at Vancouver Island at a time when *ex hypothesi* they should have been at the Pribilof Islands I should have thought on that hypothesis it was difficult to shew it was due to pelagic sealing; and certainly in regard to Behring Sea in the year 1892 it could not apply for in the year 1892 there were no pelagic sealers in Behring Sea.

Senator MORGAN.—But does it not apply to those passes through which the seals most go, and in which they are killed in large numbers?

Sir RICHARD WEBSTER.—Then I would have thought it would have driven the seals away from there. It does occur to me—I don't know whether you think it is a remark worth anything at all—that a great amount of driving on the islands might make the seals leave the islands.

Senator MORGAN.—Possibly so; yes.

Sir RICHARD WEBSTER.—It seems to me an inference that may not unfairly be drawn with reference to the evidence that was referred to by the Attorney General to say that the number of seals has increased at sea rather than diminished.

In this connection, Mr. President, to clear away all the subordinate parts that I can, and to leave as little as possible to-morrow, might I call attention to the state of matters in regard to barren seals? The argument of my learned friends disregards the element of barren seals altogether. It is suggested to us by the Tribunal to-day—suggested to me for my consideration—that I am to suppose that seals never suffer from any diseases at all. I am afraid I cannot as an advocate accept that conclusion. I know of no animal, no fish, no bird that does not suffer in the ordinary course of nature from disease, and disease which will at times nearly clear it off; and I should have thought it very strong to suggest that seals, having regard to their life, were the only animals known to the naturalists that were exempt from disease. But I suppose it will not be suggested that every female seal that is born is capable of bearing pups. But even assume it; what does it mean? The hypothesis of the United States Commissioners, under-

stating—I think it is understating, as I shall show in another connection later on—the hypothesis of the United States Commissioners is that there must be at least three million seals in a normal condition and that of that three million seals the very smallest number of females must be 1,500,000. In fact upon their own figures the proper proportion would be something like 600,000 males to about 2,400,000 females; but I am not adopting, for the purpose of my illustration, views of the proper condition of the seal herd, which on the evidence appear to be not well founded. Therefore I am not straining my point by assuming in my own favor what I may call the extravagant relations of male and female, which the United States Commissioners have thought, and the United States Case submits, to be sufficient and proper for this race. I am taking a normal condition of things and assuming three million of seals to be the total of the herd, an understatement as I should suggest, by probably a million at least; but assuming three million it would be 1,500,000 female seals bearing, that is to say having come to the age of three and dying off at the age of 13 or 14 as the case may be. They give for the extreme life something like from 10 to 14 years, and it would be an average of somewhere about 12. That seems to me to be somewhat of an overestimate.

Lord HANNEN.—Twelve years is an average of what? Pup bearing?

Sir RICHARD WEBSTER.—For pup bearing; yes. If I take it to be ten years—it really makes no difference, for the Tribunal can do the figures themselves—I assume for the purpose of simplicity of calculation that 1,500,000 is the total number of female bearing seals necessary for the herd which means that 150,000 seals pass into the barren stage or die every single year.

Mr. CARTER.—You do not mean that is their assumption. You seem to impute it as being such.

Sir RICHARD WEBSTER.—It is really their assumption.

Mr. CARTER.—I think not.

Sir RICHARD WEBSTER.—I have not put it upon you. I will demonstrate it to-morrow from the United States figures. I think the United States Commissioners say in terms that the herd must be about three millions, of which 1,500,000 would be bearing females.

Mr. CARTER.—Not bearing females. You are quite in the wrong about that.

Sir RICHARD WEBSTER.—Indeed I am not; but I shall endeavor to point it out to-morrow that I am correct. The assumption which it will be found the United States Commissioners proceed upon is that the total herd consists of bearing females about 1,500,000. I am much obliged to you, Mr. Carter. I see now what you had in your mind. I have not stated it quite correctly. I stated it from memory. I refer to page 357, of the United States Case. I know now why I made the mistake:

In order to represent more clearly the enormous herd of seals which it may be supposed at one time frequented the Pribilof Islands, undisturbed by man, these numbers may be multiplied so as to give a total of 3,000,000 seals, 750,000 being born every year and the same number dying from natural causes. Of the 1,500,000 females about 800,000 would be breeding, the remainder mostly too young to breed, a very small number being barren.

I am very much obliged to Mr. Carter for correcting me. I was quite in error; but I had no intention of misrepresenting. The thing I had in mind was the number it would be if that 3,000,000 was increased to the proper amount; and I mistook the figures. I will take the figures as stated: 800,000 for breeding females, and the average life for breeding,

which I have stated. That would therefore mean, assuming them to live an average of ten years, 80,000 passing into the barren stage or dying, granting even that among the rest there were no barren females, and that these are bearing every year. Those 80,000 at least are wholly and entirely lost, so far as the sealing industry on the Islands is concerned. It is not denied that upon the sealing islands they do not intentionally kill females. They take great credit for it. Whether they are right in taking credit or not is a matter which may be worthy of a little consideration.

But assuming, Mr. President, that a zone were established which would prevent the females being killed who had pups dependent upon them, and a close time were established, which would prevent the females being killed that were gravid, I do not hesitate to put before this Tribunal—and I ask their serious judgment upon it—that killing which would take its fair share of females, including these barren females, together with males, would be a better system than one which rejected this altogether. I must not be drawn into the argument, which I want to keep entirely distinct, of what happens to this race of seals, the enormous proportion that are killed by killer whales and other animals, that disappear altogether. I must not be drawn into the consideration of the fact that we are dealing only with the surplus of this race. That is a matter which requires to be most carefully examined, and I must keep it entirely distinct. But I point out that from the point of view of the duty of this Tribunal, namely to find what is necessary for the preservation of seal life, if they are able to define a zone which will under ordinary circumstances prevent the nursing female on whom the pup is dependent from being killed, and such a close time as will prevent the gravid female from being killed, they discharge their duty; from the point of view that those two operations are necessarily wasteful. Then I do not hesitate to appeal to our experience of any other living animal, and to ask the Tribunal to come to the conclusion that a system that takes account of the proportion of barren females would be better than a system that disregarded this altogether. *Ex hypothesi*, unless the stagey theory be found against me, the barren females do not necessarily go to the islands. *Ex hypothesi* the female that has not attained to the sexual desire, or has lost it, would not be tempted to go there in the month of June and July. If, as I have ventured to demonstrate, the stagey season cannot be one during which the seals are all on land, and are not found—except on the island, and if the cause suggested by the learned Senator for the seals being irregular in their times of arrival at the islands be not a sufficient cause, it stands to reason that given the two conditions which I have mentioned:—the protection of the nursing mother while the pup is dependent upon her, and protection of the gravid female,—it is to the interest of the world that is supposed to be longing dying for the blessing of seal-skins, that the barren females should be caught and captured instead of being wasted; and the system which has been lauded with so much praise by my learned friends disregards that annual death or disappearance or that very large number of animals, amounting in their calculation to between seventy and eighty thousand females.—

Mr. CARTER.—On whose calculation?

Sir RICHARD WEBSTER.—On the calculation of the United States Commissioners.

Mr. CARTER.—Seventy or eighty thousand females?

SIR RICHARD WEBSTER.—One tenth of 800,000. Mr. Carter did not do me the kindness to follow me. I have pointed out that on his own calculation there are 800,000 breeding females. They are supposed to continue from ten to fourteen years, bearing pups. Therefore from one-tenth to one-fourteenth of that number must pass into the barren class every year. If Mr. Carter will consider this in the silence of his own chamber, he will find I have not made a mistake; and, if I had, he would be the first to point it out when he comes to consider the matter.

MR. CARTER.—I would like to understand the matter, but I confess I do not understand how they can go into the barren class by death.

LORD HANNEN.—They do not bear any longer.

SIR RICHARD WEBSTER.—They do not bear any longer. They cease to breed because they no longer have the sexual instinct, and do not happen to bring forth the pup and eventually they die. Those that have passed breeding are what I call the barren females; but really, while admitting that Mr. Carter is my master, and that he can criticise the way in which I am putting my arguments.

MR. CARTER.—Not at all.

SIR RICHARD WEBSTER.—I trust he will try to follow the substance. The substance is that of the 800,000 breeding females every year, from one-tenth to one-twelfth cease to be breeding females; and I do not repeat myself, because the proposition seems to me, so stated, for the reasons I have given, one which does deserve to be considered.

But now, Mr. President, I want to say one word with regard to a part of the case which in my mind, in one aspect, presents, or would present, more difficulties in the way of the Government of Great Britain, and which I frankly admit at once that if the Tribunal are in a position to deal with the whole question of injury to the seal race ought to be dealt with. I mean the question of the killing of gravid females as apart from the killing of nursing mothers. Here I come to the part of the case which takes me outside Behring Sea and I endorse the arguments presented by my learned leader which I was touching upon on Monday afternoon when the Tribunal indicated that I was only going to a certain extent over ground with which they were familiar.

I must say what I am about to say under reserve because I distinctly contend that the area of Regulations is the same as the area of the right but apart from that nobody who has looked into this case fairly and desires to consider Regulations as apart from prohibition can have any doubt I think what ought to be done. When attack has been so unfairly made upon the British Commissioners let me remind the Tribunal of this one incident in connection with their Report, that they point out themselves the deleterious nature and harmful character of pelagic sealing during the spring months when the gravid females are passing up the coast, and be it right or be it wrong, be it sufficient or be it insufficient they themselves acting with perfect impartiality suggest a remedy which they submit to the judgment of those who have to decide on this question whether to this Tribunal or any other Tribunal.

The evidence shows, and I am not going in any way to minimize it or cut it down, in so far as it may tell against me, unquestionably that a considerable number of gravid females are killed during the coast-catch taking it from our own point of view, I do not think it could be put lower than 30 to 40 per cent, and I think my learned friends might fairly say as a criticism that if in the coast-catch there were as many females as males, and that most of those females other than the virgin females that might be passing up would be in the gravid condition. I

state this, as much as I can against myself, whether it is 30 or 35 or 25 per cent. ought not to make any difference in the mind of the Tribunal.

I have recognized in my argument that the theory of useful game-laws is that such a wasteful method of killing would not be permitted, and speaking to civilized men—men of the highest civilization and cultivation of all nations, I shrink from putting any argument that might not be thought to commend itself to their minds, and for the purpose of my argument, though I think I could satisfy this Tribunal, if it was at all important for me to follow it up, that in the evidence of many of the witnesses who have spoken for the United States, there is very great exaggeration, that the number of females gravid and supposed to be gravid is a great deal exaggerated, yet I cannot shut my eyes to the fact that taking the British evidence as it stands there is quite sufficient proof of the killing of gravid females during those earlier months to justify some regulation in that regard in order to prevent even that percentage.

Now what does that mean? It means this; that you ought to avoid the pelagic sealer being tempted to attack the herd at a time when it is composed principally, or largely, or to any great extent, of gravid females. We are not without statistics, and not without *data* enabling us, to a very considerable extent, to assist the Tribunal in coming to a conclusion in that respect. In the first place, the date at which the whole herd arrive at the Pribilof Islands is pretty nearly fixed. I have stated it more than once myself in the course of my argument to-day. It may be taken roughly to be about the 20th of June. It is stated by Mr. Stanley Brown, quoting from memory, to be the beginning of July, when the Rookeries are about all filled up. The United States Commissioners themselves say they arrive early in June up to the end of the month, and the harems are complete early in July. That will be found at pages 325 and 326. Of course, in a matter of this kind, there would be a difference of opinion; but it is not an unfair representation to take that.

What do we know further? We know further that, during the latter part of May and the beginning of June, the animals "bunch up", as it is called, and travel rapidly from the Unimak Pass to the Pribilof Islands; in other words, in the latter part of May, they are found *in* Behring Sea and not *outside* Behring Sea.

Mr. Justice HARLAN.—Including the females?

Sir RICHARD WEBSTER.—Yes; I confine my attention to females. It is not, for the purpose of this argument, necessary to consider the killing of males; I consider the question of interfering with that kind of killing which is said on all hands to be a kind of killing to be restrained.

Bearing that, then, in view, the first date is, within what time, or up to what time should pelagic sealing be prohibited altogether? I pass from zone, Mr. President, and deal now entirely with the question of close time.

Now it was very properly if I may say so put by a member of the Tribunal, whether or not, adhering to the date mentioned by the British Commissioners, the 1st of July, coupled with the zone indicated by Sir Charles Russell, we were not giving away a point which the pelagic sealer or Great Britain on behalf of the pelagic sealer might fairly make. My answer is it seems to me fairly not for this reason—that you cannot always calculate on a particular day. We have the evidence in the past, sometimes the seals are a few days later and sometimes a few days earlier. Sometimes they have begun to arrive in the middle

of May, and at other times not till about the middle of June and it seemed to me, in connection with the zone, to say that no pelagic sealer should go into Behring Sea at all till the 1st July, gives an ample margin, for all the bunched up herd of female seals desirous to get to the Pribilof Island to get there in safety without any attack upon the herd as it was travelling to the islands. There I am tempted to remind you, Mr. President, of a fact called to our attention by Mr. Justice Harlan—in my judgment not without significance, and that is that the great majority of sealing vessels interfered with in the Behring Sea were upon the migration route—you know the route I mean from the Passes to the Islands.

It is not conclusive because it may be that harm might be done elsewhere but at any rate it shows that in those years a number of those vessels saw the migration route was a place where pelagic sealing might be successfully carried on. Therefore, taking July the 1st as the date up to which no pelagic sealing should be carried on in Behring Sea, you secure the whole herd being in Behring Sea, as far as the herd is concerned, and in addition to that, you leave the zone that was spoken of as a further protected belt, to which I need not give a further reference.

Now, I do not know if the observation as to commencing sealing at a certain date was directed as much to inside Behring Sea as outside; but fixed dates can be easily observed. Vessels can only enter through certain Passes; they are not likely to go right the way round to the West. It is easier to “police” the matter, to use my learned friend, Sir Charles Russell’s phrase, if the date is fixed; because vessels must keep logs and, of course, that would enable a check to be kept.

Now, I come to the part outside; and a question was put by a Member of the Tribunal, What information can you give as to the 1st of May being sufficient for vessels clearing from those ports?

Let us take the ordinary state of things. I am assuming Regulations applying to sailing schooner. This Tribunal will be able to have assistance in this matter practically from some of its Members. If a schooner could make in the day of 24 hours a course of from 100 to 120 miles, I mean a course on the Chart, she would do pretty well. Of course, a schooner will sail 10 or 12 or 13 knots an hour, but that is only the way that the wind will take her; and she might have strong adverse winds. The distance is about 1,560 miles from Unimak to Victoria; and, allowing a vessel to clear away by the 1st of May, if she went post haste, you could not calculate her getting there before the middle of May.

But that is not the course the vessels would take, because they do not go out for the straight voyage. They go out for the purpose of sealing, and the Commissioner’s Report shows this, that, as soon as they come to the seals, they begin to seal and follow them up, and it is in order to let the female part of the herd, which is well ahead, get still further ahead, and get into the Behring Sea by the end of May or the beginning of June that that suggestion is made.

Lord HANNEN.—Is it your suggestion that until the first May all sealing should be prohibited everywhere.

Sir RICHARD WEBSTER.—Until the first May no sealing vessel should clear from any of those ports.

Lord HANNEN.—Suppose they do not clear from those ports, but come from, I do not know where.

Sir RICHARD WEBSTER.—I meant as far as Canadian vessels and United States vessels are concerned they should be licensed and clear

from those ports, and not be allowed to catch seals anywhere before the first May.

Lord HANNEN.—Down to the Equator.

Sir RICHARD WEBSTER.—I was really dealing with the area in question.

Lord HANNEN.—And I was exaggerating, of course. I wanted to know if you meant there was not to be any limit of area.

Sir RICHARD WEBSTER.—I do not want to pass an argument strongly in my favor, but that bears strongly on the question of ambit under Article VII, but vessels leaving for sealing in the gulf of Alaska and Behring Sea, should not clear till the 1st of May, and not enter Behring Sea until the 1st July. Those are two questions as to time which we, desirous to assist this Court honestly and fairly, and not to put a case to see how much we can get out of it, have considered to be fair, and if an advocate may say so, have made a judicial suggestion with reference to the matter in this regard.

Mr. Justice HARLAN.—Your suggestion would leave schooners clearing from British Columbia in America on the 1st May entirely free from that time forward in the North Pacific and in the Aleutian passes.

Sir RICHARD WEBSTER.—I do not know. In the Aleutian passes the evidence is universal that, except for an Indian in his canoe, no pelagic sealing is possible in the Aleutian passes, and if you look at the photograph of the Aleutian passes and see the sea running through like a mill-race, you would see that any pelagic sealing in boats is an impossibility. It has not been carried on in the Aleutian passes by any pelagic sealers. Now I want to make this observation.

We were asked, why not stop sealing until a certain day instead of sailing on a certain day, because from experience it has been found to be extremely difficult effectively to guard against breaches of such rules. You have to trust men of not the highest moral character, though they have, of course a certain amount of self-respect and good feeling; but to say that you may go out during the month of April, providing that you do not seal, the vessel being equipped for sealing is rather tempting under certain circumstances, especially if a good many seals were about. And I do not think that you, Mr. President or any member of the Tribunal, will think it is any worse to lay down or suggest a Regulation that will work effectually rather than one which can be evaded.

It does seem to me to be a suggestion that the vessels should clear from those ports not before the first of May would ensure for reasons I will briefly submit to-morrow, the advance herd of female seals being safely in Behring Sea before they can be attacked.

Sir JOHN THOMPSON.—I understand your view to be that licenses should be only procurable as regards British subjects at certain ports. I do not know if you have mentioned the United States ports.

Sir RICHARD WEBSTER.—No, I have not, but it was not because I had over looked it. It was, because I did not think the Tribunal would think I was departing from the lines laid down by the Attorney General. I think the license system is most important, and also that they should be obliged to keep logs.

Sir JOHN THOMPSON.—But you have not mentioned the names because it might involve a difference in the time of starting.

Sir RICHARD WEBSTER.—San Francisco and Port-Townsend in the United States and Vancouver and Victoria in British Columbia. I am not sufficiently expert to know if some other time should not be allowed with reference to those places, but it is a question to be calculated.

Lord HANNEN.—You must suggest something in reference to it.

Sir RICHARD WEBSTER.—I am obliged to you, my Lord. It has been pointed out to me that there might be a difference between the various ports, San Francisco and Port-Townsend, and by to-morrow morning I will consider the distances.

Senator MORGAN.—Have you any evidence to show that an Indian with his canoe could fish successfully in the Aleutian passes, and a boat not?

Sir RICHARD WEBSTER.—Strangely enough there is evidence of the Indians from the shore catching some seals in one of the Aleutian Passes but there is no instance that I know of a pelagic sealer sending out a boat from his ship. I do not know, Senator, if among your other accomplishments you are a sailor, but if so you would hardly think that a schooner could remain with the water rushing through there, and pick up a boat she had sent out in the morning, safely in the evening.

All I can say is I do not think, as far as I am concerned it is possible. I do not think there is any pelagic sealing possible there. By entering Behring Sea I mean entering the Passes—I do not draw any distinction—I am willing to agree that the mouth of the Passes, should be considered the Behring Sea.

Marquis VENOSTA.—You think by the month of June the female seals are practically in Behring Sea and there is no considerable number of gravid females along the eastern shore of the Alaskan Peninsula, going out to Kadiak.

Sir RICHARD WEBSTER.—On the evidence, by the end of May, the gravid seals are, are least as far as the western side of the Kadiak Island, and they then will be going into Behring Sea while the Pelagic sealer will be starting in the middle of May and he will not catch them up, and will have no temptation to, because in so far as he would want to carry on his business, he would not go in till the month of July. He will therefore utilize May and June. If we think of what the practical inducements are, he will not rush off to the neighbourhood of the Passes to take the chance of a few seals and have the herd of male seals which in the evidence are streaming up this place during the last part of May all through June and in July, practically speaking the temptation will be to hunt off the coasts of British Columbia during May and June and to go and hunt in Behring Sea when they go in.

Mr. Justice HARLAN.—Before you leave the map there is evidence in the case showing in July and August over all the sea north of Aleutian Islands and west of it are a great many seals.

If the vessels entered Behring Sea on the 1st July, of course during July, and August they would be at liberty to pursue those.

Sir RICHARD WEBSTER.—Except those within the zone.

Mr. Justice HARLAN.—But the sea would be clear from the Aleutian Islands to whatever zone you spoke of?

Sir RICHARD WEBSTER.—That is my submission. That is what I wished and desired to bring to the Tribunal as a reasonable Regulation.

I apologise to the Tribunal for having kept them so late today.

The PRESIDENT.—The Tribunal will meet to-morrow at 11 o'clock; take the recess at one, and adjourn at half-past three.

[The Tribunal thereupon adjourned till Friday, the 16th of June, at 11 o'clock.]

FORTIETH DAY, JUNE 16TH, 1893.

Sir RICHARD WEBSTER.—Mr. President, I will endeavour, to the utmost of my power, to compress the observations that I desire to make in conclusion, though I am quite sure that the Tribunal would wish that I should not spare anything that I really feel to be material. I will, as far as possible, avoid anything except that which seems to me of first class importance.

I was dealing with the possible control of pelagic hunting outside Behring Sea, always remembering, and I ask the Tribunal to remember, that I take this under protest and contending, as I have to argued, that the Pacific Ocean south of the Aleutian Chain is not to be the subject of Regulations by this Tribunal. My proposition was that by the end of May the female seals are practically to the west of Kadiak Island and going into Behring Sea. That was the statement that I made. There is a mass of testimony about it; I have endeavoured, as far as I can, only to pick out some of the most material passages for the purpose of citation. I think they will be found best in the United States Appendix, volume 2. I by no means suggest they are all exactly uniform, or that my statement is exhaustive; but these are, at any rate, material on the point I am mentioning. Page 217, Anderson:

While engaged in hunting during the past 18 years, I have killed more or less fur-seals. I usually first fall in with fur-seals off Cooks' Inlet,

That is just to the east of Kadiak Islands.

about the 1st of June.

Then, page 215, Avery:

I start the season off Yakutat. The first seals are seen about April the 1st.

Then Foster, page 220:

The seals appear off Cooks Inlet about the 1st of May. They appear off Unga, about the 1st of June.

That is close by Unimak.

Then, page 222, Rohde:

I have resided in Alaska 6 years, and in all that time followed the calling of a hunter. Beginning at Cooks Inlet in the Spring, we find seals off the Inlet in May, travelling westward along the coast towards the Behring Sea.

Then Tolman, page 222:

The seals are taken off Kadiak Island about the 1st of June.

Then Andersen, page 223:

I have been along the coast from Prince Williams' Sound to Semak Islands. Seals are first seen at Prince Williams Sound about the 1st of May.

Then Muller, page 222:

I start the season off Cooks Inlet. The first seals are seen about May

He does not say which part of May, and I should not have read that. Then at page 224 there are a large number of Indians (some 7 or 8) who make an affidavit and they say.

Fur-seals always appear in the vicinity of Cooks' Inlet early in the month of May, and 14 more Indians at page 225 say the same thing.

Then Gohen says:

I have observed that fur-seals first appear in the neighborhood of Cooks Inlet in small schools about the middle of April coming from the Southward and increasing in number until the latter part of May travelling along the coast of the main land from eastward to westward but never entering Cooks Inlet above Anchor point.

Then Gregoroff, on page 234, is the same as Frank Korth page 235 says:

In the early part of the season the males are the most numerous a few females being taken towards its close in the latter part of May.

That is at Prince William Sound.

And Kwam says at the top of page 236:

Seals first appear in Prince William Sound about 1st May, and were formerly quite plentiful, while now they are becoming constantly scarcer. I do not know the cause of this decrease. All the seals, that I have seen killed were females and the majority of these were pregnant cows.

There are a large number of other affidavits, but I have cited sufficient to show the class of evidence on which I rely for the statement that the pregnant females that formed part of the herd come after the bulls. The United States Case and ours is this; they are both the same, that they appear in this order, first the bulls, then the pregnant cows, then the holluschickie and last year pups.

General FOSTER.—That is not our contention.

Sir RICHARD WEBSTER.—If it is not the contention it is at all events the United States Commissioners' evidence on the point. If there is another contention we shall no doubt hear it later on. The important thing to fix is when they get into Belring Sea and the Islands, and though the evidence is extremely abundant I will be content with very few references. I will take one from the United States Commissioners' own report, which is to be found at page 325 of the United States Case. This is at the Islands.

The cows begin arriving early in June, and soon appear in large schools or droves, immense numbers taking their places on the rookeries each day between the middle and end of the month, the precise dates varying with the weather. They assemble about the old bulls in compact groups called harems. The harems are complete early in July, at which time the breeding rookeries attain their maximum size and compactness.

And if you will turn to page 385 you will find a table—I mention this now particularly in consequence of the interlocutory observation of General Foster—the table which is appended by the United States Commissioners to their report, for a series of years, and you will observe the columns, and notice in every case, taking the Pribiloff Islands, the bulls come first, then the cows, and then the pups. If you would kindly look at the dates, 1872, May 13th bulls: cows June 3rd: pups June 13th. In every case the order is that which I give—bulls first; then cows; then pups.

Mr. Justice HARLAN.—There is no table there for the bachelors.

Sir RICHARD WEBSTER.—As a matter of fact you will find that the holluschickie are stated to come with the pups.

Mr. Justice HARLAN.—No, at page 325 it says they begin to arrive early in May.

Sir RICHARD WEBSTER.—Well, if that is the point, of course it is quite immaterial to the contention I am upon—absolutely immaterial, if that was the correction intended by Mr. Foster.

General FOSTER.—That is the correction, that the bachelors come before the females.

Sir RICHARD WEBSTER.—If that was what General Foster meant I will take it from him, but it is not material for my purpose.

Now would you kindly look at the column of cows? This is what I want to direct your attention to first, the landing which takes place 180 or 190 miles from Unimak Pass is the 3rd June, the 8th June, May 24th, June 7th, June 5th, May 25th, June 8th, June 16th, No record, June 8th, No record, No record, and so on; June 10th, June 6th, and June 11th. If you go over to St. George's Island, the next one in the cows' column, you will see June 7th, June 9th, June 13th, June 8th, June 9th, June 9th, June 9th, June 6th, June 7th, June 1st, June 8th, May 31st and the 3rd June. Therefore, I point out that what I have indicated is practically—I will not use the word admitted—I do not suggest they would not say anything but what they believed to be a matter of fact is practically the view taken by the United States Commissioners, namely, that the cows are landing on the Pribilof Islands very often in the early part of June and sometimes at the end of May which shows they have passed Kadiak Island by the date I have mentioned, namely, the end of May.

Now in that connexion I ought perhaps to read a passage from Mr. Merriam's Circular Letter, page 414 of the 1st volume of the United States Appendix to their Case, paragraphs 3 and 5:

Returning the herds of females move northward along the coast of California, Oregon, Washington, and British Columbia, in January, February, and March, occurring at varying distances from shore. Following the Alaska coast northward and westward they leave the North Pacific Ocean in June, traversing the passes in the Aleutian chain, and proceed at once to the Pribilof Islands.

Then paragraph 5:

The pregnant cows begin arriving early in June, and appear in large shoals or droves, immense numbers taking their places on the rookeries each day between June 12th and the end of the month, varying with the weather.

I have at any rate adduced before the Tribunal evidence in support of the statement I made yesterday from sources that my learned friend will not be able to impeach. I only need, that I may give the information to the Court, give the references to paragraphs 637, 639, 648 and 651 of the British Commissioners' Report, because there will be found evidence giving the authority for their statement of identically the same character, namely, showing the entry of the seals into Behring Sea, and their passing along the parts of the Islands at the same time.

Now, the last observation I have to make upon this part of the case is as to whether the time that I suggest from the 1st of May is sufficient. I was asked by a Member of the Court yesterday to make a suggestion with regard to varying dates, if any, of leaving the four Ports mentioned. I propose to hand in on Tuesday the Regulations in writing; and I will suggest then to the Tribunal dates getting the best information that I can as to the actual distances and the difference of time that ought to be applied. I do desire to say, with reference to the general consideration, taking Victoria and Port Townsend, one a United States and the other a British Port, they are about the same distance, 1,560 miles, direct in each Case, and 1,850 following the coast. The only suggestion that could be made would be that the sealers would go straight up to lie outside, (for they would not be allowed to go inside the Passes) to avail themselves of the hunting in the last few days of May. Well, from the best information I can obtain, and perhaps Members of the Tribunal are quite competent to judge, under ordinary circumstances the lowest average voyage, with ordinary winds, that you could allow for a schooner to get over that 1,560 miles in ordinary circumstances

would be 15 days. Of course, if she had strong gales always blowing from the Southward and Eastward, she might go quicker; but what happens then? That would mean 15 days' waste if she has to go straight up and is not sealing on the way. The experience, as appears from the United States Commissioners' Report, is that the sealers come out when they can along the coast and do harm, as I have admitted, in the months of February, March and April in that coast catch. It is entirely for the Tribunal. In making these suggestions we have not been guided by any feeling of trying to get the best possible bargain that could be suggested for the British Sealer. In making these suggestions we have considered, that looking to the practice of sealing and the way in which done, the result of such Regulation would be that the female herd would be well into Behring Sea before they could be attacked by the pelagic sealer, and you know, of course, that in Behring Sea they will be safe until the 1st of July, and always safe within 30 miles of the Islands.

Now, the next suggestion my attention was asked to was, whether there was not evidence of sealing in the passes of the Aleutian Islands. There certainly is not beyond the instance I mentioned of a native who resided near one of those passes; but I stated my answer, on information from the British Commissioners' Report, was that the character of the Passes was such that no pelagic sealing was really practicable in them. My attention has been called to Captain Hooper's affidavit on this point in the United States Counter Case, at page 232:

Systematic observations of the movements of the seals in the Pacific Ocean, near the passes, at this season of the year is impracticable.

Lord HANNEN.—What season is he speaking of?

Sir RICHARD WEBSTER.—He is speaking of the season when the seals are passing through, if you look a little further up.

General FOSTER.—It is dated the 30th of November.

Senator MORGAN.—It is in the winter.

Sir RICHARD WEBSTER.—I will show that it makes no difference to the point I am upon. This is the description of Captain Hooper's.

Almost constant gales and thick weather prevail. In the influence of the strong current though the passes the sea is very rough.

that would not depend on the season, the strong current.

And even were it possible for a vessel to remain there, few, if any, seals would be seen. Under such circumstances the seals travel very fast and remain under water except when forced to come to the surface to breathe, and then only the nose is protruded above the water for a moment. In bad weather on the sealing grounds in the Pacific and Behring Sea the seals disappear so entirely that the Indian seal hunters (erroneously) believe they go to the bottom and remain there until the weather becomes better.

My point is quite independent of the particular season in which that was observed. It is clear from Captain Hooper's description of the Passes, I am sure that nobody, without evidence at any rate, would assume that sealing in such a place was practicable.

But Mr. Elliott in writing to Mr. Bayard, on the 3rd of December, I am reading from the 50th Congress Reports, 2nd Session of 1889, Executive Document N° 106, page 95,—a part of the letter is cited in the third Appendix but this is not,—he says:

Therefore, if you will glance at the Map of Alaska, you will observe that the convergence and divergence of these watery paths of the fur-seal in Behring Sea to and from the Seal Islands resembles the spread of the spokes of a half-wheel; the Aleutian Chain forms the felloe, while the hub into which these spokes enter is the small Pribilof Group. Thus, you can see that as these watery paths of the fur-seal converge in Behring Sea, they in so doing rapidly and solidly mass together thousands and tens of thousands of widely scattered animals as they travel at points 50 and even 100 miles distant from the Rookeries of the Seal Islands.

Here is the location and the opportunity of the pelagic sealer. Here is his chance to lie at anchor over the shallow bed of Behring Sea 50 to 100 miles distant from the Pribilof Group where he has the best holding ground known to sailors, and where he can ride at any weather, safely swinging to his cable, and in no danger from a lee shore if it should slip. The immediate vicinity, however, of the Aleutian Passes is dangerous in the extreme to him. There he encounters terrible tide-rips, swift currents and furious gales formed through the entrances, with the very worst of rough, rocky holding ground.

Therefore I do not think I have overstated this matter. This is in a letter to Mr. Bayard by Mr. Elliott. It describes that and there is no evidence to the contrary in the whole of these papers. The suggestion that pelagic sealing when the vessel must be anchored or lying to while her boats go out could take place in such passes will not commend itself to those who have experience in nautical matters of that sort.

Senator MORGAN.—How is it about the approaches to those passes.

Sir RICHARD WEBSTER.—I should have thought outside of the influence of the currents there was no difference. It was part of the Behring Sea on the one side and part of the south Pacific Ocean on the other. There is no evidence about it. The whole point put to me as I understand it was intercepting the seals *en masse* as they pass through the Aleutian Island passes.

Now there are two subjects which my learned friend Mr. Robinson, to whose assistance I have been immensely indebted, has been good enough to say he will take under his charge. The one is the allegation of waste in connection with pelagic sealing itself—waste by killing and by loss of those killed and wounded—by supposed missing or wounding a subject on which I say with all submission there has been on the part of the United States very great exaggeration, and also including the incident of green hunters upon which my learned friend Mr. Coudert was so eloquent—that we insisted that there should be green hunters on board the schooners whose function was to wound and not to capture in order that they might be taught this trade. As a matter of fact no such rule has ever prevailed or been in force at any time in the sealing vessels coming out from British ports and the other subjects to which my learned friend Mr. Robinson will if necessary direct the attention of the Tribunal is the question of the supposed immunity from raids which is claimed by the United States as being incident to their management of the Islands. There certainly is a body of testimony in these papers to show that in so far as any claim of merit is to be put forward on behalf of the United States on the ground that they have been protecting the seal species from raids, their guard has been anything but an efficient one. Those two subjects are not the limit of the subjects my learned friend Mr. Robinson will refer to of course, but he has been good enough to say that he will take those under his charge.

Now subject to handing in the written proposed Regulations I have finished the consideration of the Regulations upon the assumption that the Islands are properly managed, but there remains a very important part of this case to which again and perhaps I hope almost for the last time, I have to ask the close attention of the Members of the Tribunal and that is the question of the real cause of the decrease. You will remember that by the Treaty you are directed by Article VII to find out what Regulations are necessary for the proper protection and preservation of the fur-seal. I have already indicated that the scope of your jurisdiction is in our submission in Behring Sea. Now I want to direct your attention to the bearing and meaning of that word "necessary" because upon the evidence now before the Tribunal, and I ask every member of the Tribunal to be good enough to give me his judgment in

this matter, it can be demonstrated that any special failure and any special decrease of the seal upon the Islands in the years 1890, 1891 and 1892, and *a fortiori* earlier, is not due to pelagic sealing. In order to make out their case for the extraordinary demand which is made by the United States representatives in their so called Regulations, which are in fact no Regulation at all, but an absolute and complete prohibition—in order to support that demand they have suggested to you that the decrease is due to pelagic sealing and not to action upon the Islands.

My friend Mr. Condert, Mr. President, pressed with the fact that there was evidence to be dealt with protested in the first instance against the Tribunal considering the Islands at all and he pointed out that which is true, that from the point of view of determining Regulations upon the Islands this Tribunal has no jurisdiction but he admitted that it was most material with reference to the question how the actual decrease was caused and he attributed it to pelagic sealing in general terms, he was asked by you whether if he was going to attribute the loss on the Islands or the diminution of the seal race upon the islands to pelagic sealing it was not necessary at any rate to attempt to put some proportionate figure or some figure that would show that pelagic sealing had been a sufficient cause to produce the result. Those figures have not been forthcoming. I will show before I close to day they cannot be forthcoming, and I will submit to the Tribunal what the real cause of the diminution is. Now there are two causes suggested by the United States Commissioners. You will find the cause I believe suggested at page 349, of the report of the United States Commissioners that is the United States case:

The life of the seal herd, then, depending as it unquestionably does on the constancy of the number of births, can be endangered from two directions. First, from the killing of fertile females; and, second, from the excessive killing of males, carried to such an extent as to prevent the presence of the necessary number of virile males on the breeding rookeries. To one or the other of these causes must be charged the great change that has come upon the rookeries within recent years, and the commercial destruction with which the sealing industry is now seriously threatened.

We are firmly of the opinion that an impartial examination of all the facts in the case will show conclusively that the latter of the two possible causes has had no appreciable part in the destructive work that has been accomplished.

I accept, Mr. President, the test put down by the United States Commissioners and I propose to examine as carefully as I can what is the answer that should be suggested to the two questions which they have put on page 349.

There are other passages to which I should give a passing reference to make my citation complete, though practically speaking, they are only incidentally part of the same proposition. Take the bottom of page 361,

While there is no doubt that in some instances excessive driving has been allowed, that seals have been driven further than is actually necessary, and that proper care has not been taken to eliminate the non-killable seals as far as possible before the driving is well under way those are matters that are so entirely under control that a proper adjustment may be secured at once.

On page 362:

The assumption that driving is seriously injurious to the reproductive powers of the male is doubtless unfounded, being quite contrary to the declared belief of Captain Webster and other sealers of long experience. Against every assertion of this kind it is only necessary to put the fact

please note these words, Mr. President

that there is no evidence of the lack of virility on the rookeries, but, on the contrary, it is evident that there is a surplus of it at the present time, unless, indeed, it is assumed that harems are defuded and held against the most ferocious attacks, often at a loss of much blood and muscle, by impotent seals.

Seal killing on the Pribilof Islands has been and is conducted on the theory outlined above, that the male seals only should be killed, and of these a limited number whose age falls within certain narrow limits, and that the female should be spared at all hazards. The same principle controls the killing on the Commander Islands and, as far as we know, wherever and whenever the operation has been subjected to intelligent control.

And on page 378, the bottom of the page,

In addition to the establishment of such regulations as would practically suppress pelagic sealing, it is strongly recommended that killing on the islands be subjected to somewhat more strict and competent supervision. While it is not believed that any serious consequences have resulted from looseness in this respect, the interests involved are so important, and in some respects so complicated, that too much care can not be given to the selection of the proper persons to be intrusted with their conservation. The practice of frequent changes in the government agents is deplorable. They should be so familiar through association and observation with the appearance of the various rookeries as to be the first to notice any changes which may take place. They will thus be enabled to determine annually the number of seals which may be taken with safety and from what rookeries, whether the driving is properly conducted, etc., and their whole efforts should be directed to the preservation of the seal herd in its normal condition.

Mr. President, all those observations I ask the Tribunal kindly to bear in mind in following my argument this morning on this particular point.

Now I propose to demonstrate this, that through a long series of years in the face of warnings brought by their officials upon the islands to the notice of those who could control this matter, an excessive number of males has been killed, that the harems instead of diminishing in size, per virile bull, as the Commissioners state, I will point out to you presently, you would, expect them to do, and they ought to do if it is true that the loss is due to the killing of females, and not to the partial destruction of virile males; that the harems have been increasing in size and number per bull and it is upon the evidence upon both sides; that instead of there existing upon the island the active and energetic contests of the virile males striving for the possession of the females, there is abundant testimony that during the last four or five years the bulls upon the Pribilof Islands have been in a deteriorating, depreciated, and partially impotent condition.

Senator MORGAN.—Is there any testimony showing where these superannuated bulls go after they lose their virility, Sir Richard?

Sir RICHARD WEBSTER.—Yes, Sir, there is abundant testimony they lie behind the rookeries alone, with cows passing by them, and paying not the slightest attention to them, nor they to the cows, and instead of fighting for the cows, as they would do when they were in a virile and active condition, they lie taking no notice of the cows whatever.

Senator MORGAN.—They do not come in with the holluschickie, or the others.

Sir RICHARD WEBSTER.—No.

Senator MORGAN.—They do not haul out.

Sir RICHARD WEBSTER.—Oh, yes, they haul out. I do not think you can have quite followed my point.

Senator MORGAN.—On the shore?

Sir RICHARD WEBSTER.—Behind the rookery grounds, away from the place where the females are, they lie possibly dreaming of good times in the past; possibly thinking, as a member of the United States staff himself observed, of the good times they had been having in the past, but paying no attention to the invitations of the females round them.

Senator MORGAN.—What I want to get at is, do they herd together?

SIR RICHARD WEBSTER.—That depends on what you mean.

SENATOR MORGAN.—Do they go with the holluschickie.

SIR RICHARD WEBSTER.—No, I said not as distinctly as I could. They do not go with the holluschickie; they come with the other bulls, there practically being no fighting left, as I shall show presently, they come out on the ground where they previously came out, and when the cows come. Instead of paying attention to them, they pay no attention at all. Nobody will deny the materiality of these points. These are points that invite answer; and in selecting that which is important for this Tribunal to consider, I have selected that which in my respectful submission must be answered if our Case is going to be destroyed in regard to this matter. The whole point of the contention on this point is this: the United States contend that pelagic sealing, and pelagic sealing alone, is the cause of the diminution and deterioration; recognizing that the other cause may be most potent, they deny in their argument that it exists. I am going to examine this position from two points, first to show the decrease of seals and decrease of virile males has existed markedly for a time antecedent to the period when the pelagic sealing could have any effect at all, according to the United States contention; and, further, that the other result, namely of the diminution of harems around virile bulls in their full vigour has not occurred, but, on the contrary, so far from it having occurred, the evidence, when it is looked at and examined upon both sides, shows that there has been an increase of cows per virile bull. As I do not wish to refer again to break the sequence of my argument by reference to other passages of the Commissioners' Report, I had better, perhaps, make good my point that, in addition to the passage I read from page 349, in which they recognize that one of the causes may be the loss of sufficient virile strength upon the rookeries, they also call attention to the importance of considering whether the harems have increased in size or not. I call attention to page 344 of the United States Case:

A considerable decrease in the number of female seals upon the breeding rookeries might not be noticed at first where total number is so large, but in two or three years the effect of this loss would be felt in the class of killable seals, and might there be quite evident. The loss in one class would thus follow surely but some what behind the other in time. When the diminution in the number of killable seals became notable, attention was at once drawn to the breeding rookeries, and it was found that they were being depleted. Thus Captain Webster declared: "The great destruction has been among females. Formerly there would be, on an average, thirty cows to one bull; now they will not average fifteen".

I shall show you presently, and I shall ask you to note it in passing, that in Captain Webster's deposition in support of the United States he has not said a word as to the diminution of the size of the harems. I will show you what the facts are from witnesses who do speak to it. That statement was thought to be of so much importance it was actually repeated by the United States Commissioners at page 350.

I begin at the bottom of page 349 which is the last reference I make, to show the importance of these questions.

The polygamous habits of the fur-seal have already been described, as well as the separation in hauling out of the holluschickie or younger males from the breeding rookeries. The battles among the older males for places upon the breeding grounds have long been described as one of the peculiar characteristics of the species. A younger male is obliged to win his right to a harem by conflict with his older brethren already in possession. Many thousands of virile young males lie at a considerable distance on the hauling grounds, ready to engage in a struggle for a place in the affections of the female seal should a favorable opportunity occur.

That is when they get old enough.

Notwithstanding the depleted condition of the rookeries, these conflicts and struggles still go on. They went on last year and also in 1890.

I shall have to call attention to the evidence about this.

This condition of things is utterly incompatible with any theory which assumes a scarcity of virile males.

I quite agree.

The evidence of the most reliable and credible observers goes to prove the same thing. Mr. Redpath and Captain Webster have already been quoted as declaring that it is among female seals that the great scarcity exists, but it is worth while here to repeat the statement of the latter, that formerly there would be on an average thirty cows to one bull: now they will not average fifteen.

I have already told the Tribunal what they will find when they come to examine Mr. Webster's affidavit.

Now, Mr. President, I propose to argue this as closely as I can and without unnecessary repetition to show you what the evidence is upon this matter, and first I will deal with it *à priori*. I will ask you to take before you the two diagrams of the United States Commissioners on which I have put the numbers, so that you may compare them side by side. They are the diagrams on pages 355 and 356 of the United States Case, but by looking at them side by side and having them at once before you, you will observe the contrast, and it is an extremely important matter. I will show you presently, Mr. President, the basis upon which these diagrams are compiled involves one or two very important fallacies, but for the moment I merely argue upon the assumption that they are correct. The first one which is taken from page 352, diagram A, shows the natural condition of a herd of 40,025 male seals; and I think the Tribunal entirely understands it—if not I will explain it in two sentences.

The number of seals is indicated by the height of the line from the bottom running from 10,000, 5,000, 4,000, 3,000, and so on. It is stated perfectly correctly that the total area of the diagrams is proportionally to the total number of seals in the herd. That is stated at page 353. There is no dispute between the United States representatives and ourselves as to what these diagrams show. The natural condition of things shows 13,620 breeding bulls. The artificial state of things shows 1,980 breeding bulls. If you compare the yellow area in the second plan with the yellow area in the other plan, the year sare the same 7 to 19; the lines are proportionate and the breeding bulls are supplied from the young bulls that are left and not killed or supposed not to be killed after 5 years—the stock for replenishing in the one case is 560 and in the other case 3,500—that is just about a seventh left and the breeding bulls are 1,980 in one case and 13,620 in the other. I want to ask in the first place upon what theory such a reduction can be justified of taking down the bulls which are provided by nature to replenish the stock to about one-sixth of their number, because you will observe it is 1,980 on what they call the properly regulated killing in the new condition and it is 13,620 on what they assume to be the normal conditions?

Now, Mr. President, you put one or two questions the other day to my learned friend, Sir Charles Russell, and I think also to myself which require some notice. You asked if there was any evidence in the Case of other polygamous animals whether the production of male and female is about equal. I may say that there is no difference with regard to seal life. Both parties are agreed, as far as we can tell, the births of male and female are about equal. The United States people say, when they used to kill pups in the autumn for food when they had the opportunity of selection, they found, if they wanted to kill 2,000, they had to examine 4,000, in other words, they generally had to exam-

ine double the number in order to select the males. I have investigated that matter as well as I could from the sources at my disposal, such as Buffon and other books on natural history, and, as far as I can find out in the case of polygamous animals, there is no instance of a birth of a larger number of females than males. As far as I can find anything from the books of natural history, they appear to indicate, notwithstanding that animals are polygamous that the birth rate is equal. If you will only think of the cases which we know, such as horses, sheep, deer, pigs, and speaking of wild animals, the buffalo, which is a very notorious instance and perfectly well known, all the evidence points to the numbers being equal in those cases, and therefore the first observation that you have to make is this, that in reducing the stock from which the virile males should be chosen, you at once undertake a responsible duty, and you ought to be satisfied that the data upon which you act are sufficient.

Now, Mr. President, would you kindly observe at once here that the data upon which the United States proceed is without any authority in one respect. They assume the bull to have its virile powers for no less than 12 years. They assume the bull to be in a breeding condition from its 7th year to its 19th year. There is absolutely no evidence upon it. All the evidence which you can collect from those who have studied this matter for years is that about 6 is the outside number of years that you can assume that the bull is able properly to perform its virile functions. I will read from Mr. Bryant who has made affidavits for the United States who was on the Islands up to 1877, but never there afterwards, and who was and is unquestionably from past experience a very considerable authority, cited, as Mr. Foster reminded me yesterday, by Mr. Allen more than once in connexion with this matter in fact, I am not sure that he did not write this chapter for Mr. Allen in his book. At page 407 of Mr. Allen's monograph, Mr. Bryant says this:

As I have before stated, the large surplus of full-grown males existing in 1869 nearly all disappeared in about 6 years, and when we consider the fact of their severe labours during the breeding season when they pass from 90 to 120 days without food, engaged in a constant struggle for their position and performing the most exhaustive functions of physical life, 6 or 7 years would seem to be the limit of the active period of their lives?

Well, Mr. President, interesting information upon some of these matters of a general kind, if the Tribunal care to discuss it, or my learned friends desire to discuss it will be found in the British Commissioners' supplemental Report and in the Appendix to the British Commissioners' supplemental Report. I am not now on any question of contested matter at all or any matter which could be supposed to be misrepresented by the British Commissioners.

On such questions as deer and very analagous cases, if you care to examine the books experience will tell you that it is believed from two to three years is the limit of the really virile powers of the stag; and I want to call attention to the hypothesis upon which the United States proceed, that every bull left is supposed to be fully competent, that every bull left is supposed to retain its powers as long as it is alive, for a period of 12 years, and that, as I have said, you are justified in reducing the stock of virile bulls of 13,600 down to 1,980. Now nobody who has ever studied this matter can be ignorant of what is the consequence of natural selection. You are aware what happens by artificial selection in stock-breeding, and in utilization of male power for the purpose of improving the breed. The best bull is selected, or the best stallion,

or the best dog, or the best boar, or the best ram, and for two or three or four years, and sometimes for more under certain circumstances, they exercise their functions; but you have here no means at all of selecting the best bulls—not the slightest. The only method of selection known is that they fight for the possession of the females. Under the circumstances what is called natural selection goes on. Now I might expand this subject, without wasting time, to considerable length, but I will, at any rate, be moderate in that regard, and will only state that which I know will commend itself to the Tribunal. The extract to which I will call attention is Darwin's "Origin of Species", at page 69, from the 6th edition published in 1886, and, in order that my learned friends may not be misled, I will tell them at once it is not in our Appendix. It is under the head of "Sexual Selection":

Inasmuch as peculiarities often appear under domestication in one sex and become hereditarily attached to that sex, so no doubt it will be under Nature. Thus it is rendered possible for the two sexes to be modified through natural selection in relation to different habits of life as is sometimes the case, or for one sex to be modified in relation to the other sex, as commonly occurs. This leads me to say a few words on what I have called "Sexual Selection". This form of selection depends not on a struggle for existence in relation to other organic beings, or to external conditions, but on a struggle between the individuals of one sex, generally the males for the possession of the other sex. The result is not death.

I pause to note, in that very interesting passage,—a very graphic passage from the affidavit of Mr. Stanley Brown where he has told you for the first time with his one year's experience that the males in an ordinary herd have nothing to do with the selection of females, but that it is the female who selects her male,—showing, with great deference to Mr. Stanley Brown, how little he really studied the matter,—it is absolutely unique as far as seal-life is concerned and certainly with regard to other animals.

The result is not death to the unsuccessful competitor, but few or no offspring. Sexual selection is, therefore, less rigorous than natural selection. Generally the most vigorous males, those which are best fitted for their places in Nature, will leave most progeny; but, in many cases, victory depends not so much on general vigor as on having special weapons confined to the male sex. A hornless stag or a spurless cock would have a poor chance of leaving numerous offspring. Sexual selection by always allowing the victor to breed might surely give indomitable courage length to the spur and strength to the wing to strike in a spurred leg in nearly the same manner as does the brutal cock fighter by the careful selection of his best cocks. How low in the scale of nature the law of battle descends, I know not. Male alligators have been described as fighting, bellowing and whirling round like Indians in a Wardance for the possession of the females; male salmon have been observed fighting all day long; male stag-beetles sometimes bear wounds from the huge mandibles of other males; the males of certain *hymenopterous* insects have been frequently seen by that inimitable observer, Mons. Fabre, fighting for a particular female who sits by, an apparently unconcerned beholder of the struggle, and then retires with the conqueror. The war is perhaps severest between the males of polygamous animals, and these seem oftenest provided with special weapons. The males of carnivorous animals are already well armed, though to them and to others special means of defence may be given through means of sexual selection; as the mane to the lion, and the hooked jaw to the male salmon; for the shield may be as important for victory as the sword or spear.

When I show you, as I shall upon the evidence in this case, that practically the evidence of the Treasury Agents, the evidence of the people who had no motive whatever except to tell the truth, is that by the years 1889 and 1890 fighting for the females had disappeared upon these Rookeries, it will be some support of the view that I am presenting that there is strong reason to believe that the potent cause which the United States Commissioners themselves recognized as being one of the causes that might lead to the diminution in seal life was playing its part in depopulating the Rookeries to which these seals resorted.

Now, I will, in the first place, as fairly as I can, and as chronologically as I can, tell you what the evidence shows. First, let me refer to the figures of the Russian killing. During the Russian time, which will be found at pages 132 and 133 of the British Commissioners' Report, section 771,—you will remember that General Foster interposed the other day to say that they disputed all these figures or some of them,—I really do not think, after the fullest examination that I can make out what on earth is meant by that, because the source of every one of these figures is given. It is taken in the most important period namely from 1838 to 1860, that is to say, a period of 22 years, from the correspondence printed at Washington in the year 1890. And all I say is this, that no other figures have been suggested. The Tribunal are not to act on surmise or on the observations of an Agent, however distinguished. The authority for these figures is given in paragraphs 772 to 781. They were referred to by Lord Hannen, I think, when the observation was made the other day; and I merely mention that, as far as I know, no other alternative figures have ever been suggested for the Russian period; and it is the fact that they show, as was mentioned by the Attorney-General, an average of less than 40,000. I may mention that in the documents annexed to the President's Message, I read from Executive Document 450 of the 51st Congress, and page 31 will be found, quoting from Mr. McIntyre the special Agent of the Treasury Department, again giving the reference to another Executive Document, these figures set out, without any suggestion that they are inaccurate or not trustworthy. Criticise the figures by all means; let any deduction be drawn from them that can fairly be drawn, and then say if this is fair or not.

Lord HANNEN.—Do I understand you to say that that is this very Table?

Sir RICHARD WEBSTER.—Yes, my Lord. My learned friend, Mr. Phelps, has it now before him. I do not know how many years it comprises. Perhaps my learned friend, Mr. Phelps, will be good enough to give it?

Mr. PHELPS.—The earliest year is 1817, and the latest 1860.

Sir RICHARD WEBSTER.—Yes. I merely mention it from the point of view of authentic documents. It is possible on some such idea as this, that this was not accurate that some of the suggestions have been made about the British Commissioners. The authority is given in every single case.

Now, what happened afterwards? I wish to treat it chronologically; though perhaps I could make my argument a little more graphic by not doing so, but I prefer to treat it chronologically; and I ask the Tribunal to turn to paragraph 809 of the British Commissioners' Report. From paragraph 809 to paragraph 833 are set out extracts from the United States documents, almost without exception; or, if not without exception, the authority is given. I have, either myself or by those who have assisted me, verified the whole of these documents; and I can say (though it must not be taken from my personal knowledge; therefore, I can only say as far as I know and as far as my information has led me) that these extracts are perfectly accurate.

Let me take them chronologically, and see if it is true that upon the information before the United States up to 1884 the first time that there was any doubt as to whether the sufficiency of the number of seals or seal herd was being kept up was subsequent to that date. The other extracts are important; and I will ask the Tribunal at some

time or other to look them through; but I think I might pass to the year 1874, because it is early enough. There is an important extract in 1873, to which attention should be called:

813. 1873. It was now found that the 3-year-old seals afforded the best marketable skins, and the killing was directed to those. The "reserves" became reduced to half their former number, and each beachmaster had on the average fifteen females. When the rookeries broke up at the close of the breeding season, the females lingered instead of leaving them as before. In September and October a few young were born, showing that some females had not been served at the proper time in 1872. The females were still increasing 5 per cent. annually in number.

The paragraph 815 is:

In 1874, Lieutenant W. Maynard, U. S. N., investigated the conditions of seal life on the Pribilof Islands as Special Government Agent. He recommended that enlarged copies of maps of the breeding grounds should be furnished to the agents in charge of the islands, who should be required to compare these each year with the respective breeding rookeries. "This, if carefully done, will afford *data*, after a time, by which the fisheries can be regulated with comparative certainty." Respecting the number of seals killed, he says: "Since 1870 there have been killed on both islands, in round numbers, 112,000 young male seals each year. Whether this slaughter has prevented the seals from increasing in number or not, and, if so, to what extent, can only be deduced from their past history, which, unfortunately, is imperfectly known." He is inclined to think that no decrease had occurred between 1872 and 1874, but states that the period was too short to decide whether the killing was excessive. He adds: "The number now killed annually is entirely experimental, and we have nothing to start from as a basis." Maynard further states that the number of bulls in this year was not more than one-tenth that of the females.

Then page 138, paragraph 816.

816. The killing was this year confined to seals less than 5 years old, and more 2-year-olds were taken than in any year since 1870. This left a large number of males to mature. Many young were, however, born as late as August. In his official Report for this year Bryant protests.

I told you I think that Bryant who made affidavits on these matters left the Islands in 1877.

Bryant protests against the killing of pups for food, characterizing it as "a great waste," and adding, "I can find no precedent for this previous to the transfer of the island to the United States, only that the former Russian Fur Company allowed, as an extra indulgence to the natives, after the close of the season's sealing, to take 500 of these young seals for feasting.

You know probably Mr. President that the killing of pups continued right away till 1890 that is to say in addition to the 100,000 taken for commercial purposes I think the number was in 20 years 93,000 pups were taken for killing but this though called to their attention as a great amount, at the rate of about 4,000 or 5,000 a year, was allowed to continue till 1890.

Senator MORGAN.—Was it stopped after 1890.

Sir RICHARD WEBSTER.—Not till 1890 but after that it was stopped. Now in page 138 the end of paragraph 816.

Bryant also states in the same Report that a residence of seven successive seasons on the islands had convinced him that the killing of 100,000 annually did not leave a sufficient number of males to mature for the wants of the increase in the number of females. He explains his reasons for this in some detail.

Now, Mr. President, it may be right or it may be wrong—that we will consider presently when I go through the whole of the evidence—but at any rate I show you this is no imagination of those who have looked into this matter impartially. That as early as 1875 it was pointed out that from 7 years experience the 100,000 killed did not leave a sufficient number of males to mature.

In 1876 the second paragraph of page 817.

Bryant again states that he believes the number 100,000 fixed for killing to have been too high, and that in his report he had recommended that it be reduced by 15,000.

Then in 1881:—

Lord HANNEN.—You are passing over Miller.

Sir RICHARD WEBSTER:

Our agents report a very considerable increase in the number of females since 1871. We cannot tell that there is much increase in the number of males.

That is Mr. Miller who was President of the Board of Directors of the Alaskan Commercial Company.

Then 822.

Mr. CARTER.—Do not you read 818?

Sir RICHARD WEBSTER.—I will read any one my learned friend wishes, but of course, I am not reading them consecutively.

Mr. CARTER.—No, I observe you are not.

Sir RICHARD WEBSTER.—Of course we cannot. I am making my argument and my learned friend will read of course anything that will support his view when it comes to his turn. I am obliged to my learned friend, however, for calling attention to this.

818. 1877. Bryant states that this year there was an evident increase in the number of breeding males. He estimates that there were about 1,800,000 breeding seals on the islands, as against 1,130,000 in 1869.

Then I ought to mention this that at paragraph 821 is a citation made from his report that I shall read later on.

Colonel Murray, one of the Government Agents, dates the beginning of a steady decrease of seals from this year.

that is from the year 1880.

Then paragraph 822:

822. 1881. Elliott, in his report printed in this year, strongly protests against the unnecessary slaughter of pups for food purposes. He states in the same report that the breeding rookeries have been gradually increasing since 1857.

W. B. Taylor, Assistant Agent of Treasury Department on St. Paul in 1881, says that according to information received from those who had been a number of years on the Island of St. George, there were as many seals there as ever.

823. 1882. Dr. H. H. McIntyre, after June 1870 Superintendent of the Seal Fisheries of Alaska for the lessees, states that since 1870 the number of seals on the Pribilof Islands had increased every year. Speaking in 1888 (see under, 1888), he, however, places the beginning of decrease in this year. The same gentleman reports that at this time the desired number of large skius could no longer be obtained.

Then page 139 there are several reports of a glowing character from Mr. Moulton and Mr. Gliddon, and I think there is one in 1886, paragraph 827.

827. 1886. George R. Tingle, Treasury Agent on the Pribilof Islands, states that a frequent inspection of the rookeries on the islands showed a decided increase in the number of cows, with an ample supply of bulls.

I call attention to this in connection with a case of what was supposed to be the common observation after 1884.

Then paragraph 830:

1888. Dr. H. H. McIntyre, Superintendent for Alaska Commercial Company at the time on the islands, states that the number of seals has decreased since 1882; that the rookeries do not produce enough to bear the killing of "100,000 by marauders in addition to the 100,000 killed lawfully". He recommends that the permission accorded to natives of killing seal pups for food should be rescinded, and, speaking particularly of 1888, says: "There are at present, in my opinion, too few bull seals to keep the rookeries up to their best condition."

That is in the year 1888.

Mr. President, may I pause for a moment to remind the Tribunal that a bull-seal to be any good at all upon the rookeries, must be over seven years old. According to the best information, the best bull seals are about 9 or 10 years old; therefore, adding on one year for the birth, this must date you back to find something that has occurred to diminish male seal life as far back as 1850 or 1881; and I will point that observation presently when I come to the suggestion that pelagic sealing can have been the cause.

Then in the year 1890, at paragraph 832, the British Commissioners say:

Colonel J. Murray, First Assistant Government Agent, reports that the seals on the Pribilof Islands have been steadily decreasing since 1880, and attributes this to the excessive slaughter of males 2 to 5 years old.

Would you go back, Mr. President, if you please, to the year 1882. I did not read the last part of paragraph 823. This is what I had in my mind.

The same gentleman.—
that is Mr. McIntyre—
reports that at this time—
that is the year 1882—

the desired number of large skins could no longer be obtained.

Showing, as I shall show later on, that they were talking of killing seals of too small a size as early as the year 1882 to make up the number of 100,000. I suppose this is the evidence that the British Commissioners ought not to have included in their Report on the view of their duties suggested by my friends.

Now, Sir, I have read the documents—(in the great majority of cases, I believe in every case, the original document is here; they are at my friends disposal)—and I have read them as shortly as I could—I have read them in chronological order—and what does it point to? It points to the circumstance that in 1878, 1880, 1882 and at later years, the fact that too many seals were being killed was being brought to the attention of the United States authorities. My friends are entitled to the benefit of the fact that other people, possibly from motives in connection with the Company were not telling the truth—that is to say that there were *couleur de rose* reports in the year 1885, and in the year 1886, from Mr. Tingle and from Mr. Moulton. But we are now considering what the real fact is, and the fact to which I am addressing your attention, fact, is that during this time, if these Reports are true, too many seals were being killed—and there was too little virile life upon the rookeries in order to keep up the race of seals, attention was being called to it by persons of position and persons whose reputation ought to have attracted more attention than it did at the time the Reports were made. If you will look at page 139—I missed out the end of Paragraph 830, you will see this—that in the year 1888.

The standard weight of skins was lowered from 6 lbs to 5 lbs and to 4 1/2 lbs., because of scarcity of 6 lb skins. Thus, all males from 2 to 5 years old became, and thereafter continued to be, accounted killable.

Now, Mr. President, that is how the matter stands with regard to what I may call the concurrent Reports which were being made from time to time by Treasury Agents, and by independent people, many of whom are still living. Nobody can suggest that these agents had any motive for making reports of this kind. Their interest was the

other way and the United States do not in any way suggest their Reports were not true—because they could not suggest that—they do not in any way lead any one to the belief that they were under a mistake and had formed a wrong impression.

Now would the Tribunal (before I go to the most important time, that is 1888 and 1889) kindly turn to a diagram on page 257 of the British Counter Case, which so far as I know hitherto has not been either adversely criticised; and when the materials from which it is made up are examined. I do not think my friends will be able to impeach what it shows. This Diagram shows graphically the proportion of small skins that formed part of the catch. If I may tell you, Mr. President, anybody fond of mathematics, (and I dare say all the members of the Tribunal are), and accustomed to statistics, can make this Diagram for themselves from the original Table of the Total Sales by the Alaska Company, which is printed in the Appendix of the British Counter Case Vol II page 255. This is merely a graphic pictorial illustration similar to that shewn by the United States Commissioners upon another matter. The years are given—1873 to 1892. Along the top-line, the percentages of small and large sized skins is shewn by the *green* color as compared with the *red* color. It would be convenient, I think, if you were told at once what are “Large”, and what are “Small”. *Large* sized skins comprise “Whigs”, “Large Middlings”, “Middlings”, “Middlings and Smalls”, “Smalls”, and “Large pups”, *Small* sized skins comprise, “Middling Pups”, “Small Pups”, “Extra Small Pups”, “Extra Extra Small pups”, “Grey Pups”, and “Black pups”.

Now I do not want it to be thought that you are to attach too much importance to those particular designations. I am not going to use this against my friends at all unfairly because these are Trade names in the London Market.

Lord HANNEN.—They convey no idea to my mind.

Sir RICHARD WEBSTER.—They convey no idea to anybody’s mind as far as the pups are concerned but the importance of it is this—that every skin above 8 lb. in weight is treated as a large skin, and every skin below is treated as a small skin. Now if you would kindly look, I give the Reference at page 46 of the 10th census Report of Elliott.

Lord HANNEN.—Would you give those numbers again; they seem to contradict each other.

Sir RICHARD WEBSTER.—Every skin, my Lord, which is above 8lb is called a *large* skin.

Lord HANNEN.—There seems to be a contradiction.

Sir RICHARD WEBSTER.—The contradiction was in the way I put it. It had better perhaps, my Lord, appear on the Record in the shape of a Table: The various sizes of the North-west Coast Skins correspond to weight as follows:

	lbs. oz.
Large wigs	34.0
Small wigs	23.0
Middlings	14.6
Middlings and smalls	11.3
Smalls	9.8
Large pups	8.2
Middling pups	6.12
Small pups	5.10
Extra small pups	4.11
Extra-extra small pups	3.13
Grey pups	3.0

All that is contained on the Table which is in the Appendix: It would have been convenient, perhaps, if those weights had been put against those names, I regret it was not done, but one cannot always

foresee every point. Now on reference to the information that we have from Elliott's 10th Census Report of 1876—the one published in 1881—from weights ascertained by weighing a large number of seal skins, the skin of a seal of 4 years old weighs 12lbs; and the skin of a seal of 3 years old weighs 7lbs. I merely mention that to show there had been a largely increasing proportion of comparatively speaking young males being killed—the Reports show it, and the sales show it. We know in the year 1882 the standard was lowered in consequence of the difficulty of getting the full size of skins, and accordingly you will find, that the percentage of small skins runs up from below 50 per cent in the year 1873, to as high as nearly 80 per cent of male skins in the year 1889, with a temporary downfall (as not unfrequently happens), in the year 1885, when it fell down to something like the normal condition of matters. Therefore from that point of view it cannot ultimately be disputed by my friends successfully in this case, that during this period of years they were killing many more of the small skins than they ought to have killed. But will the Tribunal kindly appreciate this for a moment? The immediate result of pelagic sealing, if that was the cause, would be to decrease the number of *small* skins—not the number of *large* skins. I have pointed out to the Tribunal that the breeding bull of course must be more than seven years old. The killable skins which were supposed originally to be taken were four or five years old—that is to say, the bigger skins. The immediate result of pelagic sealing would have been that when it became prevalent you would have had, in a given number of seals—1,000 or 10,000—a larger proportion of bigger seals to the younger seals. When you got to a long series of years that would correct itself and you might get back to the old proportion. I do not think, if it had been true that pelagic sealing was the main cause in the first instance, but that it can be denied that you would have expected to find an increase in the proportion of big skins instead of an increase in the percentage of little skins. I mention that as a broad general commentary before I pass to what I may call more detailed matter in connection with it.

Now may I call attention to Reports upon this matter to which I submit (it is entirely for the Tribunal), the greatest attention must be paid. I can give them all in a very convenient reference on page 244 of the British Counter Case. You will find, Sir, the references given, in every instance, in the margin. The original Reports are set out in full in the Appendix to the British Case volume III, part 2, running over a number of pages. I only refer to the British Counter Case now in order that you may have them in conspicuous shape, and because I think, as far as I know, all the important extracts, or most of the important extracts are set out here. I read from page 244:

In 1890, Assistant Agent A. W. Lavender.

Now this is an Agent still employed by the United States engaged in assisting in getting up Affidavits for this case to a large extent, and there are two affidavits from him not contradicting this in any way:

In 1890, Assistant Agent A. W. Lavender writes:

The writer was surprised when he first visited the rookeries to find *no young bull seals upon them*; this looked strange to him, and he began to look up the cause, and it occurred to him that, from the constant driving of young male seals and the killing of all the 2, 3, 4 and 5 year-olds, *there were no young bulls left to go on the rookeries*, and without young blood the fur-seal industry will be something of the past in a very few years.

Now that is in the year 1890. Mr. President, I ask the Tribunal to remember this: That in that year there was made a detailed report (to

which I am coming presently), at the preparation of which, or, rather, at the notes for the preparation for which this gentleman, Mr. Lavender was present upon the island. If there had been any mistake about this matter—if it had been suggested that that Report was not accurate, there would have been strong ground for calling Mr. Lavender as a witness to prove the contrary. You know that Report was never forth coming until ordered by this Tribunal; but I call your attention to this—that in 1890 an independent Agent of the United States states that he found no young bull-seals there, and he attributes it to the killing of two, three, four and five-year-olds. Why, Sir, what as I have reminded you, is the necessary age for these bulls? The necessary age for these bulls is that they shall be seven, eight, nine, ten years old. Nobody can suggest that to the pelagic sealer is due the killing of bulls or male seals of an age say of four or five years. On the contrary, if that had been the charge against the pelagic sealer, my learned friends would have had no ground for their main complaint; and yet we find in 1890 the United States Agent is reporting that he finds no young bulls left upon the rookeries.

Now I will pass, if you will permit me to do so, Sir, all references there to Mr. Elliott's 1890 Report, because I prefer to take that by itself. I desire to show that independently of Mr. Elliott's Report, there was a body of testimony upon this matter which ought to have shown the United States authorities what the real truth was with regard to this matter; and that this allegation that pelagic sealing had depleted the sealeries could not, if fairly examined and tested by the real facts, have been seriously put forward. If that were the real case, after this evidence, I shall submit to this Tribunal that nobody really could come to such a conclusion.

Now in 1889 Mr. Goff reported also as Treasury Agent I must give you, Mr. President, a different reference for that. It is on page 245—you need not turn to it—but the actual Report, produced by Mr. Foster for us,—one Report—is to be found at page 85 of the 1st volume of the Appendix to the British Counter Case, but I read from page 245.

Now on page 247 of the British Counter Case appears the Report of Mr. Bryant who left in 1877. He says:

“The whole time I was there”—that is up to 1877:

The whole time I was there there was an ample supply of full-grown vigorous males sufficient for serving all the females on the islands, and every year a surplus of vigorous bulls could always be found upon the rookeries awaiting an opportunity to usurp the place of some old or wounded bull, unable longer to maintain his place upon the breeding-grounds. I should except from this general statement the seasons of 1873 and to 1875, when the destruction of young males in 1868, and the error made by the Company under their misapprehension as to the character of the skins to be taken for market, perceptibly affected the males on the breeding-grounds. It is not certain that the fertilizing of the females was thereby affected, and this gap was filled up, and from this time on there was at all times not only a sufficiency but a surplus of male life for breeding purposes.

That is up to the year 1877. Perhaps, Mr. President, you will be good enough to make a note in your own mind while upon the page, that Bryant's Report was speaking of 1877 when he left the island and never returned to it again.

Now that statement is taken from Bryant's Affidavit at page 7 of Volume II of the United States Case. Here was his Report which is an official Report of 1875, quoted at page 247 of the British Counter Case.

At time of writing my detailed Report on the habits of these animals, dated the 30th November, 1869, it was stated to be 100,000. This number was based on the best information obtainable at that time from the natives of the island and the few employés of the former Russian Fur Company remaining in the territory. Since

then a residence of seven successive seasons on the island, in charge of these animals, has furnished me with the desired opportunity for determining this surplus product by actual study of their habits and requirements, and the result is, *the killing of 100,000 per annum does not leave a sufficient number of males to mature for the wants of the increase in the number of females.* And as it is desirable to state some of the methods by which these conclusions have been reached by me, a brief statement of the habits of these animals and the effect of the killing of 100,000 per year for the past five years seems necessary.

These hauling-grounds are swept and driven two or three times a week during the months of June and July, and the prime seals called out for killing, and every seal growing up has to run this gauntlet for his life his second, third, and fourth year before he escapes to grow up as a breeding bull. Thus it will be seen the method of killing does not admit of the setting apart of a special number and taking the remainder for the quota for market, and the only possible way to preserve the requisite number for breeding purposes is to restrict the number to be killed so far within the product as to ensure enough escaping for this object.

I will show you, Mr. President, if I may make the observation here, that after about the year 1835 or 1836 the difficulty was so great in getting large skins—not small pups, but large skins,—that they killed in the drives every seal that was big enough to kill. There was no letting go of the five or six year olds in order that they might become breeding bulls. They were all killed.

When the lease was put in practical operation in 1871 there was a very large excess of breeding males on hand; since then the surplus has been diminished by the dying out of the old seals faster than there has been younger seals allowed to escape and grow up to fill their places, until the present stock is insufficient to meet the necessities of the increasing number of breeding females.

Then occurs a passage on page 248, lower down, to which I direct the attention of the court. I do not pause to read it, as it is under their eye; but it supports the opinion Mr. Bryant then gave.

In the year 1876 Mr. Bryant was examined by a Committee of Congress, and his answer is given on page 248.

Q. Your opinion then is that the number of 100,000 on the two islands authorized by law can be regularly taken without diminishing the crop or number of seals coming to the islands? A. I do not feel quite sure of that, as will be seen in my detailed report to the Secretary of the Treasury included in the evidence which has been laid before the Committee. There were indications of diminution in the number of male seals.

Then he refers to what happened in 1868.

Mr. FOSTER.—That is the reason.

Sir RICHARD WEBSTER.—The United States say that we have not referred to the whole of the evidence of Mr. Bryant. As a matter of fact, there is nothing left out from Mr. Bryant's evidence before that commission that tells in any way against us. On the contrary if the report to the House of Representatives of the 44th Cong., numbered 623, page 99, be referred to, it will be found that the further evidence that he gives is in our favor, with regard to the matter that they had been killing seals, that they were not allowing a sufficient number of big seals to be left to become bulls.

At page 249 of the Counter Case, Mr. Taylor, Assistant Treasury Agent in 1881, is quoted. The reference is given, and my friends can follow it. I need not give it. He says:

I believe the capacity of the bull seal is limited the same as any other animal; and I have very frequently counted from 30 to 35, and even at one time 42 cows to one bull. I think if there were more bulls there would be less cows to one bull, and in that way the increase would be greater than now.

Then Mr. McIntyre, in 1882:

I was therefore always alert to see that the due proportion of breeding males of serviceable age was allowed to return to the rookeries. This was a comparatively easy task prior to 1882 but became from year to year more difficult as the seals decreased.

Now, I ask what is the fair conclusion to be drawn from this, that after 1882 not that the pups diminished—it may be perfectly true that they were killing too many for other reasons—but that the breeding bulls could with difficulty be obtained from year to year. They could not get the breeding bulls, and those are the bulls that ought to be supplied out of the larger seals they killed in the drives.

Mr. Ryan, in 1885 and 1886, also a Treasury Agent:

As the Report will show, we killed but few bulls, though the Company was authorized to knock down all old troublesome bulls coming in their way to the number of thirty, the skins of which were wanted by the natives for door mats. The surplus of old bulls expected to be found did not make their appearance in the drives or on the rookeries this season, and I think now nor last season either.

Mr. President, this is a time when all the persons who have considered this matter, my learned friends included, are speaking of, a date when pelagic sealing could have had no effect on the bulls. This is referring to the years 1885 and 1886. The suggestion they make is that the very earliest year when pelagic sealing would have had any sensible effect would have been 1884. Even that is earlier than it could have had any effect, but taking their own case, pelagic sealing could not have had any effect upon bulls not being there to serve the rookeries in 1885 or 1886; and every one who is accustomed to deal with evidence will recognize the force of what I say.

Next is Mr. Palmer, who gives the result of his observations in 1890, the same year that Mr. Elliott was there:

It will be seen also that by this driving process the two or three year olds, which are the only ones killed for their skins, are culled out almost completely from the seals which visit these islands, and therefore that very few male seals ever reach a greater age; consequently there are not enough young bulls growing up to supply even the yearly loss on the rookeries, much less to provide for any increase.

The United States shut their eyes to every one of these facts. We know that there was great pressure being exerted. I quote from memory from one of the affidavits: "We were being pressed to get larger skins, because the buyers complained that the larger sizes were running down." I remember that extract. I will verify my recollection before I close my observations.

In the report of the Congressional Committee of the fur-seals of Alaska, report 3883 to the House of Representatives, Mr. McIntyre, a witness vouched over and over again by my learned friends as a witness of responsibility, gave this evidence, page 118:

Q. I want to know what the regulation has been or how the Company manages in regard to taking the kind of skins demanded by the foreign market? A. We always receive instructions from London as to what the market demands. There is very little variation from year to year. At first, and until 1873, the agents of the Company were not fully informed as to what the market required, and the skins sent forward were too small; but from 1873 to 1882 we were able to get exactly the sizes required, and very little fault was found by the London people. We had then, and at all times until the marauding was actively engaged in, a large surplus of animals from which to make our selection. After 1883 the sizes decreased, and have constantly decreased ever since. Last year they sent an urgent appeal to take larger skins, as the sizes were running down; but we were unable to respond, and during the present season the catch averages still smaller in size, as we were obliged to turn back for rookery service any bulls of desirable size for killing, and had very few surplus of any marketable size from which to select.

That was in the year 1888, speaking of the year 1887. Now what is happening? The sizes are running down. They are obliged to kill all they can in order to get their 100,000, and still the sizes run down, after what year? After the year 1883. In fairness, upon this issue, what answer can be given to the suggestion? Nobody pretends that at any

time pelagic sealing could make the sizes run down. The sizes running down means that smaller seals are being killed upon the land; and that diagram of the very large proportion of small seals which were being sold in the years 1883 up to 1889 is proof of what actually was occurring with regard to these very seals when the skins were taken. The consequence is that it was not that there were less young seals, but there was a much larger proportion of the young seals to the old ones. The old seals were being killed, and that was the stock from which the bulls were to be drawn.

Mr. President, kindly remember that this case I am now making is independent of any suggestion or anything based upon Mr. Elliott's report, although I will show this Tribunal that the suggestion that Mr. Elliott's report is to be regarded with suspicion or disfavor is an unworthy suggestion, and never ought to have been made even hypothetically by any one appearing for the United States.

Then on page 250 Dr. Dall in 1891—I do not know whether that is the same Dr. Dall that makes the affidavit for the United States, but I believe it is:

Dr. Dall attributes the present decline of the fur-seals chiefly to the excessive killing of young males; there is not now a sufficient number of males; in the breeding grounds to maintain the species. He admits that the method of driving referred to by Mr. Palmer is also very destructive. The excessive destruction of males began in 1872 and it has continued to the present time.

And in a letter written on the 5th of November, 1891, he says further:

What I did say was to intimate that after the killing in the open sea (the most important fact in the diminution) the second factor was the killing of too many young males rather than the injuries caused by driving; the latter being a view much insisted on by Mr. Palmer.

I will call attention later on, I am afraid I must, say this afternoon, to the condition of driving; and my learned friends will have also to bear the brunt of that when they come to deal with this question of increase. It is in my favor that these gentlemen are opponents of pelagic sealing. It is in my favor that these are the men who wished pelagic sealing to be suppressed. From the fact that they did wish pelagic sealing to be suppressed all the more important is their testimony with regard to the other potent cause at work; and this is a cause admitted by the United States Commissioners to be one of the causes which would directly affect the life and the numbers of the seals upon the islands.

Now, Mr. President, there is a very important piece of evidence in this matter from Mr. McIntyre's affidavit on behalf of the United States, at page 293 of the collated testimony:

The policy of the Alaska Commercial Company during the whole period of its lease was, as might be naturally expected, to obtain the best possible skins for market, and at the same time preserve the rookeries against injury; for it was not only in their interest to be able to secure from year to year until the expiration of the lease the full quota allowed by law, but they confidently expected by reason of their good management of the business and the faithful fulfillment of every obligation to the Government to obtain the franchise for a second term. I was therefore, alert to see that the due proportion of breeding males of serviceable age was allowed to return to the rookeries. This was a comparatively easy task prior to 1882, but became from year to year more difficult, as the seals decreased. No very explicit orders were given to the "bosses" upon this point until 1888, because the bulls seemed to be plentiful enough, and because it was easier to kill and skin a small seal than a large one, and the natives were inclined for this reason to allow the larger ones to escape; but in 1888 and 1889 there was such a marked scarcity of breeding males on the rookeries that I gave strict orders to spare all five year old bulls and confine the killing to smaller animals.

It will pass the ability of my learned friend Mr. Phelps to suggest upon any evidence in this case that before 1882 pelagic sealing had the slightest effect or could have had the slightest effect upon these bulls; and yet there is the statement of the man who is vouched over and over again as being a witness of accuracy. He says that after 1882 it became from year to year more and more difficult to get, what? The bulls. And in 1888 and 1889 every bull above five years old was spared. Why, Mr. President the very affidavit proves my case. Take five years off 1888, and where do you come back to? 1883. The bull which is five years old in 1888 must have been conceived in the year 1882; and nobody suggests, even in the oral, still less in the written, argument, that up to the year 1882 pelagic sealing had had any effect which could depreciate the number of breeding bulls at any time. Certainly at that time no suggestion of the kind is made.

Mr. CARTER.—That suggestion has been made and will be repeated.

Sir RICHARD WEBSTER.—Mr. Carter says it, Mr. President, and of course he is perfectly entitled to say it, though it is not germane to what I was saying. But when the suggestion is repeated, we shall be entitled to have the place where it has been originally made pointed out. It is not in the stress of argument, it is not in the pinch of the case, that counsel can make the suggestion. We can all make that. We can all say that we do not believe witnesses that are against us; we can all say we discredit people as to whose testimony the only objection is that it is adverse to our case. It is not to make a suggestion: it is to show upon what original document, where in the case, at any time prior to reply, such a suggestion has been made. On page 165 of the United States Case it is put in this way:

From the year 1880 to the year 1884 and 1885, the condition of the rookeries showed neither increase or decrease in the number of seals. In 1884 however, there was a perceptible decrease noticed in the seal herd at the islands.

That is not a suggestion that the difficulty in getting breeding bulls was greater after 1882 because of pelagic sealing. But I must put a restraint upon my argument, whatever the allurements may be that are held out by my learned friend Mr. Carter.

Mr. President, in this connection let us approach at once—for I am arguing this case at present quite independently of anything upon which the slightest suspicion has been cast.—let us take the other limb of the United States Commissioners argument, that which they thought of sufficient importance to repeat it twice. It is true that the harems have diminished in size? They admit that the two causes would be diminution in the number of virile males, and if there are sufficient virile males, consequently smaller harems. Is it true that the harems have diminished in size to each virile bull. I remind you, Sir, that the Commissioners rely upon the statement made to them by Mr. Webster that whereas there used to be thirty now there were only fifteen. Mr. Webster's affidavit will be found at page 179 of the second volume of the Appendix, and there is not a reference to the size of the harems from beginning to end. I give you the page in order that I may be checked if I am wrong. The most important point, according to the United States Commissioners own statement, is left unsupported by proof. But let us see whether there is not some proof on the other side.

The PRESIDENT.—Was it not given as a literal extract?

Sir RICHARD WEBSTER.—Oh no; not at all. The affidavit had not been made at the time. Oh no, it is not that. They had had a conversation with Mr. Webster. If you will kindly look once more at page 349, you will find it thus:

It is worth while here to repeat the statement of the latter that formerly there would be on an average 30 cows to 1 bull; now they would not average 15.

This is considered so important, Mr. President, if I am not unduly troubling you will you look at page 344, you will find there they quote Captain Webster and they quote Mr. Redpath. Captain Webster is the only one who is supposed to have said anything with reference to the size of the harems. Mr. Redpath only speaks of the total number of females, which has nothing of course to do with the point upon which I am arguing, which is to contrast the condition of virile males, and the condition of females per virile males.

The PRESIDENT.—Where was this declaration made?

Sir RICHARD WEBSTER.—I should think on the island to the Commissioners in the year 1891, when they were there.

The PRESIDENT.—By word of mouth?

Sir RICHARD WEBSTER.—Yes. A statement made to them on a vital point by Mr. Webster. Mr. Webster makes subsequently his affidavit—the actual date is sometime in June 1892—and that affidavit does not refer to the size of the harems or in any way repeat the statement that has been made. I do not want it to be thought that I am going to rely upon negative testimony in this respect, if you will permit me to say so. I am only calling attention to that to show the absence of affirmative testimony on the part of the United States in regard to the matter.

But there is one observation, before you adjourn, Sir, which I must make. The Commissioners were there in 1891 themselves. If they thought as they have said, that it was of vital importance to ascertain this fact, whether harems had diminished in size per virile bull, they would have examined it. Either they did or did not examine it, they have not given us their results. If they did not examine it they have failed, as I contend in my submission to this Tribunal, to consider that question which they themselves by their report put down as being a test question, and which, at any rate, I have shown my willingness to meet upon the evidence.

The Tribunal here adjourned for a short time.

Sir RICHARD WEBSTER.—I had pointed out to the Tribunal that if the United States could have established a decrease in the number of cows per virile male it was vital to their case to do so. Now, how does the evidence stand? I will call the attention of the Tribunal first to paragraphs 292 to 294 of the British Commissioners' Report.

292. Though each full-grown male or "seacatch" holding his place on the rookery ground endeavours to obtain and keep about him as many females as possible, there is a limit to the number which may be advantageously held by a single male, and when adult males are found in abundance, it is not easy to pass this normal limit; but, on the other hand, when, in consequence of a paucity of adult males in proportion to females, the harems become too large, the females are irregularly served, served too late in the season, or, in some cases, may altogether escape efficient service, with resulting irregularities in times of birth of young in the next year, or an addition to the number of barren females.

293. The proper portion of adult males to females cannot be ascertained by inspection of the Pribylof rookeries as they are at present, because of the obvious and generally acknowledged deficiency of virile males; but in the earlier years of the control of these islands by the United States, Bryant estimated the existing proportion as about one male to fifteen females, or, as indicated by other statements by the same writer, as one to nine or twelve. Elliott, a few years later, and subsequent to the date of certain changes in organization of the seals described by Bryant, writes:—"I found it an exceedingly difficult matter to satisfy myself as to a fair general average number of cows to each bull on the rookery; but, after protracted study, I think it will be nearly correct when I assign to each male a general ratio of from fifteen to twenty females at the stations nearest the water, and from there back in order from

that line to the rear from five to twelve." M. Grebnitsky, Superintendent of the Commander Islands, as the result of his prolonged experience, states that the proportion of one adult male to ten females should not, as a rule, be overpassed, and that one to twenty may be considered as a maximum limit. Captain Blair, long familiar with the fur-seals of the Asiatic coast, informed us, in speaking of Robben Island, that the number of males now existing there, viz., one adult male to twenty-five females, was far too small. Lieutenant Maynard, again, says: "The bulls are polygamous, having from five to twenty cows each; so that the number of them upon the rookeries is not more than one-tenth of that of the cows."

294. It may thus be very safely assumed that the ratio of virile males of full age, cannot be allowed to exceed the proportion of one to twenty, without serious danger of harm to the breeding rookeries, and the certainty of grave irregularities on them; and it is necessary to bear this fact in mind in endeavouring to appreciate the meaning of the present condition of the rookeries of the Pribilof Islands, where, as elsewhere pointed out, these conditions have, for a number of years, not been realized.

It is not too far to say, Mr. President, the result of that collection of authorities would put an average of something like 1 to 10 with a maximum of 1 to 15, and in extreme cases 1 in 20 being thought too high. Now let me first take the United States evidence as to what the state of things is, or rather I should say, as to what the state of things ought to be; and if the Tribunal will kindly take the 2nd volume of the Appendix, they will find Mr. Bryant's affidavit at page 6 where, in the middle of the paragraph with a marginal note of "Bulls," he says: "Here he"—that is the bull—

gathers about him as many cows as he is able to place within the radius of the area controlled by him: the average seen at one time while I was on the islands was from fifteen to twenty to a bull; but as the cows were constantly going to and coming from the water, it is impossible to calculate accurately the number to a harem. Probably not all the cows belonging to a bull were on shore at any one time; and I am of the opinion that a bull could, if necessary, serve seventy-five to a hundred cows during a season.

I mention that, as Mr. Bryant's affidavit made in the year 1892 is somewhat a strong order after he had left the Island for some 16 years; but it is important, even with his desire to make an affidavit, as far as he could, justly in accordance with the United States Case, he puts the average from 15 to 20.

I would kindly ask you to be good enough to turn to page 14 of the same book where you will find Mr. Stanley Brown's first affidavit in the matter; and, reminding you of an average from 1 to 15, on a maximum of 20, let us look how Mr. Stanley Brown, with his one year's experience, describes it:

The number of females which a bull is able to gather around him to form his harem, depending, as it does in some measure, upon topographic conditions, may be represented by extremes of one and 75. The average number of last year was about 20 or 25. Unusually large harems were infrequent.

Now I wish to speak with all respect for Mr. Stanley Brown's opinion, but it is remarkable to note that referring to this subject with a fresh mind he puts the average at 20 to 25, or 30 or 40 per cent above the 4 or 5 gentlemen of great experience, whose evidence, from their published reports, I have already read to the Tribunal; and he mentions harems he had seen which ran up as high as 75.

Now there are two accounts made of this matter by Mr. Evermann in the United States Counter Case at page 264. The first one gives 13 bulls, 90 cows, and 211 pups; and he says that he counted, counting all the harems, calling one bull and all the cows and pups about him, one harem. The next one gives 15 bulls, 260 cows, and 600 pups, which is 1 in 40; and I desire to point out a very remarkable thing that in making the count of a harem he says.

A good many cows, and a great many pups were not counted, as they did not seem to belong to any particular family. These cows had been served, and were, consequently, allowed to wander from their lords. The pups apparently do not long remain in families where they belong, but soon begin to wander about, and to collect, for a part of the day at least, into large bunches or pods.

Therefore I point out that it is an estimate not taken in a way that would create the largest maximum number I make no complaint about it but it cannot be said he counted exceptionally large harems, because he himself describes before his count he left out some of the cows and pups that might apparently belong because he thought there were more than did belong to the harems. But in the evidence as it stands you have in the year 1891 and 1892 averages according to Mr. Stanley Brown of 25, and of Mr. Evermann an estimate given from these calculations which would show even a larger quantity.

Now there is very accurate testimony of this matter given by Mr. Macoun in page 140 of the first volume of the Appendix to the Counter Case, which I will ask you to be good enough to follow reminding you once more, if I may respectfully do so, of the importance of this issue, as pointed out by the United States Commissioners themselves:

Whenever harems were well defined, and could be readily separated from adjoining ones, the number of female seals was counted. It was found that though there were a few cases in which an old bull would have but two or three cows about him; there were many other bulls which had fifty or more one in particular shown me by Mr. Brown, had about him more than eighty females. This was Mr. Brown's estimate.

The average number of females in each harem, according to my count was about thirty, my figures giving a little over that number. My attention was frequently drawn by the United States Agents to what they called the great number of mature bulls that were without harems. Comparing mentally the number of such bulls with those seen on the rookeries of last year. I decided, while on the ground, that there were not more than there were in 1891 though an additional number of mature males must have come upon the breeding-grounds. A comparison of photographs taken during the two seasons show no change in the number of bulls without harems. During neither season were there old bulls to be seen in anything like the numbers mentioned by Elliott and others.

Thus, Mr. S. N. Bynifsky says:

Thousands of old bulls, which have become useless for the purposes of propagation and are an incumbrance to the rookeries might be killed for their blubber.

Captain Bryant writes:

During the latter portion of the landing time there is a large excess of old males that cannot find room on the breeding places; these pass up with the younger seals and congregate along the upper edge of the rookery, and watch for a chance to charge down and fill any vacancies that may occur.

And again:

The number of full-grown males at this date (10th August) may be considered as three times greater than the number required, or equal to one full-grown male to every three or four females.

Elliott says, writing of the years 1872-74:

At the rear of all these rookeries there is invariably a large number of able-bodied males which have come late, but which wait patiently, yet in vain for families. All the surplus able-bodied males that have not been successful in effecting a landing on the rookeries cannot at any time during the season be seen here on this rear line. Only a portion of their number are in sight; the others are either loafing at sea adjacent, or are hauled-out in morose squads between the rookeries on the beaches.

And again:

300 or 400 old bulls were killed to supply skins to furnish the natives with canoes.

Not that number could have been secured in 1892 had the bulls without harems been driven from every rookery on both islands.

The greatest number of bulls in proportion to the cows on the rookeries were to be found at North-east Point. I visited the rookeries there in company with Mr. Brown on the 2nd July. He drew my attention to what he called the excessive number of bulls without harems and there certainly appeared to be a great many but knowing that their great size renders them conspicuous, I carefully counted all that were to be seen in the vicinity of the rookeries at this place.

The bulls near each rookery were counted three times, and the totals of the three counts were 94, 89, and 92 respectively.

There may have been a few hidden behind rocks, but certainly not more than a dozen in all placing the total number at 100, and allowing twenty cows for each bull, there were enough bulls on this rookery to serve 2,000 cows more than there were.

I do not think anybody would suggest this is not fairly reported:

This is assuming that all were of an age and condition that fitted them for service. Many of them showed the grey wig which proved them to be not yet fully grown, while others were without doubt worn-out old bulls no longer fit for service. That the majority of them were in this condition is proved by the fact that though attempts of service by grey wigs were not infrequent I never saw one of these old bulls pay the slightest attention to any females that might pass near them.

Senator MORGAN.—Will you allow me to inquire as to your observation upon the testimony? Is it a correct description of a seal that is not full grown to call it a grey wig.

Sir RICHARD WEBSTER.—I believe so, yes.

At Zapadnie Rookery 3rd July, Mr. Brown, Mr. Townsend and I noticed on several occasions a cow escape from a harem and lie down at some distance behind it, but in only one instance was any notice paid them by bulls near by. In this one instance the cow endeavoured in many ways to attract an old bull's attention, rubbing her nose against him and striking him playfully with her flippers; he made some faint response, but after a minute or two lay down and went to sleep again. Two other bulls lying near them raised their heads once or twice to observe what was going on but no attempt was made to serve the female.

There were in 1892, in my opinion, more old bulls without cows in the vicinity of the rookeries at North-east Point than the combined number on all the other rookeries.

At Tolstoi rookery (3rd July) but one old bull without a harem could be detected at the south end of the breeding-ground, where a good view can be had of a great part of the rookery.

On St. George's Island there were, in proportion to the total number of seals even fewer bulls than on St. Paul Island. On the 15th July there were not a dozen along the whole extent of North rookery, and but two were seen at Little East rookery, and two at East rookery.

Zapadnie was visited the next day, and not a dozen were to be seen there so many statements have been published to the effect that old bulls without harems are always to be found in large numbers near breeding-grounds that it would seem that the rookeries on St. Paul Island are nearer their normal condition than those on St. George.

Now, I ask you only to assume that that Report by Mr. Macoun, which I have referred to many times before, is a fair statement of what he saw.

Now, let me call your attention to the year 1890, when there were no less than four Government Agents there, who have all made Reports, besides Mr. Elliott who was sent to make an independent and exhaustive Report. Will the Tribunal kindly take Mr. Elliott's Report, which was from actual observation as I shall show you from his diary, and look at page 80 first.

THE ARRIVAL OF THE BREEDING SEALS, 1872-1890.—In view of the changed condition of the rookeries of St. Paul and St. George last summer, I took great care in noting the daily arrival of the breeding-seals and methods contrasting these notes with those taken eighteen years earlier: I can truthfully assert that they come as they came in 1872, in the same time, same manner, and in every respect comport themselves as they did, save in two characteristics; the old bulls are disproportionately scant in number, exceedingly so, and the young male life fit to take their places, is virtually extinct. I reviewed in 1874 my studies of this topic in the following language:

And then he writes what I need not read at present, except to call attention to the fact that there was a general *ratio* between bulls cows of from 15 to 20 at the stations nearest the water, and at the back from 5 to 12. That is what I read to day.

Thus in 1872, when the rookeries were carefully observed with reference to this question, I found a general average of fifteen cows to each bull: (without taking into consideration the virgin females): in 1890, a general average of forty to fifty

cows to each old bull (no young ones about), as the result of careful investigation: and single harems in which I have counted over one hundred cows each in the flimsy charge of an old and weary "sea-catch"; such harems were not uncommon: this unnatural disproportion of the sexes on these breeding grounds to-day renders the service there of reproduction quite lifeless—almost impotent, wholly so in a vast aggregate of cases.

I cannot too often repeat as I have shown you already and will remind you later on there are no less than four Government Agents, who knew of these facts, and who have made Reports, showing that they observed the same thing; and there is not a shadow of a statement that this is untrue. The only grounds on which it can be said to be untrue or exaggerated is because it is not the class of testimony favourable to the United States' contention that the harems had decreased in number. Would you kindly turn to page 240? This is the extract made at the time on Ketavie, one of the rookeries:

As this is the time the cows begin to haul out in appreciable numbers, I took a careful view at this Ketavie Rookery to day from that point of sight in the sketch opposite.

You know that there were some 30 or 40 in number, which were photographed by the United States, and the photographs have been deposited with the Report before this tribunal.

I saw but three clusters of cows in all the sweep of this picture, and they in the fore-ground right between the 1st and 2nd rollers as they come in; these pods were beves of from 30 to 50 cows each, all thickly clustered around a single bull with all the other bulls stretched in somnolence around them, just as I recorded the state of affairs on Tolstoi yesterday; and as I go over the field on Lukannon right after this I find it precisely that way there, too; this apathy of the bulls coupled with the total absence of the "polseecatchie" (or "half-bulls") on these breeding grounds at this hour is a striking contrast with that din and fury that was so marked among the swarming bulls of 1872 on this and every other one of the breeding grounds of the Pribilof Islands.

Then I might read page 241, the day before on Tolstoi, which he refers to—

But the behavior of the old bulls is extraordinary this morning at this time of the inflowing cows; they are listless; three-fourths of their scanty number, stretched out sound asleep, while right alongside of these sleepers, a pod of 15 or 30 cows will be closely clustered around a single alert bull, or one that at least is not inert and stupid. There are three such pods as that right under my eyes as I make this note, lying at the junction of the sand beach and rocks of Tolstoi rookery; no such scattering of bulls and indifference was ever witnessed on any of these breeding-grounds in 1872-'74; then every bull was alert and furious in his struggles to get possession of at least one, if not all the females within reach;—now, look at them! Why, it seems to me that these bulls are enfeebled and sick. At least it is a most remarkable deviation from the method and order of first arrival of the females in 1872; such a picture of perfect listlessness and indifference as this is, from the beginning to the end of the season, never met anybody's eye on these breeding-grounds then.

Now, nobody can read this Report and know that it was a contemporaneous record of that which he and many other persons saw at the same time, without coming to the conclusion at once, if it was possible of contradiction in fact, it would have been contradicted. I will show you it is without contradiction.

I cannot help pressing upon you the fact of four respectable Government Agents referring to this Report, knowing it is made and describing to the same extent though not in such detail the same things, all of whom must be supposed to be telling a falsehood if this is not a true story of what is going on. You cannot wonder that the United States people were not willing that such accurate information should be at our disposal.

Take page 245, on the 3rd of July. You will remember the principal hauling out begins on the 20th of June, and there are constant fights

when the first cows come in. I do not know if you have it in your minds, I read it yesterday, as soon as the cows begin to arrive the fights are worst of all,—in that time the most dire fights take place to get possession of these cows; that is, as the Islands used to be.

The hauling of the cows on Zapadnie to-day is extraordinary in contrast with its appearance here in 1872 at this time, and only a week from the hour of its utmost limit of expansion. Really, I cannot see much increase since my notes last week, but such rusty cows, such somnolent stupid bulls! such an abnormal average as 60 to 75 cows in the harems! while lots of sleeping bulls all around, though only some 40 or 50 feet away from these harems, where the bulls in charge are so feeble that they have refused the advances of eager cows repeatedly under my eyes within less than 20 minutes after I had set a fixed watch on half a dozen right within my view and near by.

Sir, I have picked those out. That is the same rookery to which one of the extracts from Mr. Macoun's Report applies. That is by no means an isolated specimen of what the gentleman saw, but may I with respect, Mr. President, kindly ask the attention of every member of this Tribunal to this fact: everybody, prior to these years, has described the fights between the bulls as occurring when these cows were coming—as scenes of perpetual fights—the bulls fighting to get their cows. Would you look at page 385 of the United States Counter Case, and let me read Mr. Stanley Brown's picture, perfectly fair I dare say, and you cannot have a better contrast. He says:

Any statement to the effect that the occasional occurrence of large harems indicates a decrease in the available number of virile males and hence deterioration of the rookeries, should be received with great caution, if not entirely ignored. The bulls play only a secondary part in the formation of harems.

Why, Sir, there is not a single man who has ever been on that island for four or five seasons who can possibly corroborate that statement.

It is known perfectly well; and expert after expert recording the life of these animals has, for a period of a quarter of a century, negatived this suggestion.

Senator MORGAN.—How could the sleepy lord of the seraglio compel the allegiance of these great numbers of cows?

Sir RICHARD WEBSTER.—They do not compel it.

Senator MORGAN.—Then what becomes of the question of selection?

Sir RICHARD WEBSTER.—If you will pardon my saying so, Senator, you are not following my proposition. The evidence is that they did not compel it in the year 1890-91,—the evidence is that they *used* to compel it.

Senator MORGAN.—I thought it was quite their practice.

Sir RICHARD WEBSTER.—It *was* their practice. *Now*, they are not in the condition to do it. The fact of animals—bulls and others—becoming incompetent for service is perfectly well known, though they are strong and quarrelsome. All that is perfectly well known. But what Mr. Stanley Brown is describing is the selection of harems by the *females*—not by the *bulls* at all.

Senator MORGAN.—I understood that the evidence and argument hitherto proceeded on the ground that these old seals compel the allegiance of the females.

Sir RICHARD WEBSTER.—That is exactly so. The whole evidence is that it was not so in 1890, 1891, 1892. Senator, I can only submit it to your judgment on the matter, and I only ask your criticism upon what I say. The evidence is universal and overwhelming that prior to the decrease of bulls on these rookeries, the formation of the harems was by the bulls. The fact spoken to by the United States witnesses is that in 1890, 1891 and 1892, the bulls did not exercise any promi-

ment part in the formation of the harems at all. Would you listen to this affidavit of Mr. Stanley Brown, the special gentleman sent to investigate and report on this matter.

He says:

It is the cow which takes the initiative. She is in the water beyond the reach or control of the male, and can select her own point of landing. Her manner on coming ashore is readily distinguished from that of the young males which continuously play along the sea margin of the breeding grounds. She comes out of the water, carefully noses or smells the rocks here or there like a dog, and then makes her way to the bull of her own selecting.

The evidence is that the bull drives her to it, and very often takes her in his mouth and makes her come and obey him, and chastises her if she does not lie down.

Mr. CARTER.—Where is that evidence?

Sir RICHARD WEBSTER.—I will give it you in a moment; it has been given in evidence over and over again.

Lord HANNEN.—When on shore? You seem, Sir Richard, to speak of it as though the female were out of the water.

Sir RICHARD WEBSTER.—I think there is actually evidence in some cases, that the bull even does that.

Now Mr. Stanley Brown says:

In this incipient stage of her career on shore there is but little interference on the part of the male, but once well away from the water and near the bull she has chosen, he approaches her, manifests his pleasure, and greetings are exchanged.

I will not overlook the point, my Lord—I believe instances are given in the Affidavits of the bull even taking the female as she comes to the edge of the water; but whether that be so or not, immediately on her coming out of the water, there is as I shall show presently, abundant evidence. But I am dealing now with this statement by way of contrast.

In this incipient stage of her career on shore there is but little interference on the part of the male, but once well away from the water and near the bull she has chosen, he approaches her, manifests his pleasure, and greetings are exchanged. She then joins the other cows and as soon as dry lies down and goes comfortably to sleep. I have seen this selective power exercised repeatedly and the result is that one bull will be especially favored, while those within fifteen or twenty feet will be ignored.

Senator MORGAN.—That brings out the point that I had in my mind: It seemed to me that an excess of bulls upon the rookeries would be quite as dangerous to seal-life, pups, and female seals in their battles and fightings as the proposition you are arguing now, namely, want of *sufficient* number.

Sir RICHARD WEBSTER.—I ask you, Senator, kindly to give your attention to the matter: when we know enough to be able to say what is the right and exact proportion so that we may inculcate peace, and not quarreling among the bulls, and still get the best bulls, perhaps that is a claim which the United States, from a moral point of view, may be able to advance. If they are able to advance it, well and good. But will you kindly, in justice to me remember what the United States Commissioners have said? The United States Commissioners have said that want of sufficient virile males will produce deterioration to the herd. It is not a question of what ought to be the condition, but what is the cause of the present condition of the herd?

Senator MORGAN.—I do not feel bound by the opinion of the United States Commissioners or by the opinion of any other man from which I dissent.

Sir RICHARD WEBSTER.—Nobody suggests, Senator, that you are bound by anybody's opinion or view except your own; but I do say, in

arguing the matter I should not be performing my duty if I did not bring this into notice.

Senator MORGAN.—That is exactly what I am trying to get you to do.

Sir RICHARD WEBSTER.—My point is this: that when I have shewn by the testimony that has been read both by Sir Charles Russell and by myself, that the selection of the females to form a harem, in the ordinary life of the seal, was by the male—when I call attention to a respectable gentleman who describes that in which the male takes no part, I think. I am not ill-founded in making the suggestion that the contrast points strongly in the direction of there not being proper virile power upon these rookeries.

Senator MORGAN.—Neither am I ill founded in trying to find out the truth about it.

Sir RICHARD WEBSTER.—I am not conscious of having said anything which could point in that direction.

Then Mr. Stanley Brown says:

The size of harems, therefore, has of itself,

This is important with reference to the Commissioners' statement.

The size of harems, therefore, has of itself but little to do with the question of the lack of virile males, but indicates only the selective power of the females.

That is in teeth of the Commissioners' statement which I read this morning. Now I was challenged by my friends, and quite properly with reference to what I was referring to.

I refer first to the language of Mr. Bryant, their own witness, at page 385 of Allen's monograph, where says:

Immediately on landing—

that is the females.

they are taken possession of by the nearest males, who compel them to lie down in the spaces they have reserved for their families. For a few days the females arrive slowly, but by the 25th of the month thousands land daily.

That is the month of June. Then it goes on:

As soon as the males in the line nearest to the shore get each seven or eight females in their possession, those higher up watch their opportunity and steal them from them. This they accomplish by seizing the females by the neck as a cat takes her kitten. Those still higher up pursue the same method until the entire breeding space is filled. In the average there are about fifteen females to one beachmaster.

That had already been read. I referred to that when I said evidence had been already given upon it.

Now in the 10th Census Report of 1881, of which again I say nobody has ever questioned the accuracy or the truthfulness, from observation, at page 36, under the heading "ORGANIZATION OF THE ROOKERIES", this is the description of it by Mr. Elliott in his first report.

They—

that is the cows—

are noticed and received by the males on the waterline stations with attention; they are alternately coaxed—

this is what I had in my mind when I said I thought it pointed to something which was done almost before the cow left the water, and I will find another reference too.

They are alternately coaxed and urged up on to the rocks, as far as these beachmasters can do so, by chuckling, whistling, and roaring, and then they are immediately under the most jealous supervision; but owing to the covetous and ambitious nature of the bulls which occupy these stations to the rear of the water line and

wayback, the little cows have a rough-and-tumble time of it when they begin to arrive in small numbers at first; for no sooner is the pretty animal fairly established on the station of male number one, who has welcomed her there, than he, perhaps, sees another one of her style in the water from whence she has come, and, in obedience to his polygamous feeling, devotes himself anew to coaxing the later arrival, by that same winning manner so successful in the first case; then when bull number two, just back, observes bull number one off guard, he reaches out with his long strong neck and picks up the unhappy but passive cow by the scruff of her's just as a cat does a kitten, and deposits her upon his seraglio ground; then bulls number three and four, and so on, in the vicinity, seeing this high-handed operation, all assail one another, especially number two, and for a moment have a tremendous fight, perhaps lasting half a minute or so, and during this commotion the little cow is generally moved, or moves, farther back from the water, two or three stations more, where, when all gets quiet again, she usually remains in peace.

Senator MORGAN.—I think, only in justice to myself, I should observe that is the very evidence upon which I ventured to make the suggestion to you that there might possibly be injury to the seal herd from excess of bulls upon the rookery.

Sir RICHARD WEBSTER.—I have never, Senator, denied it. It has no bearing with great respect upon my argument. My argument is not that there may not be too *many*, but there may be too *few*; and I do not suppose that you Sir would be disposed to question that—that there may be too few. The point of this is to see whether there are too few or not, and whether that has been the cause of the decrease.

Now I have read from the evidence with regard to this matter, but before I go further to Mr. Elliott's report will the Tribunal be kind enough to oblige me once more by taking volume 3 of the Appendix of the British Case. It is part 3. I ask you, Mr. President, to be good enough to refer to it so that you may see that people were perfectly conscious of what Mr. Elliott was doing at this Island at the time. I am going to read, first, from Mr. Goff's Report at page 15:

Professor W. H. Elliott, your recent appointee as Treasury Agent has spent the season here, dividing his time between the two Islands, and giving his entire attention to the state of the rookeries and the methods used at present in driving and killing the seals, and his report will, no doubt, be of the utmost importance and of great value to the department.

Then at the bottom of the same page there is a passage about driving that need not be read now, but it must be read later on.

And on page 17, the third paragraph:

There is but one authority upon seal life, especially the seals of the Pribilof Islands, and this is the work of Professor Henry W. Elliott, who surveyed these rookeries in 1872 and 1874, and his work was verified by Lieutenant Maynard and I am satisfied was as near correct when made as was possible for man to chronicle, but to-day there is a marked contrast in the condition of now and then.

A little lower down, sir:

To the extreme south-west of the island is the Reef Rookery, reported to have (by Professor Elliott) 301,000 seals in 1874. It has not over 100,000 seals to-day. "Garbotch", the adjoining rookery, where the Professor says he stood on Old John Rock and saw "10,000 fighting bulls", I can stand and count every bull in sight. This rookery with the reef is an extending point, etc., on that point.

Then Mr. Murray's Report, page 19.

The PRESIDENT.—The figures seem to be excessive, in regard to the diminution there mentioned.

Sir RICHARD WEBSTER.—I was not on the question of actual diminution. I was merely on the question of the knowledge these gentlemen have of Mr Elliott. Would you please look at page 19? I will not fail to regard what you say about the actual diminution, Mr. Presi-

dent. At page 19 is the report of Mr. Murray of the 31st of July 1890, the last paragraph but two, on that page:

The meeting was adjourned from time to time until they had thoroughly discussed the most important questions raised, and at the last meeting, held 23rd May, they unanimously declared that it was their firm belief and honest opinion that the seals had diminished and would continue to diminish from year to year, because all the male seals had been slaughtered without allowing any to grow to maturity for use on the breeding-ground.

That is Mr. Murray's statement in 1890, perfectly independent of Mr. Elliott's report, before it had been published, at a meeting, reporting to his Government from St. George Island of what had been the result of his investigation in that year, 1890; and that is quite as strong, though not so valuable in its bearing, and the deductions to which it leads, as anything in Professor Elliott's report.

The PRESIDENT.—That is not the opinion of Mr. Murray; that is the opinion of the natives.

Sir RICHARD WEBSTER.—I am quite aware of that, Mr. President. As a matter of fact, it is the opinion of Mr. Murray, too. But I am not upon that for the moment. Would you kindly look at the next paragraph:

I made a note of the suggestion on the journal that day, and I am now fully convinced by personal observation that it is only too true, and that the natives were correct in every particular.

But you, Mr. President, were perfectly right in one sense. I was not calling attention to it for the purpose of endorsing or proving Mr. Murray's opinion. I do so now because you directed my attention to it. But the significance of it is this: that long before the report upon which it has been attempted to throw discredit, had been published, the Treasury agents, reporting independently, had said identically the same thing in regard to this matter.

Then Lavender. He reported on the 26th of July, 1890. You will find it on page 21. I will not read it again, because I read it this morning; but I only call your attention to the passage. It begins:

The writer was surprised when he visited the rookeries, to find no young bull seals upon them.

That was written on the 26th of July, 1890, from St. George's Island to the Government.

On the 31st of July, at page 48, Nettleton, writing from St. Paul, says:

In relation to the condition of the seal rookeries and hauling-grounds of this island, I do not feel called upon to go into details in view of the full and exhaustive manner in which the subject is treated in your Report of this year, and also in view of the forthcoming Report of Professor H. W. Elliott, who was sent by the Department especially to examine and report upon the condition of seal life on this and the Island of St. George.

Does any man believe that if Mr. Elliott's report did not represent fairly what it was, that some of these other agents who had been eyewitnesses of the fact which he had described, and had partially described it themselves, would not have been called upon immediately to report as to the real facts by the United States Government? Not one of these is asked to report—not one of the experienced men, but an entirely fresh mind is sent in the year 1891, who had no experience whatever of the seal islands.

The PRESIDENT.—Mr. Nettleton did not make his report to the Government, but to Mr. Goff.

Sir RICHARD WEBSTER.—He reports to Mr. Goff. From my point of view it makes no difference, because it is intended to be forwarded to

the Government, and it is so forwarded. The duty of each of them is to report through their chief to the Government. I quite admit that it should be described as a report by Mr. Nettleton to Mr. Goff; but it came to the United States Treasury Department.

Now, Sir, as I have touched upon this, will the Tribunal kindly favor me by letting me call their attention to the character of this report of Mr. Elliott's? I am making a very great draft upon their patience, but it really is important that it should be understood. I will not refer to it except in connection with one subject afterwards; but if you, Mr. President, will be kind enough to take it before you, you will find that in his letter to Mr. Windom of the 17th of November, he describes his appointment, and he says he went there supposing he should find everything to be occasioned by pelagic sealing; and it is the strongest evidence in favor of the impartiality of this report that nobody condemns pelagic sealing more than Mr. Elliott does. He is perfectly entitled to do it from the point of view of regarding what he was reporting, that is to say, the interest of the United States. At the first page in Roman numerals, just underneath the date, the second paragraph begins:

I may as well frankly confess, at the outset, that I was wholly unaware of the extraordinary state of affairs which stared me in the face at the moment of my first landing, last May, on the Seal Islands of Alaska. I embarked upon this mission with a faint apprehension of viewing anything more than a decided diminution of the Pribilof rookeries, caused by pelagic poaching during the last five or six years.

But from the moment of my landing at St. Paul Island on the 21st of last May, until the close of the breeding season those famous "rookeries" and "hauling grounds" of the furseal thereon, and of St. George Island, too, began to declare and have declared to my astonished senses the fact that their utter ruin and extermination is only a question of a few short years from date, unless prompt and thorough measures of relief and protection are at once ordered on sea and on land by the Treasury Department, and enforced by it.

Quickly realizing after my arrival upon these islands that a remarkable change for the worse had taken place since my finished work of 1874 was given to the public in that same year, and the year also of my last survey of those rookeries, I took the field at once, carrying hourly and daily with me a series of note books opened under the following heads:

And those you are aware, Sir, are all verbatim annexed to the Report. Would you let me call your attention to page 4. He had cited from his report of 1872-74. I read from the middle of page 4:

In 1872-74 I observed that all the young male seals needed for the annual quota, of 75,000 or 90,000 as it was ordered in the latter year, were easily obtained every season, between the 1st of June and the 20th of July following, from the "hauling grounds" of "Tolstoi", "Lukannon" and "Zoltoi Sands"—from these hauling grounds adjacent to the "rookeries" or breeding grounds of "Tolstoi", "Lukannon", "Reef" and "Garbotch". All of these points of supply being not more than one and a half miles distant from the St. Paul killings grounds—the "Tolstoi" drive being less than 600 feet away.

Then he refers to his own work, at page 5:

Therefore, when summing up in my published work of 1872-1874, I was positive in declaring that although I was firmly convinced that no increase to the then existing number of seals on these Islands would follow any effort that we might make (giving my reasons in detail for so believing), yet I was as firmly satisfied that as matters were then conducted, nothing was being done which would injure the regular annual supply of male life necessary for the full demand of the rookeries. I then declared "that *provided* matters are conducted on the seal-islands in the future, *as they are to-day* 100,000 male seals, under the age of five years, and over one, may be safely taken every year from the Pribilof Islands without the slightest injury to the regular birth rates, or natural increase thereon: provided also that the fur-seals are not visited by any plague, or pests, or any abnormal cause for their destruction, which might be beyond the control of men.

Therefore I am justified in saying that he starts with convictions, properly expressed, in favor of the fact that his previous report had been well founded.

Then at the bottom of page 5:

Sixteen years have elapsed since that work was finished: its accuracy as to the statements of fact then published was at that time unquestioned on these islands, and it is to-day freely acknowledged there: but what has been the logic of events? Why is it that we find now only a scant tenth of the number of young male seals which I saw there in 1872? When did this work of decrease and destruction so marked on the breeding grounds there, begin? And how? This answer follows:

1st. From overdriving without heeding its warning, first begun in 1879, dropped then, until 1882, then suddenly renewed again with increased energy from year to year, until the end is abruptly reached, this season of 1890.

2nd. From the shooting of fur-seals (chiefly females) in the open waters of the North Pacific Ocean and Behring Sea, begun as a business in 1888, and continued to date.

Mr. FOSTER.—That should be 1886.

Sir RICHARD WEBSTER.—I did not know.

Mr. FOSTER.—It is a typographical error, I mean.

Sir RICHARD WEBSTER.—Oh, I beg your pardon. I am much obliged for the correction. I thought Mr. Elliott was referring to the fact of the small number in Behring Sea, but I am much obliged to Mr. Foster. I proceed:

Thus the seal life candle has been literally "burning at both ends" during the last five years.

That day in 1879, when it became necessary to send a sealing gang from St. Paul village over to Zapadnie to regularly drive from that hitherto untouched reserve, was the day that danger first appeared in tangible form since 1870—since 1857 for that matter.

The fact, then, that that abundant source of supply which had served so well and steadily since 1870—1881, should fail to yield its accustomed returns to the drivers—that fact ought to have aroused some comment.

Then on page 7:

I can see now, in the light of the record of the work of sixteen consecutive years of sealing, very clearly one or two points which were wholly invisible to my sight in 1872—1874.

This does not appear to be a partisan report.

I can see now what that effect of driving overland is upon the physical well being of a normal fur-seal, and from that sight, feel warranted in tracing the following ground.

The least reflection will declare to an observer that while a fur-seal moves easier on land and freer than any or all other seals, yet, at the same time it is an unusual and laborious effort, even when it is voluntary: therefore, when thousands of young male seals are suddenly aroused to their utmost power of land locomotion, over rough, sharp rocks, rolling clinker stones, deep, loose land, mossy tussocks and other equally severe impedimenta, they in their fright exert themselves violently, crowd in confused sweltering heaps one upon the other so that many of them are "smothered" to death and in this manner of most extraordinary effort to be urged along over stretches of unbroken miles, they are obliged to use muscles and nerves that nature never intended them to use, and which are not fitted for the action.

Then occurs another passage with reference to driving. I need not read it through, if the Tribunal will kindly run their eye through it. There is a passage at the bottom:

When they arrive on the killing grounds after four or five hours of this distressing effort on their part, they are then suddenly cooled off for the last time prior to the final ordeal of clubbing: then when driven up into the last surround or "pod" as the seals are spared from cause of being unfit to take, too big or too little, bitten, etc., they are permitted to go off from the killing ground back to the sea, outwardly unhurt, most of them: but I am now satisfied that they sustain, in a vast majority of cases, internal injuries of greater or less degree, that remain to work physical disability or death thereafter to nearly every seal thus released, and certain destruction of its virility and courage necessary for a station on the rookery even if it can possibly run this gauntlet of driving throughout every sealing season for five or six consecutive years; driven over and over again as it is during each one of these sealing seasons.

Mr. Elliott is not alone in this opinion, Mr. President, by any means. I will show you corroboration of this. I merely mention this for the purpose of bringing to your mind what will be the effect, the double

effect, of killing off all the bigger seals, and at the same time redriving those that are allowed to grow up, if they happen to escape.

I ought perhaps to read the last paragraph on page 8:

With this knowledge, then, the full effect of "driving" becomes apparent and that result of slowly but surely robbing the rookeries of a full and substantial supply of fresh young male blood, demanded by nature imperatively, for their support up to the standard of full expansion (such as I recorded in 1872-1871)—that result began, it now seems clear, to set in from the very beginning, 20 years ago under the present system.

Then lower down on the same page:

Naturally enough, being so long away from the field, on reading Mr. Charles J. Goff's report for the season's work of 1889, I at once jumped to the conclusion that the pelagic sealing, the poaching of 1886-1889 was the sole cause for that shrinkage which he declared manifest, on those rookeries and hauling grounds of the Pribilof Islands.

Mr. Justice HARLAN.—Did Mr. Goff make two reports?

Sir RICHARD WEBSTER.—One has been produced to us, Sir. I referred to it this morning at page 84 of the first Volume of the Appendix to the Comter Case. Whether he made another or not, I do not know. If he did make another, it has not been produced; but I should like, as the Judge has put that question to me, to read a passage from this very report, where after referring to the pelagic sealers as pirates, anticipating the argument of Mr. Carter, he says:

If these piratical vessels were allowed to butcher the seals regardless of sex and age, the seals of Alaska will soon be exterminated. The prosperity of these world-renowned rookeries is fast fading away under the present annual catch allowed by law, and this indiscreet slaughter now being waged in these waters will only hasten the end of the furseals of the Pribilof Islands.

Therefore I call attention to the fact that the reports made by Mr. Goff in the year 1890—most careful reports—with regard to the effect of driving, as you will see later on, and corroborating Mr. Elliott with regard to the absence of bull seals, are made by people who are certainly as desirous as they can be of supporting the United States case.

Senator MORGAN.—Sir Richard, I have made no harsh commentary upon Mr. Elliott while this case has been going on, and I do not propose to make any now; but it is a subject that ought to be inquired into, whether he, having recommended that 100,000 seals could be taken profitably to the seal herd and to the United States—

Sir RICHARD WEBSTER.—In 1878.

Senator MORGAN.—In 1878; having recommended that, and the Government having observed the policy which he recommended without question at all, is he not particularly interested in showing that the loss of numbers in the seal herd was not due to following his advice, but was due to some other cause?

Sir RICHARD WEBSTER.—I should have thought so, and he should have endeavored to put it upon pelagic sealing; but I beg to observe that it is because they have gone on taking the 100,000 annually, that he honestly and candidly said he was wrong.

Senator MORGAN.—I do not dispute that at all; but it is a little unfortunate that the Government, having followed his advice, has no right now to question his statements or opinions about it.

Sir RICHARD WEBSTER.—It is not a question of no right to criticise his opinions. They have every right. My learned friends have not heard from me a single word to the effect that they have not the right to criticise his opinions. I was prepared to show the circumstances under which and the knowledge with which Mr. Elliott reported, and you know what Mr. Phelps said yesterday in regard to the matter. Criticise this

report as much as you like. Say the opinions are wrong; but as a record of what was seen in the year 1890 it is honest and truthful, and being honest and truthful, it must be regarded by this Tribunal. I have never suggested, Mr. Senator Morgan—I say it with great respect,—I have never suggested any doubt of the right on the part of members of the Tribunal to question the opinions of any of these gentlemen, Dr. Dawson, Sir G. Baden-Powell, Mr. Palmer, Mr. Elliott, Mr. Goff—any of them; but at the same time the Tribunal have got to be satisfied that it is this pelagic sealing which has caused this decrease. I will show that it cannot be. But I am at present following out the line indicated at page 349 of the United States Commissioners Report:

The life of the seal herd, then, depending as it unquestionably does on the constancy of the number of births, can be endangered from two directions: First, from the killing of fertile females; and, second, from the excessive killing of males, carried to such an extent as to prevent the presence of the necessary number of virile males on the breeding rookeries.

That is not suggested to be otherwise than a fair test, unless the United States Commissioners, who are belauded by my learned friends in the most glowing terms, are to be thrown overboard at the last moment. I have read today warning after warning that the 100,000 seals were too many. It is no answer to my argument to say Mr. Elliott made a mistake in 1874. The Tribunal cannot absolve themselves from any responsibility by saying that it was Mr. Elliott's mistake or anybody's mistake. I am calling attention to these facts to show that the absence of virile males on these rookeries has been an all powerful cause of deterioration of the seal race and of the absence of the number of seals from the islands.

Mr. President, I do not know whether you think I am exceeding my duty if I respectfully ask this Tribunal to be good enough to read this report for themselves and judge of it; because in my respectful submission to the Tribunal, the best judgment is obtained by reading the whole, and I am perfectly willing that it shall be considered that I am only calling attention to specimens, and that anything that may be said against me, or in any way in which it is thought I have been overstating the matter, shall be judged by the contents. But there are one or two passages to which I ought to call attention. If you will kindly look at page 88, you will see the status of 1872 and the status of 1890 compared in parallel columns, showing that the natural incidents of seal life in connection with the arrival and the dates at which they came to the island are shown to occur at the same time, and about the same period in the year 1890 as before:

STATUS OF 1872.

1. On the rookery ground the Bulls were all by June 1st.
2. Located on this ground then no further apart than 6 to 10 feet, and
3. were very active, incessantly fighting with the
4. thousands upon tens of thousands of "1 2 bulls" or polseacatchie, which were then trying to land upon the breeding belt of sea-margin, provoking and sustaining a constant fight and turmoil there, but being almost invariably whipped off by the old bulls, stationed there.

STATUS OF 1890.

1. On the rookery grounds the Bulls were all by June 1st.
2. Located on this ground, now from 15 to 150 feet apart and are inert and
3. somolent: I have not seen a single fight between the bulls yet.
4. Not a single "1/2 bull" or polseacatchie attempting to land and serve the cows—not a single one have I been able to observe—in fact there are none left: those that exist have been ruined as breeders from the effects of driving; and several thousand of these broken spirited bulls, old and young now loafing on the outskirts of these rookeries, and hauling out with the small holluschickie on the sand and rock margins.

Of course, the photographs in this case corroborate that to the letter, and the picture which Mr. Stanley Brown gave exactly corroborates it, that these bulls were not the fighting, quarreling bulls that had been the typical feature of these rookeries before.

5. Cows began to arrive on the breeding grounds by 4th to 6th of June: and all arrived in good form by July and were

5. Cows began to arrive on the breeding grounds by 4th to 6th of June, all arrived as a rule by July 10, and were

6. located on the breeding-ground in compact solid masses uniformly distributed over a given area of ground no matter how large or small.

6. located on the breeding grounds in scattered harems, solidly here, one or two harems, then a dozen or so families scattered over twice and thrice as much ground as they should occupy if in massed as in 1872-74. The scant supply of, and wide stations and feebleness of the bulls is undoubtedly the reason for this striking change in their distribution as they ordered it in 1872-74.

If this is not a fair statement, of the facts, why have not any of the experienced people been called to contradict it. It is all very well to send a gentleman, however distinguished and however honest, to make his observations, which in fact corroborate this; but where are the experienced agents who can contradict it, and who have not been called?

7. A general average of 15 cows to 1 bull was the best understanding: once in a while a peculiar configuration of the breeding ground enabled one bull the chance to pen up 35 or 45 cows, but it was seldom witnessed.

7. A general average of 45 or 50 cows to 1 bull is the best estimate that can be made to-day: there are so many harems of 60 and 75 cows in charge of one bull to each, and frequently single harems of 100 to 120: cows that it makes the general average of 45 to 50 very conservative.

Mr. President, you will not have forgotten that Mr. Stanley Brown, in the affidavit which I read today, referred to the harems running up to 75 cows in 1891. Now here the same statement which, if the allegation had been untrue, persons there in the year 1890 could have contradicted it. No amount of statement that there are fewer animals on the islands contradicts the point of this remark, which is directed to the general virility of the bulls and the attraction that that bull affords to females who are influenced by the sexual passion.

Would you look, Mr. President, at the last comparison, No. 8, at the bottom of page 89?

The PRESIDENT.—We have read it.

Sir RICHARD WEBSTER.—Then if you will turn back to page 74. This is in answer to the criticism by Senator Morgan of this man. I read from the bottom of the page:

I was right in then assuming that no increase could be noted over the record of 1872-74; but I was wrong in then believing that no injury to the regular supply of young male life necessary for the full support of the breeding grounds, would follow from the driving and killing of the holluschickie as condoned: also the deadly work of the pelagic sealer was not suggested in any serious sense sixteen years ago, and I did not take it into calculation. I have given, in my letter of introduction, the reason why this driving of the holluschickie, has been so destructive to young male seal life—a reason which I could not grasp in 1872-74 since it required time and experience to develop the fact beyond argument and contradiction. It is easy to see now in the clear light of the record that had there been no poaching at sea and had every young male seal been taken in every drive made from the outset in 1871, over one year old and under five, the annual quota of 100,000 would have been easily filled without injury whatsoever in less than twenty working days from the 14th of every June, with only one quarter of the driving necessary under the past and present order of culling out the largest seals for slaughter, and releasing the smaller ones from each drive, when on the killing grounds:—in other words, taking all the young

male seal as driven, over one year old and under five years would have saved on an average for every year the lives of at least 50,000 to 60,000 holluschickie, while those spared from the club annually, during the last 20 years have nevertheless perished, or, surviving, were yet rendered worthless for rookery service from the immediate or subsequent effect of severe overland driving.

When I remind you again, Mr. President, in this connection that owing to the complaint with regard to the size of the skins, and the evidence shows they were killing during these years every seal that was big enough to kill.

The PRESIDENT.—Do you mean that according to Mr. Elliott's observation and impression.

Sir RICHARD WEBSTER.—In 1890.

The PRESIDENT.—Altogether—in 1890 if you like—that the driving in the Russian time for instance, would have been less violent and less rough than it is now.

Sir RICHARD WEBSTER.—The evidence is that they have been driven much further and driven much more frequently. I will not neglect that point, Mr. President. They have been driven much further and driven much more frequently, and the same seal has been driven for this long distance more than once—several times during the same year, and it follows from this simple reason the Islands were not worse from 1830 to 1870 than they were from 1870 to 1890. During the period from 1830 to 1870, *ex concessis*, there was no pelagic sealing. The Russian average is under 40,000. It is a considerable over statement to speak of it, I believe, as 40,000 over those years, and consequently less driving was required and excluding the consequences of raids and the taking of the pups referred to in the evidence to day, it is not that the same driving had a greater effect—Mr. Elliott never suggested that for a moment. The fact is, which Mr. Elliott and other persons equally independent and equally observant call attention to, that driving has been carried on in late years in a way that would injure seals to a greater extent than it has been before.

Now on page 91 you will see the conclusion :

It seems from the foregoing surveys that at the close of the season of 1890, there are still existing upon the Pribilof rookeries 959,000 seals, old and young and pups of this year's birth, or about one third of the whole number of breeding seals and young recorded as being there in '74, how then can they be so near the danger of extermination, though they are in danger of it?

The explanation is as follows :

1. There is but one breeding bull now upon the rookery ground where there were fifteen in 1872: and the bulls of to-day are nearly all old and many positively impotent.

2. This decrease of virile male life on the breeding grounds causes the normal ratio of 15 or 20 females to a male as in 1872-'74 now to reach the unnatural ratio of 50 to even 100 females to an old and enfeebled male.

3. There is no appreciable number of young males left alive to-day on these "hauling" or non-breeding grounds to take their place on the breeding grounds, which are old enough for that purpose, or will be old enough if not disturbed by man, even if left alone for the next five years.

4. Meanwhile the natural enemies of the fur-seal are just as numerous in the sea and ocean as they ever were—the killer-whale and the shark are feeding upon them just as they did in 1872-'74.

5. Therefore, we have destroyed by land and by sea the equilibrium which nature had established in 1868 on these rookeries, and we must now restore it, or no other result can follow save that of swift extermination.

6. That condition of 1868, being restored, then that surplus male life can be taken again under better regulations than those of 1870, and the pelagic sealing can be restricted to proper limits, so as to enable the fur-markets of the world to have a regular supply for all time to come.

The PRESIDENT.—It would be inferred from that that a regular supply would reach a certain number only—whether it is taken by sea or by land.

Sir RICHARD WEBSTER.—Yes, that must be so.

The PRESIDENT.—A limitation of the number. How could you limit the number at sea.

Sir RICHARD WEBSTER.—We know perfectly well that that limits itself to a very large extent, but I am sure you will allow your mind to follow the line on which I desire to argue. I point out that the diminution of the seal life upon the islands is not due and cannot be due to pelagic sealing.

Lord HANNEN.—That is with reference to what regulations should be made, and then arises the difficulty of applying it.

Sir RICHARD WEBSTER.—I will point it out, of course, at the end, but perhaps I may be permitted to make the observations before.

Our contention is it is not intended you are to regulate pelagic sealing so as to enable 100,000 or any other maximum number to be taken upon the islands. You are not to regulate pelagic sealing to allow an excessive quantity to be killed upon the islands. You are to regulate so as to do what is necessary, as far as pelagic sealing is concerned, to prevent the extermination of the herd. That does not mean that they are to exterminate them upon the islands; and you, Mr. President, have been so good as to show you have been following me. Take this case. Suppose it is true there is only one breeding bull instead of 15, it means that a large number of cows will not be effectually served, and a great many more cows will fail to bear pups, and consequently many of the cows will not come back to the islands again, by reason of not having a pup, and therefore not having the instinct which induces them to return. This has a direct bearing on the question of the maintenance of sufficient supply of virile bulls. Now page 104 he refers to the driving:

Ever since 1879-82 the surplus young male seal life has been sensibly feeling the pressure of the overland death drive, and the club; harder and harder became this wretched driving to get the quota in 1883-84; finally when 1886 arrived, every nook and cranny on these islands that had hitherto been visited by the "holluschickie" in peace was now daily searched out.—close up back of, and against the breeding rookeries, under every cliff wall by the sea, over to South-West Point, and to Otter Island, and even the little islet, Seevitchik Kamman, under the lee of the Reef was regularly hunted out.

I need not have read that passage in such detail, but I will tell you how I will deal with that part of the case. I shall show you by the reports of Mr. Elliott, I shall show you by the report of Mr. Goff, I shall show you by the report of Mr. Murray, that instead of being able to get from 50 to 60 per cent killable seals out of a drive they were only able to get 14, 15, and 16 per cent.

They were turning back as much as from 86 to 90 per cent of the seals driven, so that the youngest seals and those less able to bear the strain of driving were being rapidly driven to force up this quota of 100,000 seals out of the supply that was on the islands. I do not hesitate to put before the Tribunal that that does mean a serious injury to the life of a seal; and applying all general principles the seal is not likely to be such a good bull when he comes to the time of service, as he would be if not over-driven.

The PRESIDENT.—How do you explain the quota? If there are less young seals one would think the proportion of those taken and kept would have been smaller.

Sir RICHARD WEBSTER.—That is exactly the point to which I desire to bring your mind. If it was true that pelagic sealing year by year was killing the pups, the proportion of the young, or one-year-old, to the

four and five-years-old, would have been lessening, and you would have had more large seals in proportion. Now, what do we find. It is in evidence that there are fewer four or five-year-old, and a large proportion of pups, and that shows, therefore, that some other cause than the death of the pups, or the death of the mother and pups, is affecting seal life.

The PRESIDENT.—It shows something which has prevented it, but if there are so many young ones that proves that the old bulls do their service.

Sir RICHARD WEBSTER.—May I point this out. If I do not make it clear I am sure you will ask me to repeat it. I say the evidence shows pups of one year and two years old are being constantly driven. I say the evidence shows the increasing difficulty of getting a four or five-year old seal. They find a much larger proportion of one and two-year-old seals among those driven, that is to say, something has happened which prevents seals reaching four or five years, and it must be one of two things that almost every seal of that age is killed, if the driving these young seals prevents them coming to the age of four or five—there is abundant testimony on this, and do not think it is my imagination, because I have not imagined a single thing in this case—I am merely pointing out, supposing in the year 1890 they drive 10,000 seals, and in order to get enough big seals they turn back 80 per cent; and suppose in 1891, driving the same number of seals in order to get an equal number they have to drive them twice and turn back 90 per cent, I say to you as a proposition of mathematics, if the decrease in the total number, had been caused by the death of pups, you would have the proportion of three and four-year-old seals, to the pups, increasing instead of decreasing, whereas if you find in the following year that the proportion of three and four year old seals, or larger seals, has diminished, it means that the one or two year old seals have died or not come to maturity. I challenge criticism upon that argument.

I say that anybody who will look at this thing fairly and impartially and judicially will be forced to the conclusion that the killing of 30,000 mothers and 30,000 pups in the year they are born will increase the proportion of old seals to be found in the herd next year, and that therefore, if you find that, instead of it being a larger proportion of 4 or 5 year old or 3 or 4 year old, a constantly diminishing proportion, something else is diminishing the numbers besides the killing of the pups. I know I speak to gentlemen who are perfectly competent to criticize any argument I may address to them and that is an argument of which I invite criticism.

The PRESIDENT.—You have made your construction very clear.

Sir RICHARD WEBSTER.—Now, I will digress for a moment, and you will not object as it is in consequence of what you have said, in order to call attention to what Mr. Goff said on this particular point; and the passage I refer to today, at page 15, is directly in point on your question. It is the third part, page 15, at the bottom of that page.

Now, in opening the season it is customary to secure all the two-year-olds and upwards possible before the yearlings begin to fill up the hauling-grounds and mix with the killable seals. By so doing it is much easier to do the work, and the yearlings are not tortured by being driven and redriven to the killing-grounds. Heretofore it was seldom that more than 15 per cent of all the seals driven the latter part of June and the first few days in July were too small to be killed, but this season the case was reversed, and in many instances 80 to 85 per cent were turned away. The accompanying percentage examples will show the disposition of this year's drive. The first killing of fur-seals by the lessees was on the 6th of June, and the scarcity of killable seals was apparent to all.

Now, this is by the gentleman who has to inspect the drives and make the return to the Government in regard to that matter.

I call attention to that. It must be due to the fact that something has happened to the two-year-old seals of the year before or the three-year-old seals of the year before. Somehow or other the seals which have been two and three years old in the year 1889 did not appear in the same proportion as three- or four-year-old seals in 1890.

Now, what does that point to? It points to a death or diminution of the older seals in that year.

Mr. CARTER.—By redriving?

Sir RICHARD WEBSTER.—Yes, by redriving.

Mr. CARTER.—But there was not any redriving in 1889.

Sir RICHARD WEBSTER.—Forgive me; this Report is written in the year 1890, and if there was no redriving in 1889, it is the strongest corroboration of what I say.

Mr. CARTER.—I was not speaking of any argument to be derived from it, but the fact.

Sir RICHARD WEBSTER.—In order that I may not appear to be taking it from Mr. Carter, because I think he will find that it is not quite accurate, we have it now suggested that redriving never began till 1889.

Mr. CARTER.—No; 1890.

Sir RICHARD WEBSTER.—You said 1889; but 1890 will make it stronger. That is what Mr. Goff says. I will not be deflected from my point. I beg my learned friends' pardon; I care not when redriving began. Whatever it was, it was not the death of the pup from pelagic sealing; it is something which prevented the three-year-olds being four-year-olds, and the four-year-olds being five-year-olds.

Would you look, Mr. President, if it is not unduly troubling you, at the following passages?

The season closed on the 20th of July, and the drives in July show a decided increase in the percentages of small seals turned away, and a decrease in the killables over the drives of June, demonstrating conclusively that there were but few killable seals arriving, and that the larger part of those returning to the islands were the pups of last year. The average daily killing for the season was 400, or a daily average of 522 including only the days worked.

In 1889 the average daily killing from 1st of June to the 20th of July inclusive was 1,516, or a daily average of 1,974 including only the days worked. With this undeniable decrease in merchantable seals, and knowing the impoverished condition of the rookeries and hauling grounds, and believing it to be inimical to the best interest of the Government to extend the time for killing beyond the 20th of July, I adhered to the letter and spirit of your instructions to me, and closed the killing season on the 20th of July, against the bitter protestations of Mr. George R. Tingle, General Manager for the lessees;

he was the gentleman who said everything was going on all right.

His communication to me upon the subject and my reply are enclosed. Had there been a reasonable probability of the lessees securing their *quota* of 50,000 seals I should have deemed it my duty to extend the time for killing to the 31st of July.

The killing of the 6th of June, the first of the season, was from the Reef Rookery, with a drive of about 700 seals; the total killed, 116, 83 1/2 per cent. being turned away as too small.

Will any man who values his position in arguing suggest that the larger proportion of smaller seals could possibly be produced by pelagic sealing? It is obvious that it must have been something which has affected the length of life of the two- and three-year old seals. That is perfectly plain.

On the 11th of June, the drive was from the Reef Rookery, about 1,000; total killed, 574; 42 1/2 per cent. turned away. On the 24th of June the drive was from the Reef Rookery and Zoltai hauling grounds combined, and about 144 were driven;

total killed, 206; 85 1/2 per cent. turned away. This exhausted Zoltoi hauling grounds for a period of twenty one days, and it was not available until the 19th of July, when again, in connection with the Reef Rookery, the last drive was made, and about 3,956 seals were driven; 556 were killed, and 86 per cent turned away. The seals turned away from the several drives invariably returned to the hauling grounds and rookery from which they were driven only to be redriven to the killing field and culled of the few killables that chanced to join them upon their return to the sea from each drive. By referring to the Table marked D., showing the daily killing for this year, and also comparing the same with that of last year, you will see that from all of the drives the same percentages were turned away as from those I have cited.

We opened the season by a drive from the Reef Rookery, and turned away 83 1/2 per cent., when we should have turned away about 15 per cent. of the seals driven, and we closed the season by turning away 86 per cent.

I commend this to my learned friend, Mr. Carter.

A fact which proves to every impartial mind that we were redriving the yearlings, and considering the number of skins obtained that it was impossible to secure the number allowed by the lease, that we were merely torturing the young seals, injuring the future life and vitality of the breeding rookeries to the detriment of the lessees, natives and the Government.

The contention is, and it is true, that if you kill a mother with the pup dependent upon her, the pup will die and will not get to be one year or even six months old. It is obvious if this is true, that they find this enormously increasing proportion of pups, something is happening to the two-year olds.

The PRESIDENT.—Is Mr. Goff still in office on the Islands?

General FOSTER.—No, he is not.

The PRESIDENT.—He has retired?

Sir RICHARD WEBSTER.—Now at page 16 he has made an affidavit for the United States, and there is no suggestion that Mr. Goff is not a witness or a gentleman who has told the truth in these Reports. Whether or not he may have been too lenient to the lessees I do not care. It is very likely that the lessees were allowed too much, but the fact is this, that these facts—and they are facts—could have been contradicted by dozens of persons, if they were not the truth. Would you let me read to the end of that page, if you please?

It is evident that many preying evils upon seal life—the killing of the seals in the Pacific Ocean along the Aleutian Islands and as they come through the passes to Behring Sea by the pirates in these waters, and the indiscriminate slaughter upon the Islands regardless of the future life of the breeding rookeries have at last with their combined destructive power reduced these rookeries to their present impoverished condition to such an unequal distribution of ages and sexes that it is but a question of a few years, unless immediately attended to before the seal family of the Pribilof group of islands will be a thing of the past.

The PRESIDENT.—I suppose “pirates in the passes” are.

Sir RICHARD WEBSTER.—The pelagic sealers. It is only a statement that they seal *en route*, and catch them as they are coming to the Pribilof Islands.

Senator MORGAN.—Caught them in the passes.

Sir RICHARD WEBSTER.—No, not that they caught them in the passes, but after they have passed through. It is a compendious expression.

Mr. President, there is no suggestion of which there is any record in these papers—unless made in some way which I am not cognizant of—with reference to Mr. Goff which can affect his testimony. That the United States did not like Mr. Goff for telling the truth or thought he was too lenient to the lessees does not militate in any way against the statement of fact. Mind you, this is spoken to by the independent observer Mr. Elliott who went and saw these things himself and never wrote his Report until long after this was written. I should think there

could be no greater testimony to the truth of these facts than that Mr. Goff was no longer in the employ of the United States Government in consequence.

General FOSTER.—I do not want my remark to be understood as meaning he was dismissed by the Government.

Sir RICHARD WEBSTER.—That is a perfectly fair observation.

General FOSTER.—In fact, until very recently he was in the employ of the Government. I am not sure he is not now, but till recently he was in another capacity.

Sir RICHARD WEBSTER.—What I mean is, if there is anything to be said against the position of this man, it should be said openly, but now we know that Mr. Goff is a gentleman who from his position will be regarded as telling the truth. This was said in July 1890 and Mr. Elliotts report I think is the 17th November.

The PRESIDENT.—He was writing it probably at the same time.

Sir RICHARD WEBSTER.—Yes for he refers to things that happened after this date, and various dates in his diaries, and from the point of view of corroboration, I submit it is extremely important. Now, Mr. President, I have only to call attention to the driving, but I am afraid that I have reached my time.

The PRESIDENT.—You can do it if it will not take too long.

Sir RICHARD WEBSTER.—Well, Sir, I am in your hands, but I am afraid I could not do it under twenty minutes at least.

The PRESIDENT.—Then we will take it on Tuesday, at 11,30.

During the temporary absence of Mr. Cmynglame the Tribunal authorizes Mr. Henry Hannen Barrister at Law to perform his duties.
[Adjourned till Tuesday the 20th June at 11,30]

FORTY-FIRST DAY, JUNE 20TH, 1893.

Sir RICHARD WEBSTER.—I have but one other concluding subject to touch, Mr. President, in any amount of detail; and you will remember, Sir, that I had addressed this Tribunal with reference to the existing conditions of the Islands, and had argued to the best of my ability, citing numerous passages of the evidence, that there is the strongest possible testimony to show that the condition of the Islands in the years subsequent to 1886, and I might even say earlier than that, was due to the reckless killing of the male-life for a long series of years. I know or I believe the Tribunal will be good enough to read for themselves the passages in Mr. Elliott's Report that bear upon this; but, in order to complete my statement, I will enumerate the pages that they may appear upon the note.

You will remember, Mr. President, that two features of active male life upon those Rookeries are fights among the males and a proportion as we contend of not more than 15 to 20 females to each male bull as compared with the condition of things which has been described, and of which I gave the evidence of the other day,—practically speaking no fighting at all among the bulls, a large number of comparatively speaking effete bulls and a comparatively few bulls with very large harems.

I call attention to page 24 of Mr. Elliott's report. I will only give you, so that you may have them on the note, the pages, and I ask the Tribunal to be good enough to read the series of extracts. About the middle of the page he speaks of the absence of bulls which formed the striking feature of that changed order of affairs and declares a reduction of more than one half of the females and fully 9/10ths of the males on this rookery.

Then the third paragraph on that page:

Eighteen years ago these slopes of "Garbotch" and the Reef Parade were covered with angry, eager lusty bulls, two and three weeks before the first cows even arrived: they came in by the 5th to the 22nd May in such numbers as to fill the space at close intervals of from 7 to 10 feet apart, solidly from the shore line to the ridge summit, and over, even, so far that it required the vigorous use of a club before we could get upon "Old John Rock" from the rear:

That is the name of the place:

then two, at that time they were fighting in every direction under our eyes.

This season I do not observe a bull here, where I saw at least ten at this time 18 years ago. Now, *not a fight in progress anywhere here*, there are not bulls enough to quarrel, they are now scattered apart so widely over this same ground as to be a hundred and even a hundred and fifty feet apart over ground where in 1872 an interval of ten feet between them did not exist.

Now I remind the Tribunal this is referring to animals of an average of eight years old, and many of them still more. It is most pointed testimony and the Tribunal already know that which I have told them so many times—they will find in Lavender's, Goff's, and the other contemporaneous reports, the strongest independent confirmation of this statement. On page 33, the bottom of the page,

On Lukannon this last summer, while there were two fifths as many cows as in 1872, yet the bulls did not average more than one-fifteenth of the number they showed in 1872. On Keetavie

and so on. I do not pause to read the whole passage. I ask the Tribunal to be good enough to note it for consideration. There are many more, but I must make a selection, and I want to call attention to the daily field notes. Would you look at page 232 where they begin, and you will find under each rookery, and giving the date, Mr. Elliott set down what he had actually seen on many occasions. You will find that he refers to the fact of Mr. Goff being with him at times, and he refers to other Treasury Agents being there. I ask the Tribunal to kindly note pages 232, and 233 and 236. You will see there what I had in my mind.

In company with Mr. Goff and Dr. Lutz I made my plotting of the breeding seals as they lay on the Reef and Garbotch to-day.

And then follows a categorical statement of what he saw. I shall ask the Tribunal to be good enough to read for themselves Mr. Goff's affidavit made on behalf of the United States: not a word of qualification of this or a suggestion that this is not a true state of things—not a word.

Then page 242. "A survey of Tolstoi this morning. That is on the 30th July, and on page 243 on the 7th July. The Tribunal must not think that these are exhaustive statements of all the Report contains. The real way to judge of this Report is to read it and picture to yourself what the man was seeing from day to day, and assuming him to be a man of experience, which cannot be denied—a man who had more experience than anybody else, and appointed from a knowledge of his impartiality and sent to report that it was pelagic sealing and nothing else that injured these rookeries—it does enormously strengthen the value of this Report. I pass from that, Mr. President, because I think, at any rate, the Tribunal appreciated my argument on this the other day.

I come now to the third cause of injury to these rookeries and again I say, taking it from the testimony on both sides, that on impartial consideration you must come to the conclusion that, driving, over-driving, and redriving have for years been injuring the male life on these rookeries. I will as briefly as possible put before you the evidence as to this part of the Case, and I will ask the Tribunal to turn to the British Commissioners' Report, paragraph 704. This is what the British Commissioners reported from what they saw themselves before they had the corroborative testimony to which I am about to call attention later on.

I read from paragraph 704:

One of the most important points connected with the method of taking fur-seals on the Pribilof Islands, is that of the driving from the various hauling grounds to the killing grounds. However safeguarded or regulated, the method of driving fur-seals overland for considerable distances must be both a cruel and destructive one. Active and graceful as a fish in the water, the fur-seal is at best clumsy and awkward in its movements on land, and though it is surprising to note at how good a pace it can, when forced to do so, travel among the rocks or over the sand, it is also quite evident that this is done at the expense only of great effort and much vital activity, as well as at serious risk of physical injury. A short shuffling run is succeeded by a period of rest, and when undisturbed, all movements on shore are carried out with the utmost deliberation and frequent stoppages. But when a herd of seals, half crazed with fright, is driven for a distance of a mile or more from the hauling ground to some killing place, already pestilential with the decaying carcasses of seals previously killed, it unavoidably, and however frequently the animals may be allowed to rest, entails much suffering. When the weather is at all warm, or when the seals are pressed in driving, individuals frequently drop out and die of exhaustion, others again are smothered by the crowding together of the frightened herd, and it is not infrequent to find some severely wounded by bites ruthlessly inflicted by their companions when in a high state of nervous tension. It appears also, from information obtained on this subject, that in warm weather seals, during

a drive, occasionally pass into a state of violent spasmodic activity, which is aimlessly maintained till death ensues. Under such circumstances, drives have not infrequently had to be abandoned.

On St. Paul Island, the longest drives now practised are those from Polavina to the vicinity of the salt-house near Rocky Point, and from Tolstoi to the village killing grounds. These are about equal in length, and each not much less than two miles. On St. George, the longest drives are from the Great Eastern Rookery and from Starry Arteel Rookery to the village killing grounds, each being about three miles in length, the time occupied in driving being from four to six hours, according to the weather. Under the Russian regime much longer drives were made, and in the entailment of these a very considerable improvement has been effected, but the essentially injurious features of the drive remain the same.

On Behring Island, of the Commander group, the drives are short, the longest being about one and a-half miles, from the South Rookery. On Copper Island, on the contrary, the drives generally extend across the island, and are from three to four miles long, very rough, and crossing one or more intervening steep ridges. These drives must be much more trying to the seals than any now made upon the Pribilof Islands, and are, in fact, only rendered possible by extreme caution on the part of the drivers, and by the expenditure of much time.

If it were possible to drive only those seals which it is intended to kill, little exception could be taken to the method of driving in the absence of any better method, but the mingling of seals of varied ages upon the hauling grounds from which the drives are taken, even under the original and more favourable conditions of former years, renders it necessary to drive to the killing place many seals either too young or too old to be killed. It is sometimes possible to "cut out" from the drives many of these unnecessary individuals *en route*, and great care is exercised in this respect on the Commander Islands, though little appears to have been practised on the Pribilof Islands.

It admits of no dispute that a very considerable impairment of the vital energy of seals thus driven, and eventually turned away from the killing grounds, occurs, altogether apart from the certainty that a proportion of such seals receive actual physical injuries of one kind or another, but this appeared to have been recognized on the Pribilof Islands only within the past two or three years.

Then come a citation from Mr. Goff's report which I have already read.

Now, Mr. President, I want to say a word with reference to the facts of this matter by calling attention to the citations at page 261 of the Counter Case, passages which have already been read and I will not trouble you by reading them again, of a number of people with regard to the cruelty of the drives; but I do want to say one word about Mr. Palmer. And I will ask you to be good enough to turn to pages 187 and 188 of the British Commissioner's Report, where Mr. Palmer's Report upon this matter is set out at length.

Now, what are the facts with regard to this? If you will look, Mr. Palmer, of the United States National Museum, Washington, a gentleman whom it is not suggested had either motive or object in saying what was not true, personally dissected and examined a large number of these seals. The facts are stated at page 188:

When driven into the water the seals are weak from two causes, the drive and lack of food; before they can secure food they must rest, and rest is only obtainable at the expense of that most vital necessity of these animals, their fat. I remember looking with great curiosity for the cause of death of the first dead seal that I found stranded on the beach. Externally there was nothing to indicate it, but the first stroke of the knife revealed instantly what I am confident has been the cause of death of countless thousands of fur-seals. It had been chilled to death; not a trace remained of the fat that had once clothed its body and protected the vital organs within. Since the day that it had escaped from the drive, it had consumed all its fat in the effort to keep warm, and nothing remained but to lie down and die. I opened many after this, and always discovered the same, but sometimes an additional cause, a fractured skull perhaps. I have even noted those left behind in a drive, and watched them daily, with the same result in many cases. At first they would revel in the ponds or wander among the sand dunes, but in a few days their motions became distinctly slower, the curvature of the spine became lessened; eventually the poor brutes would drag their hind flippers as they moved, and in a few days more become food for the foxes. In every case the fat had disappeared.

It will be seen also that by this driving process the 2- or 3-year-olds, which are the only ones killed for their skins, are culled out almost completely from the seals which visit these islands, and therefore that very few male seals ever reach a greater age; consequently, there are not enough young bulls growing up to supply even the yearly loss on the rookeries, much less to provide for any increase.

I ask, if that is not true, why have not we the evidence of people who, in 1891 and 1892, opened and examined these seals? There have been openings and examinations of pups quite properly to make out their death was due to the pelagic sealer. There was an examination in 1891 of pups to show that there was no trace of organic disease; and I want to know if it be not true that this driving has this effect,—nobody suggests that Mr. Palmer is not experienced, nobody suggests that he is not honest; and he personally opened these seals himself and he stated, speaking to a scientific society, the result of his own observations. But it does not rest only on Mr. Palmer though that would be a very, very strong fact if it stood alone. I remind you again, and I will not stop to read them because most of them have been read already, on page 261 of the British Counter Case you will find a collection of extracts of persons who have spoken on this matter.

Now, I will ask you to be good enough to take volume I of the Appendix to the Counter Case, and to look at what was observed in the years 1891 and 1892 by Mr. Macoun. I read from page 152 of the 1st volume of the Appendix to the Counter Case.

When on the Pribilof Islands I was present at four "food-killings", three on St. Paul Island and one on St. George Island, and was thus enabled to observe carefully the methods employed by the agents of the North American Commercial Company, and the natives working under them, in selecting from the thousands of seals driven to the killing-grounds the few hundreds that were to be killed. I had expected that the driving and killing of these seals would be under the direct supervision of an officer of the Government, for while it was well understood that the skins of the seals killed would be taken over by the Company, the object of the killing during the *modus vivendi* was supposed to be not for the purpose of taking skins for the Company, but to supply the natives with food. I did not myself accompany the natives during the whole progress of a drive from the hauling-grounds to the killing-grounds, but on three occasions on St. Paul Island I accompanied the drive for some distance before the killing-grounds were reached. On none of these occasions did an officer of the United States Government see anything of the seals until they were all driven together near the killing-ground, and once the killing had to be delayed for some time until the Treasury Agent reached the ground. Once only on either island did an officer of the Government in my presence interfere in any way with the natives or the agents of the Company in their work of clubbing and skinning the seals, or make to them any suggestion as to which seals ought to be killed and which spared, and the number of seals killed on every occasion depended not upon the wants of the natives, but entirely upon the number there were in the drive that were thought by the agents of the Company to be of a size that would give to them skins of the greatest value. The one instance referred to above was at the killing on the 1st of July. A seal with apparently a broken shoulder was allowed by the natives to escape though they noticed its condition. Colonel Murray,—

he was one of the Government Agents, and I have read his Report before,

then ordered one of them to go after it, and it was killed. At this killing less than 300 skins were taken. A careful account was kept by me of the number of seals that were driven up to the clubbers, and were allowed to escape after having been huddled together on the killing-ground, while those of a killable size were selected from the drive.

But 14.1 per cent. of the whole number of seals driven at this time were killed, while among those that escaped I counted seventeen that were badly enough bitten or wounded to bleed considerably, and there were doubtless many more that I failed to notice. Three of those injured were young seals that had evidently been struck by the clubbers, as they were badly ent about the head. One seal, about 6 years old, that had been wounded in the belly, was allowed to escape. I went to where it had rested for a few minutes, and found as much clotted blood as would have filled a breakfast cup. Another seal had a gash in its back about 5 inches long, and though

a four-year-old seal of the size that was being killed was allowed to go free, as the skin had been injured. A wounded or bleeding seal was to be seen in nearly every small pod of from thirty-five to fifty that passed through the hands of the clubbers. There were, of course, many others that had blood on them that had come from the killed or wounded seals, but on the seventeen referred to above the wounds could be plainly seen.

At the killing of the 25th of July one young seal escaped with a broken nose, and another with an eye hanging out. Such things attracted no attention from either the natives or the officer of the Government or Company, being apparently considered by them to be quite matters of course.

I noticed at every killing on St. Paul Island at which I was present, that as each little pod of seals was driven from the killing ground to the lagoon 20 or 30 yards away, one or more lagged behind the others, moving with great difficulty, and by means of their fore-flippers only, as if their backs or hinder parts had been hurt in some way. They seemed to revive after the water was reached, and it was not possible for me to determine whether the injury was of a kind that would affect them permanently or not.

No better proof of the injury done to seals by driving could be had than to walk along the route followed by them when driven from a hauling-ground to the killing ground. The ground is on all sides strewn with bones; and if there has been a recent drive, many rotting carcasses are also to be seen. The day after a drive from Middle Hill I walked for about a mile from the salt-horse along the route over which the seals had been driven, and found seventeen carcasses of seals that had become overheated, and had been killed so that their skins might be saved. I found one dead seal lying in a small pond of water, about a mile from the killing grounds, through which the seals had been driven; it had no doubt become exhausted, and, lying down there, had escaped the notice of the drivers. The fur was still good. The carcasses referred to above were all of animals of the size of which the skins would be of the weight required by the Company, and much better able to bear the fatigue of the long drive than the younger ones.

As actual counting at four killings show that less than 20 per cent of the seals.

This is very important in reference to what was subsequently discovered as the observations of Mr. Elliott, Mr. Goff, Mr. Lavender, and Mr. Murray in the year 1890, of which Mr. Macoun had no knowledge when his (Mr. Macoun's) Report was written.

As actual counting at four killings show that less than 20 per cent of the seals driven were of what the Agents of the Company considered a killable size, the number of young seals hurt while being driven must be very great, but not, I think, greater than those injured when the seals are huddled together surrounded by the clubbers. With no escape in any direction they draw nearer one another, until they are at last crowded so closely together that little more than their heads are visible, except when one of the larger seals struggles out from among the others; if of a killable size, it is knocked on the head and falls back into the struggling mass. The "pod" is continually poked and stirred up by the clubber, in order that the seals may be kept moving and when all that are of the proper size have been clubbed the others are driven from the killing grounds, with cries from the clubbers and the beating of pans by the attendant boys. If by chance a "killable" seal escapes with the younger ones, a club is thrown at it, and though many are struck in this way, I never saw one stunned or prevented from reaching the lagoon, a short distance away. Whether such seals receive permanent injury it is impossible to say, but the throwing of the club at them always appeared to me an act of wanton cruelty or a sort of pastime to amuse the clubbers while the next "pod" of seals was being driven up.

While the seals were huddled together on the killing ground the clouds of steam rising from them shewed plainly the over-heated condition of the animals.

Sir, there are before the Tribunal photographs of these animals while they are being driven. You will find at pages 30 and 31 of the original Census report of Mr. Elliott the description of the way in which these animals move, and I must say I think in the face of this evidence the statement that the pelagic sealer was a man actuated by a taste for cruelty was rather unfortunate in the argument of the United States speaking of this in the knowledge of the evidence we now have before us I do not think that those who are so enamoured of this method of killing on the islands can boast very much on the score of cruelty. Probably it had better be left out of the argument altogether so far as

they are concerned. But Mr. President in this connection will you be good enough to look at the corroboration from Mr. Elliott's report of this matter and I will ask you to look at page 104. Again I am not pretending to read all the paragraphs, but there are some here I wish to direct attention to.

Ever since 1879-'82 the surplus young male seal life has been sensibly feeling the pressure of the overland death drive, and the club; harder and harder became this wretched driving to get the quota in 1883-'84; finally when 1883 arrived, every nook and cranny on these islands that had hitherto been visited by the "holluschickie" in peace was now daily searched out,—close up back of, and against the breeding rookeries, under every cliff wall by the sea, over to South-West Point, and to Otter Island, and even the little islet, Seevitchik Kamuan, under the lee of the Reef was regularly hunted out.

Every three-year old, every four-year old and every well-grown two-year old male seal has been annually taken here during the last two years within a day or two at the latest after it showed up on the beaches, and in the rear of rookeries, prior to the 26th-31st, July.

In 1872 the killable seals were permitted to "haul up" in every sense of the word; they hauled out far inland from the sea; in 1890, the few killable seals that appeared never had time in which to "haul up" over the land,—they simply landed, and at the moment of landing were marked and hustled into a drive; up to the 20th of July last summer, from the day of their first general hauling as a body in June, this class of seals never had an opportunity to get wonted or accustomed to the land,—never were permitted to rest long enough to do so after landing.

Then page 118 he is describing the driving which had been previously spoken of in his old Census Report.

Such was the number and method of the young male seals in 1872-'74: it is very different to-day: from the hour of the first driving of 1890, May 21st up to the close of the season, July 20th, all the driving was regularly made from rookery grounds—from the immediate margins of the breeding animals with the solitary exception of that one place, Middle Hill, English Bay, St. Pauls Island. Not a drive made elsewhere in the course of which cows and pups and bulls were not disturbed and hustled as the young males were secured.

I call attention to the fact of females being included in the drive with reference to some further evidence later on. Then follows on page 118 and 119 a passage as to the driving of cows on which I rely, but which is not very nice reading.

General FOSTER.—There is an omission there in the next sentence. "As long as the breeding season was unbroken"—the omission is, "was at its height, and the compact organization of the rookeries was."—

Sir RICHARD WEBSTER.—I am much obliged. Now look at the bottom of this page,

Last season, during that desperate effort made then to get the catch of 100,000, parties were regularly sent over to drive the holluschickie off from Seevitchie Kammen, from Otter Island.

That is not unimportant with reference to the effect on the habits of seals of this driving on the islands.

When I expressed my surprise at this ferocious driving begun early in June, I was met by apparent equal surprise on the part of the drivers, who wondering at my ignorance, assured me that they had been driving seals in this method ever since 1885.—"had been obliged to, or go without the seals"!

The driving itself, in so far as the conduct of the natives conducting the labor was concerned, was as carefully and well done as it could be; they avoided to the very best of their ability any undue urging or hastening of the drive overland from the rookeries; they avoided, as nearly as they could, under the circumstances sweeping up pods of cows and pups—did all that they could to make as little disturbance among the breeding animals as possible: but even with all their care and sincere reluctance to disturb the rookeries, cows were repeatedly taken up in their scraping drives on the margins of all the rookeries and their pups left floundering behind to starve and perish ultimately.

The manner to-day of driving overland to the killing grounds is unchanged from the methods of 1872, but the regular driving from every spot resorted to by the hol-

Inschickie on both islands has caused the establishment of killing grounds and a salt house as early as 1879 at Stony Point (Tonkie Mees), and a slaughter field at Zapadnie on St. Paul the skins being taken from the latter point by a bidarra to the village; (which was sent over from there every time a killing was made) and are now hauled down in wagons, (mule teams) from the former locality, to the salt houses of St. Paul.

Now these are facts stated, I admit, to Mr. Elliott on the information of the people in the islands that the change took place as early as 1879, and another change later on. If this was to be contradicted it ought to be contradicted categorically, and by people who knew. Then if you will turn to pages 146 and 147 and you will find some important percentages showing that which I enforced on the Tribunal on Friday last, the increasing proportion of small instead of the decreasing proportion of small, which would have been the consequence if pelagic sealing was at the root or had been the real cause of this mischief. Thus the bottom of 146.

Average percentage of seals "turned" out from the driven "pods" seasons of 1872-1874, including nothing but 7 to 12 lb skins taken from the start to the finish.

General FOSTER.—It is 1872 to 1874, inclusive.

Sir Richard WEBSTER.—Of course it is.

General FOSTER.—It is inclusive of years, not of pounds.

Sir Richard WEBSTER.—For this purpose it is not material. The point is they were taking from 7 to 12 pound skins, and not small ones.

From June 5th to the 15 inclusive, 5 per cent to 8 per cent of each driven herd. From June 15th to June 30th, 10 per cent to 12 per cent. From July 1st to the 15th 35 per cent to 40 per cent. From July 15th to July 20th, 60 per cent to 75 per cent.

Now the corresponding dates in 1890 were up to the 4th July only 7 to 12 pound skins were being taken; and then 5 pound skins. From June 5th, to the 15th 60 per cent to 70 per cent of each driven herd driven back. From June 15th, to June 30th, 70 to 85 per cent. From July 1st to July 15th, 85 per cent to 90 per cent. And then, even after the lowering of the standard from July 15th to July 20th, 90 per cent to 93 per cent turned back. Now these facts are spoken to by the man who had seen them and are, in my submission to this Tribunal, of more value than any number of opinions of people who had no previous experience and simply say what they think with regard to the effect of driving upon these animals. Then, if you will kindly turn to page 248, this is with regard to the rookery of Polavina on the 3rd July:

Visited this rookery ground and surveyed the area and position of the breeding animals in company with Mr. Goff.

My final survey of this rookery shows it to be one of the two rookeries only which seem to have suffered only half in loss of form and numbers. I can not avoid the conclusion, however, that this rookery like Zapadnie, has been cruelly driven during the last four or five seasons, perhaps the last eight years, since the chief hauling-grounds always laid up behind the breeding lines of Polavina; therefore, when the shrinking of holluschickie began, the scraping of the large semicircular edge of Polavina Rookery commenced in earnest, since the young males naturally do here as they do everywhere else on this island to-day, they lie up closer and closer to the lines of the breeding seals.

Then, beginning at paragraph 267 going on consecutively to 283, I press upon the Tribunal the importance of this evidence. There are tables of the actual counts of the numbers taken, the numbers killed and the numbers turned away day by day written down as they occurred in the presence of these very Government Agents, and that extends from the 23rd June up to the 26th July, the last date of an actual record; that is 25 days of actual observation—of course, not consecutively, but

when the drives have occurred, and the Tribunal will find, if they will be good enough to study those tables, corroboration which with great respect, my learned friends will not be able to dispute. I will call attention to my point as I pass on briefly. I will take page 273, 78 per cent rejected; that is the 27th June. Page 275, on the 28th June, 85 per cent turned away; page 276, on the 30th June, 84 per cent turned away (I leave out fractions); page 277, on the 1st July, 90 per cent rejected, or rather 85 per cent rejected, and 90 per cent of those were yearling pups; page 278, 88 1/2 per cent rejected on the 2nd July; page 279, 91 rejected on the 3rd July, and on the same day 81 per cent at another place. On the 4th July, page 281, 90 1/2 per cent rejected; on the 7th July, page 282, 92 per cent rejected. My learned friends will understand that I will read every one if they wish it, but it makes it clear that what was going on was that there had been a reckless slaughter of the holluschickie, perfectly independently whether or not there were sufficient male lives on the rookeries, in squeezing these unfortunate rookeries so as to get these 100,000 seals *per annum*.

Now at page 251 of this report occurs a passage which ought to be read. You will remember a man named Webster, whose conversation with regard to the size of the harems is quoted in the United States commissioner's report, but his affidavit is absolutely silent as I pointed out to you the other day with regard to the size of the harems subsequently but there is a statement on pages 250 and 251, the one I am referring to which seems to me to be of importance. It is under the date of 25th July.

Daniel Webster is the veteran white sealer on these islands; he came to St. Paul in 1868, and, save the season of 1876 (then on a trip to the Russian Seal Islands), he has been sealing here ever since, being in charge of the work at North East Point, annually, until this summer of 1890, when he has conducted the killing on St. George. He spoke very freely to me this afternoon while calling on me and said there is no use trying to build these rookeries up again so as to seal here as has been done since 1868, unless these animals are protected in the North Pacific Ocean as well as in Behring Sea; on this point the old man was very emphatic.

That is an important point as showing impartiality in this matter.

Webster came ashore on St. Paul island in the spring (April) of 1868, an employé of Williams and Havens, of New London, Ct. He took charge of the sealing then begun on behalf of this firm at Novastoshnah or North East Point. Hutchinson, Kohl and Co. had the only other party up there at that time. This was the first irregular sealing ever done upon this island since 1804.

Webster said that H. K. and Co. and he took over 75,000 young male seals at N. E. Point alone, that summer of 1868, and only stopped work from sheer exhaustion of their men, who were not only physically "used up," but also they had used up all their salt and had no suitable means left of saving any more skins.

When, then both parties stopped work he said that no apparent diminution of the number of holluschickie was evident to any of them; and that this fact created much comment; he declares that there has never been so many seals on that ground since that "although there was a fine showing of seal, Mr. Elliott, when you were there in 1872, yet there never has been so many there as in 1868."

He says that ever since 1876-77 he has observed a steady shrinking of the hauling grounds at North East Point a very rapid contraction during the last six years, especially rapid since 1887-'88.

That he never agreed with the statement recently made of the great increase of seals over my record of 1872-'74; but on the contrary has always said that no increase ever followed it, and that he always said so to both Treasury and company agents whenever questioned he declared a steady diminution; he says that when down in San Francisco last (about 5 years ago, winter of 1885-'86) he was not asked any questions by anybody as to the increase of seals, and he volunteered no information; if he had been asked, he would have spoken his mind freely.

Webster says that in 1872-'74 he was then able to get all the holluschickie he wanted from that sand beach on the North shore of the "Neck" at N. E. Point never went anywhere else for them, or near a rookery.

Now would you kindly turn over to page 303. A conversation was held on the 6th August in the presence of all four Government Agents Murray, Nettleton, Goff the ordinary Agents and Mr. Elliott the special one. Colonel Murray took the notes and he is the Colonel Murray whose report I have read. I need not read though I commend to the notice of the Tribunal the whole of this conversation, but I turn to bottom of page 302. Where there is an answer by George Booterin one of the witnesses examined. Their names are given on page 300 and you will find it stated they are the men who had been longest on the island.

They are Artamonov, Booterin, Sedoolie, Vollkoy, Korchootin, Sedick.

I began to see in 1877 that this trouble was ahead, but whenever I or my people spoke about it we were told by the company men "Americans" (*sic*) that it was not of our business and we must not talk about it. Whenever we talked about the seals the company men threatened to send us away from the island.

Question. (By Mr. Goff to Booterin.) Was that the reason you would not talk to me last year?

Answer. I hardly remember now why I did not like to talk about the seals.

Question. What do you men think of the effect on seal life of the driving of the seals?

Answer. When the old Russian Company drove, and the drives came in here, they never killed anything over a three-year-old; all over that were either never disturbed, or else spared; and if the same thing had been practiced ever since, there would be no scarcity of seals to-day.

Question. How many three-year-olds do you think you can get next year?

Answer. If they were to drive all the seals on this island next year they would get nothing and would only disturb and injure the rookeries.

(By Kerick Booterin.) Whenever any killing is allowed, if they never kill any over three-year-olds, and kill only three-year-olds and under, I believe there would be no injury done.

Question. Do any of you remember the "Zapoooska" of 1834?

"Zapoooska" Mr. President means a rest given to the islands.

Answer. Yes, Booterin and Artamonov remember it well.

Question. How many seals were killed after the first year of that order, and how were they killed?

Answer. The first year we killed only one hundred holluschickie, and we increased the number every year afterwards.

Question. What do you think of another "Zapoooska" for today?

Answer. (By Kerick Booterin.) When the Russians ordered their Zapoooska, little by little afterwards, everything grew better, and if the same thing is repeated to-day, everything will grow better, and if it is not done, no seals will come here. We observed that the men sent here by the Government since old Capt. Bryant, till we saw you men and talk now with you, took no interest in the seals, but whenever busy, were engaged in shooting our hogs, in fact they very seldom visited the rookeries.

Question. Did you men ever talk or attempt to talk about seal life to any of the Government officers before Mr. Goff's time?

Answer. Yes, on several occasions, and they answered we did not know anything about it.

Then a little way down by Mr. Elliott

We propose to immediately inform the Secretary of the Treasury of the exact condition of affairs, and we know that he will take care of the seals and the people too. That he is the only man who can talk, but that he sent us here to get the facts, and he will act upon that information. That none of us in Washington knew of the true condition of affairs up here; until Mr. Goff wrote down last year to the Secretary of the Treasury not a word has ever gone from here since 1870 which even hinted at any danger to the seals.

Indicating that that had been occurring which may be better imagined than described. The Company Agents and the Treasury Agents prior to 1889 were not telling the Government the truth as to the condition of the Islands.

Now, Mr. President, on page 304, I will just read the summary with regard to this interview.

The foregoing statements are made only by those natives who in 1872-'74 were old enough then to really observe and think; these men above named are the only survivors of that age when I was on the island in 1872; also, when the above interview was in progress, Kerick Booterin during the whole time held a small note book in his hand, open, and not seeing him make any notes or refer to it at the close of the talk, he was asked by the interpreter what he wanted to do with the book that he had there; he then showed us the following written statement (in Russian) which he said he made for me, as he was not certain whether we should meet and talk, or not, before I left the island.

Then this is the statement August 6th:

Pardon me, Mr. Elliott, I never call myself a big man, but now I shall talk what I know, and will not tell what I do not know.

I think that as the hauling grounds were, they will be if the drives were made and the killing made from small ones, the large ones spared. If that is done, I think all will be well. If that is not done, more harm will come to the rookeries so that there will be no more hauling out on the rookeries. If a "Zapooska" is not made, then we will lose the land if the Treasury does not look out. If the hauling-grounds could sustain the company, then the grass and everything like it would not grow there now. This loss will fall upon us and upon our children. We cannot longer sit quiet and talk about there being lots of seals.

I speak to every member of this Tribunal, and I say to suggest that that report is not the report of truth not by direct attack but by casting suspicion upon it as was done by Mr. Carter in his original argument is unworthy; I was about to justify Mr. Elliott's position when my offer drew from Mr. Phelps the frank acknowledgment he did not intend to attack Mr. Elliott except by criticism of his report, which he is at perfect liberty to do—I say, if you look at that report and apply to it your experience and knowledge of life, you cannot but come to one conclusion; and that is that in 1889 the impartial Treasury Agent, Mr. Goff, who is still in the service of the Government, Colonel Murray, Mr. Nettleton, and Mr. Lavender, as well as Mr. Elliott, came to the conclusion the bulls had been practically exterminated from this island for some years before.

Now the evidence in rebuttal of this from Mr. Stanley Brown is rather curious, and I read from the second volume of the United States Appendix, at page 18, under the head of redriving:

From my knowledge of the vitality of seals I do not believe any injury ever occurred to the reproductive powers of the male seals from redriving that would retard the increase of the herd, and that the driving of 1890 necessary to secure about 22,000 skins could not have caused nor played any important part in the decrease that was apparent on every hand last year.

Now that affidavit was made after a few months' or rather a few week's examination, of the rookeries by Mr. Stanley Brown. It is not saying too much to ask this Tribunal not to regard such testimony, in the face of the body of evidence to which I have been calling attention this morning, as well as that to which I called attention on Friday last. But is it true that female seals have been appearing in the catch from the islands to a much greater extent than they ought to have? I will ask attention on this point to the British commissioners' Report, paragraphs 716 to 719, and again I do not hesitate to appeal to the careful way in which these gentlemen formed their opinions, and to the way in which they have been corroborated by the subsequent testimony, paragraph 716.

As already indicated, all the evils incident to "driving" in any form became greatly intensified when, with a diminished number of killable seals, the attempt is still continued to obtain a large yearly number of skins. This occurs not only because

of the driving and redriving above referred to, but also in consequence of the fact, that under such circumstances the remaining killables lie very close to the breeding rookeries, so that it is no longer possible to make drives without disturbing the rookeries themselves. Thus, it has occurred that, in late years, considerable and increasing numbers of breeding females have been driven to the killing grounds with the killables, though when recognized there in the process of selecting for killing, they have been released. The probable special effect of such treatment of females, as well as the fact that in the disturbances caused upon the breeding rookeries, a certain number of the young are almost certain to be killed, have been already noted.

Then in paragraph 717 is the extract from the original Census Report, and in paragraph 718 is Captain Bryant's testimony with regard to the possible inclusion of females for killing among these driven. But if the Tribunal will be good enough to take the second volume of the Appendix to the British Counter Case at page 245, I will read the evidence of six or seven of the fur merchants in the very affidavits referred to by my learned friend, Mr. Condert. This is at paragraph 5—Mr. Stamp.

A noticeable feature about the consignments from the Pribilof Islands has been that, while formerly the consignments were entirely composed of male skins, of late years from 1883 up to 1890 female skins have appeared among them each year in increasing numbers.

Now the question may arise as to whether or not you can tell sex very accurately, but in making this affidavit Mr. Stamp could not have had in his mind that there would be anything important in the particular dates he mentioned; and he puts 1883, a date some seven years back, which would corroborate the statement I have been making this morning as to the date the driving close to the rookeries actually began.

The PRESIDENT.—It does not appear that this testimony should relate to seals killed on the islands.

Sir RICHARD WEBSTER.—Yes.

The PRESIDENT.—You think it does not mean the Pribilof herd altogether.

Sir RICHARD WEBSTER.—No that is not contended. These affidavits have been referred to before. I do not wonder, after the lapse of time it should, have escaped even your memory, Sir, that the skins from the Pribilof Islands are distinguished from the north-west catch all through by fur merchants. You will find I am accurate in that respect. Then at page 246 paragraph 6:

In inspecting consignments of Alaska skins in recent years, I have from time to time noticed that the number of female skins had very much increased, and in the last few years in which the 100,000 skins were taken, I personally noticed a very considerable percentage of female skins. Female skins began to make their appearance about 1883 in this catch, and have increased in numbers each year since reaching, as I have said, a very considerable percentage in 1889.

Then the next paragraph shows what I had in my mind with reference to the others.

In examining the consignments of the north-west catch, I have always noticed, and during the past two years especially, an increasing number of skins which showed neither spear nor shot marks, and which appear to be identical with Alaska.

He is speaking of the sea catch as the north-west catch, and so they all do.

Then Mr. Rice at page 246, paragraph 3, says:

Up to 1878 I never remember having seen among the Alaska catch any female skins. In that year for the first time I noticed the appearance of a few female skins, which I at once drew to the attention of the firm. In the following year there were also a few of these skins, but what percentage, or what number, I cannot at this distance of time recall. Since that period I have always noticed amongst the Alaska catch a certain percentage of skins which were female, and which percentage has slowly increased, and amounted to, in my opinion (at a rough guess) in 1889 to from 10 to 15 per cent.

These are the same gentlemen who refer to there being 70 or 80 per cent of the female skins in the sea-catch—the same gentlemen whose affidavits are relied upon by my learned friend, properly enough, for that purpose.

Then Mr. Vyse at page 248 paragraph 3.

As regards the Alaska catch, in former years this was entirely composed of male skins, but latterly I have noticed amongst them a certain percentage of female skins, which have increased a little in more recent years. It is very difficult to form anything like an accurate estimate of what this percentage is. In my opinion, it is about 10 per cent.

Then Mr. Bevington, page 249, paragraph 3.

As regards the Alaska catch, I have during the last four or five years noticed amongst them a small quantity—say from 10 to 15 per cent.—of female skins.

Then Mr. Allhausen on the same page, paragraph 3, says:

There is another feature in relation to the Alaska skins, viz., that they, for the most part, are entirely composed of male-skins. Of late years, that is to say, from the year 1883 or 1881, I have noticed amongst this consignment a certain percentage of female skins, which percentage has increased in later years.

Sir, it is corroboration, and corroboration not of an unimportant kind, though, of course, not quantitative, showing what you would expect was happening if males were becoming scarce and if they continued to take more of the two-year olds and more of the one-year olds, and they were obliged to drive closer to the rookeries and so did include some females who were disturbed from the rookeries.

Now, passing as rapidly as I can over one or two remaining matters, I want to tell you the class of evidence which you have to consider. Will you kindly take map 7 of the United States Case.

The PRESIDENT.—That is the East Point Rookery Map.

Sir RICHARD WEBSTER.—That is the East Point Rookery Map. I desire to call attention to the class of evidence by which the case I have been making is sought to be met. I call attention therefore to n^o 7 of the maps annexed to the United States Case, the map of East Point Rookery. I only take this one, without going through them all, because it best illustrates what I mean, and I think the Tribunal will be surprised when I tell them how this has been prepared. The thick red colour is a survey by Mr. Stanley Brown of the breeding ground in the year 1891. The continuous red line, as appears from the colour is supposed to be the condition of the rookery in 1882, and the broken red line is supposed to be the condition of the rookery in 1870; that is to say, this map is supposed to show that it had gone from the dotted line up to the thick line between 1870 and 1882, and had shrunk from the thick red line of the hatched colour, as it is called, by the year 1891.

If any maps or records had been kept in the Islands possibly I say there might have been some value about it but it is somewhat astonishing when I tell you that these marks particularly the thick line and the dotted line have been put down by people, two of whom have been absent 14 or 15 years from the islands, from memory not going even upon the islands again—made either in San Francisco or in some other place where they were without a note or memorandum of any sort or kind. I ask you to look at that part by the Sea Lion Point, look at the lines opposite side of the Islands. Look at the way in which minute curves are supposed to be drawn from memory and all I say is that that class of testimony may be of some value to show general increase or general decrease but can be of no value in order to form an estimate as to whether or not the condition of the Islands is due to the killing of females as distinguished from the killing of males. I give my learned

friends simply the references in each case to the affidavits where they will find my statement supported, that these lines have been drawn by people who have been absent in all but one case 10, 12, or more years from the Island and from memory without notes. It is the United States Case, Appendix n° 2, pages 3, 44, 60 and 167. Those are the affidavits of the gentlemen, Mr. Morgan, Mr. McIntyre, Captain Bryant and Mr. Stanley Brown, Mr. Stanley Brown, of course, being responsible only for the plotting of what he saw in the year 1891.

Senator MORGAN.—Did Mr. Stanley Brown's report have no reference to Mr. Elliott's previous surveys?

Sir RICHARD WEBSTER.—None whatever, Mr. Senator; it was made entirely upon his own surveys; in fact, it does not appear from any reference in Mr. Stanley Brown's affidavit, so far as direct reference is concerned,—you cannot tell if he had it or not.

Senator MORGAN.—Mr. Elliott surveyed the same rookeries?

Sir RICHARD WEBSTER.—Mr. Elliott surveyed the same grounds; but no reference is made anywhere to Mr. Elliott's Report as I said the other day by Mr. Stanley Brown.

Now, Mr. President, I was challenged the other day with regard to the Russian figures of killing. I know now they will not dispute the figures, but they say that we made an improper use of them. My point is that prior to 1867 and 1868 no experience of the Islands would have justified a killing of anything like 100,000. May I remind you for a moment of how the matter stands? We say that the average of the figures given on page 132 of the British Commissioners' Report, showing the killing prior to 1868, shows an average of less than 40,000 a year. They do not now dispute the authenticity of the figures so far as they appear, of course, a few years were only estimates, but all the figures come from United States sources. But what they say is, that you, the British Commissioners, have behaved very unfairly and very improperly in estimating the figures at something less than 40,000 and your case is an unfair case, because you have made that statement. I desire to tell the Tribunal that in the United States Executive Documents, N° 36 of the 41st session, Mr. McIntyre, the witness referred to many times by the United States reporting to Mr. Blaine in the year 1869, or rather reporting to Mr. Boutwell, the Secretary of the Treasury, and Mr. Boutwell sending it on to Mr. Blaine who was then the speaker of the House of Representatives,—it is on page 15,—uses this language with regard to the Russian killing, which, at any rate, show that the British Commissioners were not less accurate than Mr. McIntyre, in fact they have been more liberal.

From the same authority (that appears to be Vemianodoff), we learn that during the first few years following the discovery of the Islands in 1781 over 100,000 skins were annually obtained; but this it seems was too large a number, for the decrease in the yearly return was constant until 1842, when they became nearly extinct; and in the next decade the whole number secured was 129,178, being in 1852 but 6,564. But from 1852 under judicious management, there appears to have been an increase, and, in 1858, 31,810 were taken which was the largest catch in any one year until 1867, when, as I am informed, some 80,000 or 100,000 were secured under the supposition that the territory would soon be transferred to the United States.

Now that was the statement made perfectly impartially in 1869 by Mr. McIntyre that the largest annual catch in any year from 1842 down to 1869 had been between 31,000 and 32,000.

Lord HANNEN.—That is not in accordance with all these figures because some are larger.

Sir RICHARD WEBSTER.—In the year 1865—Yes—That is the first that I see.

Lord HANNEN.—There is some in 1859.

Sir RICHARD WEBSTER.—It is just 32,000.

Lord HANNEN.—And in 1865 it is 40,000 odd.

Sir RICHARD WEBSTER.—But your Lordship will notice that those years 1863, 1864 and 1865 have a query against them. I quote this not for the purpose of saying one is as true as the other, but for the purpose of showing the conclusion drawn with regard to the figures by independent persons advising the United States many years ago was in accordance with the independent judgment, made by the British Commissioners, and, yet it is in the face of this, that a grave attack is made by the United States on the unfairness of the British Commissioners, because they thought fit to say that the average of those years did not exceed 40,000 seals *per annum* on an average of years.

Now, Mr. President, attention was called by my learned friend Mr. Carter, or Mr. Couderc, to one or other of the replies from Naturalists. I think, Mr. Couderc read professor Huxley if I remember and I want the Tribunal exactly to understand how that matter rests.

Will you be good enough to oblige me by taking the first Volume of the United States Appendix.

Senator MORGAN.—May I enquire, Sir Richard, whether there is evidence in this case to show that during the time of the rest which the Russians gave to these Islands that they provided that sealing might go on on one island while the other was entirely exempt.

Sir RICHARD WEBSTER.—I do not know Mr. Senator Morgan, but I think it is quite possible and a very reasonable suggestion. I do not know how it stands. I do not remember it.

Senator MORGAN.—I only called attention to it to have it looked into.

Sir RICHARD WEBSTER.—It strangely accords with a note that I have of an observation that I intended to make to this Tribunal as to what might be reasonable with regard to these Islands, but I mention this that I do not really know whether the "Zapooska" was sometimes at St. George's sometimes at St. Paul's or how it is.

Now I want respectfully to caution the Tribunal on this, because it is clear that these replies of the naturalists must be at any rate considered with some little caution though many of them are not against me at all having regard to the way in which their opinion was invited. Would you kindly look at page 415. A statement occurs there, by Mr. Merriam, of supposed facts, upon which the expert gentlemen are asked to express an opinion, and, it is not going too far to say, that in many of these most important facts there was a serious controversy of fact known to exist at that time. Therefore one must to a certain extent regard the report and opinion, however distinguished the author of it may be, with some little caution, having regard to the nature of the memoranda which was put before them.

I will only call attention to the most important matters, and I will take them, if you will bear with me, by the numbers. In paragraph 8—I indicate those which cannot be taken as facts:

The act of nursing is performed on land, never in the water. It is necessary, therefore, for the cows to remain at the islands until the young are weaned, which is when they are 4 or 5 months old.

Now there is not a passage in the evidence which justifies that statement, that as a matter of fact, the pups are weaned before they are four or five months old. The evidence on both sides shows that in the end of July and beginning of August the pups are scattered all along the islands and apparently weaning, in the ordinary sense of the word, has taken place long before that.

Senator MORGAN.—I believe it is true that the female seal, Sir Richard, never nourishes her young in the water.

Sir RICHARD WEBSTER.—Certainly, but that is not my point. My criticism is with reference to the statement that it is necessary for the cows to remain on the land until the young are weaned which is when they are four or five months old. I addressed the Tribunal last Wednesday or Thursday on the matter and for reasons which I gave, I contended that apparently the period of actual nursing by the mother seal before the pup becomes to a certain extent independent cannot be put at the outside at more than five or six weeks.

Senator MORGAN.—My question only related, you know, to the fact that whatever nursing there was and whatever time was occupied was necessarily on land.

Sir RICHARD WEBSTER.—And I never contradicted that.

Senator MORGAN.—I was not aware Sir Richard, that you had or that I said you had.

Sir RICHARD WEBSTER.—I will deal with anything I can, of course, but it does not really bear upon my point. My point of attack is the statement that they are not weaned till they are four or five months old. I say that that is not accurate. Then at the beginning of paragraph 10 copulation takes place only on land. I say that that is not accurate. Then 14:

Cows when nursing, and the non-breeding seals, regularly travel long distances to feed. They are commonly found 100 or 150 miles from the islands and sometimes at greater distances.

It is not too much to say that that is, at any rate, a very disputed point. Here, it has been treated as an ascertained fact.

Then 17:

The nonbreeding male seals ("holluschickie"), together with a few old bulls, remain until January, and in rare instances even until February.

That, again, as a statement of fact, cannot be supported.

Then 18:

The fur-seal as a species is present at the Pribilof Islands eight or nine months of the year, or from two-thirds to three-fourths of the time, and in mild winters sometimes during the entire year.

The breeding bulls arrive earliest and remain continuously on the islands about four months; the breeding cows remain about six months, and the non-breeding male seals about eight or nine months, and sometimes during the entire year.

I think that is a grossly exaggerated—I will not say more than that—

Then 20:

In addition to the commercial killing above described, a number of male pups were formerly killed each year to furnish food for the natives, but the killing of pups is now prohibited by the Government.

When I remember that this report was written in 1892, and that the killing of pups continued under protest, up till the year 1890, I think the fact had perhaps better have been more distinctly stated.

Then at the top of page 417—(I am only calling attention to the most pointed ones)—You will see this:

Inasmuch as the number of seals annually secured by pelagic sealing represents but a fraction of the total number killed, a glance at the above figures is enough to show that the destruction of seal life thus produced is alone sufficient to explain the present depleted condition of the rookeries.

Mr. President, I cannot but wonder whether, when this was written Mr. Merriam had or had not been allowed the privilege of seeing Mr. Elliott's Report? Those words obviously mean but a very small frac-

tion. Of course, if it was 90 per cent, 95 per cent, or even 75 per cent, there would be no object in putting it in—it would have conveyed to the mind of an ordinary reader that a very small fraction indeed of the seals that were shot at were recovered.

Then at the end of the 4th paragraph on page 417, you will see this:

It is evident that this killing of nonbreeding males could in no way affect the size or annual product of the breeding rookeries unless the number killed was so great that enough males were not left to mature for breeding purposes. There is no evidence that this has ever been the case.

I do not know now whether Mr. Merriam had seen Goff's Report, the Treasury Agent Lavender's Report, Murray's Report which is in the year 1890 and 1889, stating that 1889 he, Lavender, could not find enough breeding males upon the rookeries that there was none left. It is a most distinct statement. It may be right or wrong—that I submit to the judgment of the Tribunal, but, to say the least, it is rather strong for Merriam to state if he knew of this report that—there is no evidence of there being any loss by virile males.

Then further down he says:

Having been selected by my Government solely as a naturalist, and having investigated the facts and arrived at the above conclusions and recommendations from the standpoint of a naturalist, I desire to know if you agree or differ with me in considering these conclusions and recommendations justified and necessitated by the facts in the case.

I am not at all surprised, Mr. President, that gentlemen replying to that *ex parte* letter and taking those statements to be facts, you find some of their Reports more unfavorable to my contention than you would perhaps have had, if a more accurate statement of the real condition of the evidence had been put before them. But even then there are certain matters which I think should be referred to. I call attention to the letter of Mr. A. Milne-Edwards, who is "Le directeur du muséum d'histoire naturelle", in Paris. At page 419, in the end of the second paragraph he says:

We know that our migratory birds are, during their travels, exposed to a real war of extermination, and an ornithological international commission has already examined, not unprofitably all the questions relating to their preservation.

Would it not be possible to put fur-seals under the protection of the navy of civilized nations.

And then on page 419 he says:

There is, then, every reason to turn to account the very complete information which we possess on the conditions of fur-seal life in order to prevent their annihilation, and an international Commission can alone determine the rules, from which the fishermen should not depart.

Therefore he, with prudence and caution is not prepared to endorse the statement suggested by Mr. Merriam that nothing but the absolute prohibition of pelagic sealing is to be the remedy.

Then I come to the letter of the gentleman who writes from Christiania, Mr. Collett. I am only of course taking those from which I say evidence in my favour can be obtained. At page 421 he says:

My own countrymen are killing every year many thousands of seals and *cystophora* on the ice barrier between Spitzbergen and Greenland, but never females with young; neither are the old ones caught, or and that is the greatest number, the young seals. But there is a close time, accepted by the different nations, just to prohibit the killing of the females with young.

That is not in favour of complete prohibition of pelagic sealing.

I next read an extract from a letter from Dr. G. Hartland of Bremen which will be found on page 422, in which he says:

I sincerely regret that for practical reasons it cannot be thought of to prohibit fur-seal hunting for a few years entirely, as this would naturally assist numerically the menaced animal.

Applying both to land and sea. Then Professor Salvadori from Turin says on page 423:

No doubt the free pelagic sealing is a cause, which will act to the destruction of the seal herds, and to that it must be put a stop as soon as possible.

But at the same time, I think that the yearly killing of about 100,000 young males on the Pribilof Islands must have some influence on the diminutions of the herds, especially preventing the natural or sexual selection of the stronger males, which would follow, if the young males were not killed in such a great number. So that, with the stopping of the pelagic sealing I think that, at least for a few years, also the slaughter of so many young males in the Pribilof Islands should be prohibited.

That is a very remarkable thing showing that his judgment, even in the face of the statement made that there was no evidence that there had not been a sufficient number of males left, in Mr. Merriam's letter.

Then Dr. Blanchard who writes from Paris, says, in the third paragraph of his letter at page 427:

I will go even further than you, for I think it urgent not only to rigidly prohibit the taking of the migratory *Callorhinus* in the open sea, but also to regulate and limit severely the hunting on land of males still too young to have a harem.

According to your own observations the male does not pair off before the age of 6 or 7 years and the female gives birth to only one pup at a time. It can be said, then, that the species increases slowly and multiplies with difficulty. These are unfavorable conditions, which do not allow it to repair the hecatombs which for several years past have been and are decimating the species.

That points quite as much to the regulating and dealing with the matter upon the islands as at sea.

I next read from the letter from the two gentlemen at Stockholm, at the bottom of page 428. After saying that the facts stated would form a base for regulations, they say:

These regulations may be divided into two categories, viz—1mo.—Regulations for the killing, etc., of the Fur-Seals on the rookeries in order to prevent the gradual diminution of the stock; 2do.—Regulations for the Pelagic Sealing or for the hunting of the Seals swimming in the ocean in large herds to and from the rookeries, or around the rookeries during the time when the females are suckling the pups on land.

Obviously a very just and proper recommendation. Now I know there are some others who accept "wholesale", (if may use the expression), Mr. Merriam's recommendation to condemn pelagic sealing and pelagic sealing only. It is not doing too much to call your attention to the character of the letter addressed to them by Mr. Merriam, and, notwithstanding that, to the very important—statements and opinions given in reply by some, of those distinguished naturalists.

Mr. President, it is said that pelagic sealing is the only cause that has injured this race of seals. It is utterly impossible for my friends even to prove it, I say it is utterly impossible for my friends even to go near establishing any proof of it. I care not what figures are taken. I will take the whole pelagic sealing up to any date you like to give. The year they take is 1884, contrary to the facts found by the original investigation of these matters by either Mr. Goff, Mr. Elliott, Mr. Murray, or anybody else—for the purposes of their case to day they say in 1884 a decrease observed. Why, Sir, if you took the whole pelagic sealing up to 1884, and if you assumed that every one of the seals killed to bear a pup, and if you assumed all those pups to live, it could not have had anything like influence upon the year 1884 as suggested. But, of course, that would be grossly unfair to pelagic sealing, because the case made by the United States is that only one-half of the seals that are born are males—that is to say, one-half are males and one half females; and only one half of those males return as yearlings—that is to say one quarter of the total number—and still less as two year olds.

And when I remind you—taking it not from any Table that is disputed, but from the total pelagic catch—the north-west catch, in and out side Behring Sea—the numbers in 1879 are 11,090; in 1880, 15,227; and in 1881, 11,655—if you apply even the tests of the United States Commissioners to that, the reduction in the year 1884 in two and three-year-olds, could not amount to more than between 4,000 and 5,000 seals if every one of the females produced a pup.

Mr. CARTER.—How many do you say?

Sir RICHARD WEBSTER.—I give the figures they are in the Table page 257 of volume II, of the Appendix to the Counter Case of the total Pelagic Catch. In 1879 it is 11,090; in 1880 15,227; in 1881, 11,655.

Mr. CARTER.—I mean your statement of what it would amount to?

Sir RICHARD WEBSTER.—I say, if you assume all to be females, and merely apply the death-rate from the United States table, the utmost deficiency there could be of two and three-year-olds in the year 1884 would be between 5,000 and 6,000 seals.

But now, Mr. President, will you let me remind you what the condition of things is with regard to pelagic sealing. It is very well put, Sir, at page 211 of the British Counter Case and the references are given to the detail information about it in the Commissioners Report.

In the Case of the United States, it is claimed that this took place concurrently with increased sealing in Behring Sea and in consequence of the death of suckling female seals. But in 1884 only one Canadian sealing-schooner is known to have entered Behring Sea.

The first ship to enter was in 1883, the "San Diego", an American ship.

But in 1884 only one Canadian sealing-schooner is known to have entered Behring Sea, and in 1885 but two schooners, and it was not till 1886 that as many as sixteen vessels entered the sea.

Now the case made with regard to the killing and deterioration of the holluschickie or the males is due to the fact it is said of the nursing mothers being killed in Behring Sea. Now I need not do more than put my point before the Tribunal to show the impossibility of sealing to that extent inside Behring Sea, up to the year 1886, having had any sensible effect on the rookeries at all the answer is whatever may have been the diminution of general seal life unquestionably pelagic sealing played its part, and I have not for one moment suggested the contrary but you must look to some other cause to find the very large decrease and, looking for some other cause, you find it in the evidence to which I have called your attention.

Now with reference to the fact that in the years 1891 and 1892 that there is no diminution of the number of seals found at sea, you will find at page 29 of the Second volume of the Appendix to the British Counter Case, the Summary of the evidence of 132 witnesses as to the seals being as numerous at sea in the years 1891 and 1892, that so far as you can gather from that testimony there has been no corresponding decrease in the seals at sea, confirming another matter upon which the Commissioners and others have expressed an opinion that the effect of this treatment upon the islands may be to drive a considerable number of the seals to the sea. I was asked by Senator Morgan whether there was any evidence at all of these animals suffering from disease? I expressed an opinion or rather I remarked that any race of animals would indeed be extraordinary which was entirely free from disease to which, as far as we know certainly all animals that have ever come under our notice are subjected.

Senator MORGAN.—I assume they must be necessarily the subject of disease.

Sir RICHARD WEBSTER.—But there is very remarkable evidence about it. I ought to have been able to answer it off hand, but I turn to that which contains more knowledge and truth about Seal life than anything else, and that is to the Report of the British Commissioners I call attention to paragraph 339 of the British Commissioners Report:

It can scarcely be doubted that the fur-seal of the North Pacific is also subject to diseases of various kinds, the prevalence or otherwise of which have their effects on the numbers at each particular period. Inquiries made on the subject have, however, not brought to light any notable mortality which has been attributed to disease, nor do previously published reports include any mention of such mortality. It may thus at least be inferred that no notably fatal disease has attacked these animals while upon their breeding islands within historic times, but it is not safe to affirm that disease has been wanting, or that epidemic diseases may not, at any given time, appear, and require to be allowed for in any regulations made respecting the killing of seals.

In the Report of Mr. C. H. Jackson on the fur seal islands of Cape Colony, already referred to, he writes: "Upon several islands, especially in the Ishabar group, are to be found the remains of vast numbers of 'seal', probably the effects of an epidemic disease at some distant period".

On the same subject and referring to the same region, Mr. H. A. Clark writes as follows, quoting "Morell's Voyages": "In 1828 Captain Morell, in the schooner 'Antartic', visited the west coast of Africa on a fur-seal voyage. At Possession Island, in latitude 26° 51' south, he found evidence of a pestilence among the fur-seals. The whole island, which is about 3 miles long, he states, was covered with the carcasses of fur-seals, with their skins still on them. They appeared to have been dead about five years, and it was evident that they had all met their fate about the same period. I should judge, from the immense multitude of bones and carcasses, that not less than half-a-million had perished here at once, and that they had fallen victims to some mysterious disease or plague." About 17 miles north of Possession Island are two small islands not over a mile in length, where Captain Morell found still further evidence of a plague among the fur-seals. "These two islands," he says, "have once been the resort of immense numbers of fur-seals, which were doubtless destroyed by the same plague which made such a devastation among them on Possession Island, as their remains exhibited the same appearance in both cases".

Elliott, after stating that he has observed no disease among the seals of the Pribilof Islands, quotes a recorded instance of a plague affecting the hair seals of the north of Scotland, Orkney and Shetland Islands, and adds: "It is not reasonable to suppose that the Pribilof rookeries have never suffered from distempers in the past, or are not to in the future, simply because no occasion seems to have arisen during the comparatively brief period of their human domination".

At page 62 of the Census Report. I happen to know the place mentioned very well indeed, and some-thing about the seals, too—speaking of the hair seal, Mr. Elliott puts this in his note:

The thought of what a deadly epidemic would effect among these vast congregations of Pinnipedia was one that was constantly in my mind when on the ground and among them. I have found in the British Annals (Fleming's) on page 17 an extract from the Notes of Dr. Trail: "In 1833 I inquired for my old acquaintances, the seals of the Holes of Papa Westray, and was informed that about four years before they had totally deserted the islands and had only within the last few months begun to reappear. . . About fifty years ago multitudes of their carcasses were cast ashore in every bay in the north of Scotland, Orkney and Shetland, and numbers were found at sea in a sickly state."

I cannot help thinking that with an enfeebled race for the reasons which I have been referring to, and with the want of supply of sufficient virile males such a condition of things is not less likely in the future than it has been in the past.

Mr. President, on many of the matters upon which I have addressed you, there is interesting information to be found in connection with the photographs which are before the court; but of course I do not want to stop to occupy time by those being examined, as the Tribunal can ask for information upon them if they desire anything further in that connection.

The PRESIDENT.—May I beg to put a question to you, Sir Richard, in regard to the statement you made a few minutes ago.

Sir RICHARD WEBSTER.—Which is that?

The PRESIDENT.—The statement with regard to the abundance of fur-seals at sea. You say that the driving and ill-treatment of the seals on the islands may have driven a great quantity of seals to the sea.

Sir RICHARD WEBSTER.—Possibly.

The PRESIDENT.—Do you mean to say they would resort to any land during the time they were at sea?

Sir RICHARD WEBSTER.—Oh no; I think there would be more found at sea. Of course I do not want to reargue the question. My contention is that except for the purpose of reproduction, as with the bulls, there is no evidence of the absolute necessity of going to land at all, that a large number of the holluschickie do go, possibly by gregarious habits, and possibly for other reasons; but that I suggested to you that it is not a vital necessity except in the cases to which I have referred.

The PRESIDENT. You admit, then, that they must go for those few purposes.

Sir RICHARD WEBSTER.—Certainly. It seems to me fair upon the evidence to point out that in all probability a less number of these animals would be likely to be found on the islands, and a larger number at sea if there was the amount of disturbance on the islands to which attention has been called; but of course, Sir, that they would go back again in large numbers is equally plain when the disturbing element was removed.

I was asked to hand in and before I conclude I propose to hand in the paper of regulations. These, Sir, are the regulations which I, in conjunction with my learned friend the Attorney General and my other learned friends, submit to the Tribunal as the regulations which upon the evidence, ought to be laid down by this Tribunal, assuming there be proper management upon the islands; and I can only repeat that which he put before you, Sir: these have not been framed as a bid in order that they may be the subject of further expansion. They have not been framed from our point of view of considering what is the least we would offer, thinking the Tribunal ought to order more. Rightly or wrongly, these have been framed with the intention of putting before the Tribunal what would appear to be fair regulations, having regard to the evidence as to the seals that ought to be protected in Behring Sea, by which I mean the gravid females passing from through the Aleutian Passes to the Pribilof Islands and the females in immediate attendance upon the islands nursing their young. They are as follows:

REGULATIONS.

1. All vessels engaging in pelagic sealing shall be required to obtain licences at one or other of the following ports:

Victoria, in the province of British Columbia.

Vancouver, in the province of British Columbia.

Port Townsend, in Washington Territory in the United States.

San Francisco, in the State of California in the United States.

2. Such licences shall only be granted to sailing vessels.

3. A zone of twenty miles around the Pribilof Islands shall be established, within which no seal hunting shall be permitted at any time.

I do not propose to reargue, Mr. President, that that means a very much larger zone in reality, because of the absolute necessity of observing the zone.

Senator MORGAN.—You mean, sir Richard, that it shall be established by law in both countries?

Sir RICHARD WEBSTER.—Certainly.

4. A close season from the 15th of September to the 1st of July, shall be established, during which no pelagic sealing shall be permitted in Behring Sea.
5. No rifles or nets shall be used in pelagic sealing.
6. All sealing vessels shall be required to carry a distinguishing flag.
7. The Masters in charge of sealing vessels shall keep accurate logs as to the times and places of sealing, the number and sex of the seals captured, and shall enter an abstract thereof in their official logs.

Probably some members of the Tribunal may not know the distinction between a "Log" and an "Official Log". The official log is that which the Master is bound to enter up and deposit at certain places at the end of every voyage; the daily log is only accessible if you can get access to the ship. The official log is a public document, and must be deposited under penalty. It is in order to insure that the information may be accessible that it is proposed to enforce entries in the official log.

8. Licences shall be subject to forfeiture for breach of above regulations.

Senator MORGAN.—All these eight propositions, as I understand it, are based upon the assumption that the two Governments, or the Governments respectively, shall enact laws to that effect?

Sir RICHARD WEBSTER.—Certainly.

Lord HANNEN.—And I suppose it is for that reason that you do not go into the question of how these are to be enforced?

Sir RICHARD WEBSTER.—It is for that reason, my Lord. I suggest that what I may call the proper determination of this Tribunal would be a determination of the regulations which ought to be made; from the point of view of the necessity of preserving seal life and that it would not be proper for this Tribunal, or just to the United States or Great Britain, to dictate in what form the local municipal legislation of the two countries should be to enforce the observance of the regulations, or what should be the amount of the penalty or the degree of punishment. As regards clause eight we thought that it would not be right that where there had been a breach of the regulations the license should continue as though no such breach had taken place; but with regard to the form of municipal legislation, I have conceived that the actual machinery whereby the United States and Great Britain respectively would legislate in order to carry out and enforce the regulations, is a matter which should be left entirely to them.

Senator MORGAN.—Sir Richard, if you please, n^o 3 reads, "A zone of twenty miles around the Pribilof Islands shall be established, within which no seal hunting shall be permitted at any time." The distance between the islands of St. Paul and St. George is about 27 miles.

Sir RICHARD WEBSTER.—Thirty-six.

Senator MORGAN.—If you say "around the Pribilof Islands", I do not know where the centre of that zone would be.

Sir RICHARD WEBSTER.—The regulation means from the nearest land, Sir. That is the proper expression. "Around the Pribilof Islands" like the selvage, or border. It is 20 miles from the nearest land, and there would be no right to go between the two islands.

Lord HANNEN.—You might express it, then, as within twenty miles of any land.

Sir RICHARD WEBSTER.—Within twenty miles of the nearest point of land. It practically is extending the three mile limit for the purposes of this case by convention; because, Mr. President, as you observe, these regulations which are being suggested, to be determined by the Tribunal as though by agreement between the two nations; failing agreement between the two nations, they are being established

by this Tribunal. And upon the point which I think Lord Hannen and Senator Morgan directed my attention to, it is not to be supposed, for reasons that I will say a word about in a moment, that two nations agreeing with each other, would consent to delegate to the other nation the form of determination as to what shall be the legislation which the particular nation would itself lay down. To point my observation: the United States would never consent to Great Britain dictating to the United States what would be the form of the United States legislation.

Lord HANNEN.—The regulations cannot be carried out in either country without legislation.

Sir RICHARD WEBSTER.—In neither country could the rights of nationals upon the high seas be interfered with except by municipal legislation.

Senator MORGAN.—And therefore there has to be in both governments legislation that is as nearly parallel as it can be made.

Sir RICHARD WEBSTER.—Subject only to the good feeling and good faith on the part of the Government making the legislation, that the act or statute shall be effective for the purposes for which it is intended.

Senator MORGAN.—Then I understand that if we should adopt regulations, with such amendments as you have proposed to them, that these regulations would have no sanction for their enforcement except the fact that this award would make them a part of the treaty obligation between the two Governments.

Sir RICHARD WEBSTER.—I consider, Sir, it would be just as though the two nations had agreed upon regulations and then there would be a moral obligation upon each country to give effect to that agreement, and that moral obligation would have as much effect, of course and be as much respected, as if it were a legal obligation.

Senator MORGAN.—And in the case you suggest, of either government failing to carry into effect by law regulations that were satisfactory to the other.

Sir RICHARD WEBSTER.—I have not suggested that.

Senator MORGAN.—I am suggesting it—or any regulations at all, then the remedy of the other Government would be only to hold that the Government failing to carry them into effect had not complied with its treaty obligations.

Sir RICHARD WEBSTER.—I should think so. There was one regulation that we did not think it right or proper, Mr. President, to insert, because it seemed to me it ought to come essentially from the Tribunal, and that is as to whether or not these regulations should continue for a definite time or should be supposed to be in perpetuity. Of course, in one sense the Tribunal could not affect the rights of the nation. Assuming that the award, being enforced by municipal legislation, and in five or ten years time either the United States should take the view that it was not satisfactory, or that Great Britain should take the view that in the circumstance then shewn to exist the state of things was not satisfactory, no award of this Tribunal could limit the right of the country in the future to say.

The PRESIDENT.—I can hardly think it is permissible that you should say such a thing before us. We are doing serious business, and the two Governments have pledged themselves to execute whatever we award. If they break their word, of course they can do so, but they have pledged themselves.

Sir RICHARD WEBSTER.—If you will forgive me for a moment, I was going to deal with that matter. I had not finished the mere expression

of the proposition. I desire to say that if there was a changed state of circumstances after the regulations were in force that could not legally alter the right of a country to say. "We must make a fresh bargain;" but I desire to point out that after this full discussion—that was the very word on my lips—this Tribunal may be of opinion that it has sufficient information to indicate that at any rate they can see so far into the future as to be able to say either that the regulations are so moderate that they will always be useful or at any rate that they ought to last for a period of years: and it seems to me that if the Tribunal took that view then they would or might indicate upon the face of the regulations that they ought not to be touched or interfered with or denounced by either Government for a period, or not until after the period of a given number of years, and then that the moral obligation, as strong as the legal obligation, would be imposed upon those countries for whatever time the Tribunal should indicate. I hope you will follow, Mr. President—I apologize for having ventured to interrupt you—that that was what was in my mind, the sequence of what I desired to put before you that if the Tribunal desired to indicate that either in all time or for a period of years which they thought sufficient to indicate, the regulations ought to be maintained unaltered then the moral obligation would rest on the nations as I have already said. I did not mean in anyway to suggest that either country ought to do otherwise than loyally act up to the award. On the other hand, I feel it my duty to point out that the Tribunal itself cannot tell for certain what the effect of regulations may be. It may be that the herd of seals will become so numerous that they will be in such a condition as to be an injury to the fishing industry of the Pacific. It may be that the herd will not be sufficiently protected for all time, and that therefore the United States may ask for some further protection. According to the best of their lights the Tribunal should, if I may humbly submit, deal with that matter; and it is for that reason that I did not think it respectful to the Tribunal to intimate whether there should be a suggestion by the Tribunal that the regulations should be maintained for a limited time or should be indefinite as to time.

The PRESIDENT.—The point was whether it would be wise for us to foresee a change in circumstances and to legislate for perpetual maintenance of our regulations. That was the question in my mind.

Sir RICHARD WEBSTER.—Yes sir; I have one or two questions to notice.

Before any general scheme for the preservation of seal life as a whole, some opinion must be formed, some mental decision must be come to as to what is a proper condition of things upon the islands. It is absolutely necessary. You may not say anything about it in your award; that I have nothing to do with but in making up your mind what regulations are necessary as a restriction upon the rights of the pelagic sealer you must have formed some opinion in your mind as to what will be the *de facto* exercise of rights by the United States upon the islands. For instance, supposing that you were of opinion that the United States were going to kill every seal within the next five or six years, as they say in law they have a right to do, and I do not deny their legal right to do it; supposing you were of opinion that the United States were within the next five or six years going to kill every seal on the islands, there would be no necessity of regulations at all. On the other hand if you were of opinion that the United States were going to be moderate in the exercise of their so-called rights, then the pelagic sealer, who would be entirely benefitted by that moderation, ought to have his rights

restricted. And from that point of view, notwithstanding the observations of my learned friends I say the British Commissioners approached the problem of zone fairly. Whether or not the particular figures they suggested would be what this Tribunal would think to be fair is entirely a different question; but speaking of it as a proposal, it was a perfectly legal and rational way of dealing with the whole question.

I am afraid my learned friends and those they represent care so little for suggestions made from Great Britain that they probably will think it impertinent of me even to make a suggestion; but having studied this matter, I only put it for their consideration: I think if they were to kill off a certain proportion of the old bulls, really effete bulls, every year, and never drive a seal twice, that is to say, kill all they drive, at any rate, any distance more than a few hundred yards, and periodically leave certain of the rookeries undisturbed, there would very soon be an enormous increase in these herds of seals. Of course my learned friends may suggest that it is impertinent of me even to have made a suggestion of the kind. They may think that nobody appearing for Great Britain has a right to express any opinion with regard to management upon the islands. Certainly the experience in the past would seem to indicate that a little more control is, to say the least of it, desirable. Almost as much has been practically conceded by the United States Case. But, Mr. President, I cannot help thinking that in fixing any regulations, whether in Behring Sea, and still more, as I will say, if you will permit me, afterwards, outside Behring Sea—in fixing any regulations dealing with the question of seal life as a whole, nobody could properly consider the problem without having formed in his own mind some standard idea, as to the way in which the islands will be conducted, and the extent to which the killing will go on in any particular season.

The Tribunal here adjourned for a short time.

The PRESIDENT.—Sir Richard, we are ready to hear you.

Sir RICHARD WEBSTER.—Mr. President, the Tribunal will notice that the Regulations that we propose are confined to Behring Sea; in four respectful contention to this Tribunal looking at the matter as carefully as possible, it seems to us impossible to come to the conclusion that the jurisdiction of this Tribunal was intended to extend anywhere over the ocean. Our submission is that the area of jurisdiction for the purposes of *Regulations* is the same as the area of *Right*. But I particularly desire that the position of Her Majesty's Government should not be misunderstood; Her Majesty's Government, and the Canadian Government have, from the first, been willing, and have expressed their willingness, to concur in any reasonable Regulations for the protection of seal-life as a whole—I mean of seal-life generally; on the grounds we have explained in argument we submit that the jurisdiction of this Tribunal to make Regulations is confined to the area in dispute—that is to say that part of Behring Sea, east of the line of demarcation mentioned in the Treaty of June 1867.

I cannot help reminding you Sir, of one sentence in passing—that if that were not so, you would apparently have jurisdiction to make Regulations for the Commander Islands without the presence, here, of Russia, because those are equally seals in or habitually resorting to Behring Sea; and therefore it would seem to point, of necessity, to the original area which was the subject of so much discussion.

The PRESIDENT.—May I remind you that the Regulations we have to do with are merely between England and the United States.

Sir RICHARD WEBSTER.—That is entirely why I pointed it out, if I may say so.

The PRESIDENT.—There would be no objection in principle even for them to bear on the Commander Islands.

Sir RICHARD WEBSTER.—That is why I ventured to point it out, I only submit it; I must not re-argue it.

Lord HANNEN.—You can scarcely say that the seals in the Commander Islands *habitually* resort to the Pribilof Islands, even though they may sometimes go there.

Sir RICHARD WEBSTER.—There is nothing about habitually resorting to the Pribilof Islands, my Lord. It is habitually resorting to Behring Sea.

Mr. Justice HARLAN.—But Question 5 speaks of seals frequenting the Pribilof Islands.

Sir RICHARD WEBSTER.—I am only too glad to know that my argument has been appreciated by every Member of the Tribunal. In Question 5 it is, “in the fur-seals frequenting the islands of the United States in Behring Sea”; and in Article VII it is “for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea”. You must not tempt me to reargue this point.

Mr. Justice HARLAN.—Then I withdraw my observation.

Sir RICHARD WEBSTER.—No; the observation must not be withdrawn; but owing to the President's unfailling courtesy in making that observation to me, it did occur to me it was worth while noting in passing that some limitation must be put on those words “in any event”. But would you be good enough to consider the particular point I am upon; and that is the position Her Majesty's Government took with regard to Regulations outside Behring Sea.

Senator MORGAN.—The jurisdiction over seals that may be found in the Pribilof herd is not necessarily a jurisdiction over Commander Islands.

Sir RICHARD WEBSTER.—There is nothing about “Pribilof herd”, Mr. Senator.

Senator MORGAN.—I think, Sir Richard, there is something.

Sir RICHARD WEBSTER.—Well, if so, it has escaped my attention. I do not think there is anything about Pribilof herd.

Senator MORGAN.—That is my own characterisation of the class of fur-seals that resort habitually to Behring Sea.

Sir RICHARD WEBSTER.—I do not think there is any distinction, for that purpose, between seals going to the Commander Islands and the Pribilof Islands.

Senator MORGAN.—I merely mention that the jurisdiction exercised would not be over the Commander Islands, but over the seals.

Sir RICHARD WEBSTER.—Then, again, though I am being led away from the point I am closely devoting my attention to, it would be in favour of the argument I am presenting. If they are to be given that large area, they would extend to other seals,—

Senator MORGAN.—If it is in favour of your contention, Sir Richard, you are welcome to it, so far as I am concerned.

Lord HANNEN.—As Mr. Gram has pointed out to me, our enquiry is in regard to the questions that *have* arisen between the United States and Great Britain in these matters; and no question has arisen as to the Commander Islands.

Sir RICHARD WEBSTER.—Mr. Gram has put and your Lordship has put to me again that which I ventured humbly to call the attention of the Tribunal many days ago. I am sure you will forgive me for saying that, because you will thereby see that I have not overlooked the point though I abstain from arguing it over again. I am assuming that the Tribunal exercise their own impartial judgment on the matter

I am only desirous that the position of Her Majesty's Government should be known. We submit that it is established that the maximum number of seals to be killed on the Pribilof Island ought to be limited in any year to the number which the condition of seal life upon the islands will permit without unduly reducing the stock.

Senator MORGAN.—Have you any number, Sir Richard, to state?

Sir RICHARD WEBSTER.—It must be less than 100,000, Mr. Senator. I should say, if you ask me to make a submission to the Court; the outside number, according to the present state of things, would be about 60,000 as a real, regular annual figure.

That such maximum number should be from time to time fixed by competent inspectors appointed by the United States Government, having regard to the observed state and condition of the seals, and that full and sufficient records should be kept of the number and sexes of the seals on the islands.

Senator MORGAN.—And subject to a reduction below 60,000 in case of necessity.

Sir RICHARD WEBSTER.—Certainly, I have indicated that by saying it should be fixed from time to time by the United States Inspectors, looking to the observed condition on the Islands.

That all drives on the Islands ought to be carried out under the personal supervision of competent United States Government officials who should be responsible for the due observance of any regulations laid down by the United States.

The PRESIDENT.—That is a suggestion of yours.

Sir RICHARD WEBSTER.—I am pointing out to you what are the conditions that are necessary for seal life as a whole, regarded as distinct from pelagic sealing in Behring Sea. I am assuming that what was so much pressed by Sir Julian Pauncefote is being considered, that is to say, the general welfare of seal life in Behring Sea on the Islands and in the Pacific.

The PRESIDENT.—Altogether.

Lord HANNEN.—Did not I catch from you something about a joint action between the English and the United States.

Sir RICHARD WEBSTER.—I was suggesting this, which is only that which has been agreed to by Russia, that suitable persons designated by the Government of Her Britannic Majesty should be permitted to visit the seal islands from the 15th June to the 15th December to inspect and take copies of the records and confer with the officials in order to obtain necessary information as to the real conditions of seal life.

Senator MORGAN.—That is with a view to further negotiations between those Governments.

Sir RICHARD WEBSTER.—Quite so, Senator. It is with a view that you may understand the position which has been for more than five years maintained consistently and persistently by Her Majesty's Government, and that, upon those conditions being assented to or arranged, Her Majesty's Government are perfectly willing to provide by necessary legislation that there should be no pelagic sealing outside, that is to say anywhere at all prior to the 1st May on the assumption that the United States would agree equally to limit their nationals fixing a corresponding date, it may be a fortnight earlier; I do not know. The question was put to me—San Francisco is about 800 miles lower down, and I should think that a fortnight earlier would be the proper date to take. That is suggested to me by Mr. Tupper and those who well understand this matter, that a fortnight would be a reasonable time between Victoria and San Francisco.

My position, which at any rate has been made clear, is this: the Government of Her Britannic Majesty has as much at heart the welfare of the seal race for the benefit of pelagic sealers as the United States can have for their nationals. It is a more important interest in Canada than it is to the lessees, and the few dollars that go into the Treasury of the United States.

The PRESIDENT.—That is what we may derive from the terms of the Treaty.

Sir RICHARD WEBSTER.—And we are most anxious that a proper arrangement should be made, and as I have said, and I wish to repeat, Sir Julian Pauncefote expressed it over and over again, but that is perfectly independent of the questions that had arisen as a matter of controversy and which are, for the reasons we have submitted, to be arbitrated upon by this Tribunal.

The PRESIDENT.—It being admitted that both nations very sincerely wish for the preservation of seal life, you will permit me, Sir Richard, to ask you a question? I heard you mention, possibly as making an admission, for it is the general wish of both nations, that you supposed the fair average number of seals proper to dispose of on the Islands would amount to 60,000?

Sir RICHARD WEBSTER.—I was asked by the learned Senator to make a suggestion and I believe that is the maximum.

The PRESIDENT.—Will you allow me to ask—it is a theory, and we can only admit this as a theory, as we are not here to make Regulations inside the territorial rights of each nation, how many seals would you suppose might, on an average, be taken by pelagic sealing every year?

Sir RICHARD WEBSTER.—You see Mr. President, that would practically speaking correct itself, because the character of pelagic sealing is that only a certain proportion, so to speak, of seals can be captured. It is not possible, as was suggested by Mr. Coudert, for ships to crowd the sea and kill every possible seal. I should have thought in that respect, a part from questions of discrimination, it is perfectly true that pelagic sealing contains in itself a self-correcting element or safety valve so to say.—That you cannot kill an exceptional number, but remember that I have assumed that the original Regulations to which I have called attention are supposed to be enforced under any circumstances which imposes the condition of no pelagic sealing at all in Behring Sea up to the 1st July, and no pelagic sealing at any time within a fixed limit, rigidly speaking, of 20 miles, which means practically 30 miles. We assume those to be in force always, and I submit under the circumstances that pelagic sealing cannot practically injure the race.

The PRESIDENT.—Though it may take a very large proportion,—as we have seen in the last year—a very large amount of seals?

Sir RICHARD WEBSTER.—Well that depends, Mr. President, on what you mean by “proportion”. If you only mean “quantity” they may take a large quantity.

The PRESIDENT.—I mean both.

Sir RICHARD WEBSTER.—Well, I should have doubted, with all respect, if “proportion” was a correct expression. Would you define first with what you would compare it?

The PRESIDENT.—With the killing on the Islands.

Sir RICHARD WEBSTER.—I should have doubted if the outside number of seals that could be killed on the Islands under any circumstances, would amount to more than something a little over 60,000. I do not think, or rather I should say I submit it to you that the pelagic sealing at sea will affect that number for this reason, that the seals taken at

sea by pelagic sealing taken on our submission, to a large extent are a class of seals not frequenting the islands at the time. I do not refer to that, but the barren females who will be found away from the islands, and a large number of others, have no motive or inducement to go—take the male seals which are not forming part of the breeding or producing stock upon the islands.

The PRESIDENT.—We have had the number of seals killed at sea last year and the year before, and the amount was 70,000.

Sir RICHARD WEBSTER.—You are speaking, I think, of the amount of seals killed in 1891.

The PRESIDENT.—1891 and 1892.

Sir RICHARD WEBSTER.—To a large extent outside of Behring Sea.

The PRESIDENT.—And Behring Sea is to be added.

Sir RICHARD WEBSTER.—As a matter of fact there were killed there, Sir, 500 only.

The PRESIDENT.—It should be added if Behring Sea was left open.

Sir RICHARD WEBSTER.—Of course, one must have it one way or the other. It cannot be put against me both ways. All pelagic sealing up to July 1st is stopped, and you have to contrast the new state of things with the old; and my submission to this Tribunal is that after the 1st July in every year sealing in Behring Sea would stand at about a normal figure. It may be 30,000 or 25,000 or thereabouts, but it would be directed to and attack a class of seals that to a large extent would not be going to the Islands, and would never be got by the people on the Islands at all. I have endeavored to make my point clear on that, and I hope I have done so.

The PRESIDENT.—You do not say outside Behring Sea there would not be seals killed also.

Sir RICHARD WEBSTER.—Outside Behring Sea; the position of Her Majesty's Government is that upon reasonable arrangements made that an undue quantity should not be killed on the islands they would be willing to prohibit pelagic sealing until the 1st of May which would cut off all the dangerous killing, outside as well as inside.

The PRESIDENT.—What do you consider not to be dangerous?

Sir RICHARD WEBSTER.—The killing of seals south of the Aleutian Islands after the 1st May, and in Behring Sea after the 1st July, outside the 30 mile zone, dealing with the matter as a whole. If I have not made the point clear, Sir, I would ask you to put the question again.

The PRESIDENT.—I think you have made it quite clear; but I also think that the questions I have put have contributed to make it more clear to me at any rate.

Sir RICHARD WEBSTER.—I have not the smallest doubt as to that, of course, Sir.

The PRESIDENT.—And I would like to know the total average in the killing of seals that is admissible both on sea and on land.

Sir RICHARD WEBSTER.—The killing of seals, both male and female altogether would amount to something like 90,000 or 100,000, but you must not understand me as admitting the absurd contention that killing a female necessarily reduces the number of a herd. I do not want to go back on that: it is such an outrageous contention.

The PRESIDENT.—That has been argued very fully.

Sir RICHARD WEBSTER.—Because if what I say were so, the herd would have disappeared years and years ago, because hundreds and thousands are killed every year. If you put it to me what is meant by the total killing, I should say a total killing on land and sea of between

90,000 and 100,000 of which about 60,000 are killed on the Islands and between 30,000 and 40,000 at sea. I do not refer to the Russian side, but the catch on the coast and in Behring Sea. I must not be understood as to be going back from the position that both my learned Leader and I took up as to what is the function of this Tribunal under Article VII.

Senator MORGAN.—Now, Sir Richard, as to the License System proposed here: I wish to ask a question for information, in order to ascertain the attitude of the Counsel for the British Government. Does this system, as you propose, require that all licenses shall be taken out at the particular ports, and that other pelagic hunting is unlicensed?

Sir RICHARD WEBSTER.—So far as our nationals are concerned, it would be unlawful.

Lord HANNEN.—They would have to clear from those Ports?

Sir RICHARD WEBSTER.—And be licensed to seal. Our object is to be satisfied that the country gets full information, and that the vessels are obliged to be under proper control.

The PRESIDENT.—And what as to the Indians sealing on the coasts?

Sir RICHARD WEBSTER.—If I were to speak of that in the way in which I think it ought to be spoken of, perhaps my learned friends would get angry.

Mr. CARTER.—No, Sir Richard, please do not hesitate on that score.

Sir RICHARD WEBSTER.—I assure you I have a very great consideration for it; but the Indians on the coast or many of them have become and developed into being pelagic sealers. Several of the schooners are actually owned by Indians, and to suggest that they are to be specially protected, according to the philanthropic instincts of my learned friends, paddling their own canoes, two at a time, and wearing the seal-skins, I do not think contributes much to this very interesting discussion.

Senator MORGAN.—I suppose, under your system, either Great Britain or the United States would have to establish a way to prevent citizens of both countries from obtaining licenses as fictitious traders?

Sir RICHARD WEBSTER.—I will say a word or two on that in a moment.

Now, what have I on the other side? The burthen has rested entirely on Great Britain of arguing this question of Regulations. My learned friends, Mr. Phelps and Mr. Carter, in their wisdom, on behalf of the great Country, one of the mightiest countries in the World, have thought fit to propose to this Tribunal a Regulation which they know and must know is degrading to my Country. They ask you, this Tribunal, to say this:—Decide every issue of right against the United States, the issues they themselves selected,—decide them against the United States; say that British, French, German, Italian and all countries are to have equal rights upon the high seas; but so far as Great Britain is concerned the next moment destroy that right absolutely and for ever over an area that never entered into the purview of the United States Representative or Great Britain's Representative when it was being discussed. I confess to my country it was somewhat humiliating to hear the United States suggest that this was the kind of thing to be enforced on Great Britain by the Award of this Tribunal. Mind, Sir, you are making an Agreement for the parties; and when I look at this proposal and at the attitude of the United States, the ships of Great Britain and under the British flag are to be seized and taken in by United States cruisers and condemned in United States courts.

Why, it is not 20 years ago, or barely 20 years ago, when the United States absolutely claimed that the United States flag, even if fraudu-

lently exhibited, was to be a protection against either search or seizure. When Great Britain protested that, if a fraudulent use of the United States flag was made so that it covered the Slave Trade which was recognized as unlawful in both Countries, facilities ought to be given for the search. "No", said the United States, "our flag is inviolable upon the sea"; and yet, in the face of this, it is to be suggested that you are to impose upon Great Britain the humiliation that you are to tell Great Britain her vessels are to be seized by American cruisers and taken into the nearest port. I think a little consideration might have brought it to the minds of those who instruct my learned friend that such a Regulation was not a Regulation fit to be submitted to this Tribunal. But I ask the Tribunal to consider it from another point of view. Will you remember the concluding words of article VII?

The High Contracting Parties furthermore agree to co-operate in securing the adhesion of other Powers to such Regulations.

The Regulations are to be such that Great Britain and the United States can have a reasonable hope of inducing other Powers to adhere to them on the ground of humanity and of mutual self-interest and some other grounds which may commend themselves; but, on the hypothesis that we are discussing, there will be no such inducement that can be offered. Every other national is to be excluded from sealing over these millions of square miles, an area, as the Attorney General pointed out, vastly larger than ever entered into the minds of the despotic potentates in years gone by; and I want to know how would it be possible to prevent the very abuse that Senator Morgan called attention to a moment ago that of sailing under foreign flags, a thing to be deprecated by every right-minded citizen or subject,—Japan or Russia to say nothing of the flags of other countries would be, of course, an ample protection assuming Great Britain to be the only nation whose nationals were prevented from sealing over this vast area.

But I take leave to say on behalf of Great Britain it is not a regulation at all. Prohibition is not Regulation, and many examples of that can be given. We know with reference to the liquor traffic—we know what regulating the sale and manufacture of intoxicating liquors is, and we know what prohibiting them is. In no Court save in this could it be possible to suggest that you are under cover of a regulation to enforce an absolute and positive prohibition. Sir, the United States say that they will not discuss this question of regulations at all. Nothing will satisfy them but absolute and total prohibition over this vast area. Would that promote peace? We hoped in all probability that my learned friend Mr. Phelps might indicate that there was some intension of discussing the basis of regulations from a more moderate standpoint. But no: at the invitation of my learned friend the Attorney General, Mr. Phelps said he should maintain that those were their rights; that by the form of regulations read by Mr. Foster, at the conclusion of the Attorney General's speech, on behalf of the United States he elected to stand; and, as part of that, the right claimed by the United States, for the first time for 50 years, is of searching and seizing vessels of a friendly flag, in time of peace, on the high seas: taking them in and condemning them in their own ports, as though they were pirates, or, to use the phrase actually used in the United States argument, *hostes humani generis*. There is not a suggestion of this in the Diplomatic Correspondence all through these years; no suggestion made that such a proposal is to be agreed to by Great Britain, and I remind you with great respect, Mr. President, that this Tribunal is

only making for the parties the agreement which, according to the judgment of the Tribunal, they ought to have made for themselves. Could any body suggest in fairness, with any lingering feeling that there ought to be in the breast of the United States towards the Old Country, that the degrading prohibition, with reference to the right of seizure and search by the national ships of the United States, should be imposed on Great Britain in the interest of the preservation of seal life, no necessity for such a thing having been shown, and it being foreign to any reasonable scheme that has hitherto been suggested.

Sir, I hope, at any rate, difficult as my task may have been, and performed, without appreciating, possibly, the full weight and proportion of every point, that I have, at any rate, satisfied this Tribunal that the proposals of the United States are unjust in themselves, and such as this Tribunal would not in any way enforce. I ask you again to believe that which has been put forward so clearly by the Attorney General, that we have approached this question of regulations with the honest intention of assisting the Tribunal to get at the facts, with no desire to injure the seal-race, or to require for the pelagic sealer anything that belongs to the United States. It is a common interest to be protected. Our rights are supposed to be declared. Those rights are to be protected, and to be interfered with only if it is necessary to prevent the destruction of seals. If the United States desire, to reserve to themselves the monopoly of destroying seals entirely, they will always have that as they have the possession of these islands; but the regulations which this Tribunal should direct, we respectfully submit, are regulations based upon the fact that the rights of British subjects, and of all other nations, to seal upon the high seas has been established, and that those rights are only to be curtailed to the extent that is necessary in order to prevent their injuriously-affecting the seal-race. Sir, it may occur in the rest of this case that some point has escaped my attention, and should such point be started we may have to ask you to hear us upon it, but I ask the Tribunal to be good enough to take into their consideration that which we have addressed to them on this question of regulations; and we believe, at any rate, that the Award of this Tribunal, or its determination, will be just and equitable, and will not be couched in such a way as it must be couched if it adopted the United States Regulations to destroy at one stroke the rights previously declared to exist in British sealers.

The PRESIDENT.—Sir Richard, with all thanks and gratitude for your very business-like and useful argument, let me put one question more to you. According to what you suggest, as to the measure of police which might be adopted in your Regulations towards the sealers of each nation, do you mean to say that the police even during the close season and within the close area, should belong exclusively to the public navy of either nation concerned.

Sir RICHARD WEBSTER.—No, Sir, what I mean is this. I only contend for that for which the United States universally contended up to this point, and which Russia, Great Britain, France, and, as far as I know, every other civilized country has always contended for successfully that if a ship is found infringing the convention by the ships of another nation it shall be handed over for justice to the Courts of its own flag.

The PRESIDENT.—You admit of its being arrested by a foreign ship then.

Sir RICHARD WEBSTER.—Assuming it to have broken the Treaty and assuming that Treaty to be in force with the country whose flag the vessel was flying. Thus it is provided that if British vessels are

seized by Russians, they shall be forthwith handed over at Yokohama or at any port in the British possessions for trial by the British authorities, and I say, with deference to my learned friend Mr. Phelps experience, and anybody who is acquainted with these matters of international comity and agreement, that I am aware of no case where a civilized nation has allowed her ships to be seized and handed over to other Tribunals except in cases in which the country has practically agreed to the establishment of Courts, which Courts are to have jurisdiction over their own subjects. A case very familiar to you, no doubt, Mr. President, is that of Tunis, where Great Britain, has recognized the Existence of the French Courts in Tunis and has consented to abolish her own consular courts there. But I am aware of no case where it has been insisted that the United States cruisers may seize British ships and condemn them in United States Courts.

The PRESIDENT.—I would ask, Sir Richard, if it is your opinion that these matters should be within the sphere of the Regulations that we have been called upon to make?

Sir RICHARD WEBSTER.—I should have thought not, Sir, I should have thought you were intended to determine, and I speak with great deference, what Regulations were necessary for the preservation of seal life and not intended to tell either nation, that is either the United States or Great Britain, how the Regulations so determined upon were to be enforced for their respective nationals. Might I put another case? Suppose you should be of opinion a fine of \$500 would be proper fine for a breach. I do not think that that would be the kind of thing to be imposed by these Regulations.

I think the United States would be entitled to say that we think \$500 is too much or too little. That is a matter that the Tribunal might have left us to carry out. My reading of these words is Regulations necessary for the preservation of seal life—not Regulations to enforce the Regulations which are necessary—and it would seem to me that the purview of your jurisdiction would be governed by the words, “what is necessary for the purpose of the protection of seal life”, and not “what is necessary for the purpose of enforcing those Regulations” which you have yourself described. I do not know if I make my meaning clear?

The PRESIDENT.—Perfectly. Then in your view we should not be competent to frame Regulations which would practically amount to the same as a convention between both Governments concerning these questions.

Sir RICHARD WEBSTER.—If you mean by that the clause relating to procedure, I think certainly not. I cannot think a better case than the United States demand. They demand that no citizen or subject of the United States or Great Britain shall kill and so on. Then that the foregoing Regulations should apply to and extend over all those parts east of the 180th meridian down to the 35th parallel, and so on; and any boat or craft other than those mentioned and described which may be found engaged in sealing, and so on, may be seized and captured by any armed vessel and condemned in any Court of competent jurisdiction. I on behalf of Great Britain do not ask that such a degradation should be inflicted on United States citizens.

The PRESIDENT.—That is another question. I understand this sanction of penalty seems to be too strong and contrary to the dignity of your Government, but another mode of sanction may be thought of, the sanction between Russia and Great Britain for instance—in the same sense as it is in the *projet* of the United States you might accept of it being brought into Regulations.

SIR RICHARD WEBSTER.—My answer is that it is based on the 14th article.

The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to Arbitration.

In my submission no question is referred to the Arbitrators as to the way in which Regulations should be enforced.

The PRESIDENT.—It is referred to us by the contention of the other side.

SIR RICHARD WEBSTER.—By the formal paper handed in, yes. Not by the contention of the other side as appearing from any of their documents up to that time, neither in the Case, Counter Case, Argument or Diplomatic Correspondence. I am aware that General Foster, representing the United States, has made that demand, but that is the first time that such a demand has appeared.

Mr. GRAM.—But, Sir Richard, is it not your contention that we should include in your Regulations this sentence that the “License should be subject to forfeiture for breach of the above Regulations?”

SIR RICHARD WEBSTER.—I suggested that that would be a reasonable recommendation; it is what I may call a Regulation necessary for the protection of seal life.

Lord HANNEN.—It is a penalty.

SIR RICHARD WEBSTER.—You must draw the line somewhere. I take the view that mere machinery for the enforcement of Regulations was not intended to be referred.

Lord HANNEN.—I think to be consistent, you must strike out that.

SIR RICHARD WEBSTER.—It occurred to me that it might be said to be going too far, but it seemed also to be very near the line. I looked at it in this view, though I hope you will not think I want to justify myself, that I thought the Tribunal might think a Captain or an owner who has broken the license is not a fit person to be licensed a second time. That was the idea. It does not seem to be quite enforcing the same thing as procedure, or penalty, or condemnation of a vessel, but I really did not think very much of the question of consistency in putting it down, but really what was a proper Regulation.

The PRESIDENT.—In Article III of the Treaty for the *Modus Vivendi*, it is provided:

Every vessel or person offending against this prohibition in the said waters or Behring Sea outside of the ordinary territorial limits of the United States, may be seized and detained by the naval or other duly commissioned officers of either of the High Contracting Parties, but they shall be handed over as soon as practicable to the authorities of the Nation;

and so on.

That is about the same plan as suggested. This is embodied in the Treaty regulating the *Modus Vivendi*. You construe it that this Treaty is, to a certain extent, the form of the Regulations?

SIR RICHARD WEBSTER.—Well, Sir, I cannot go back from what I have said. I do not consider it so, if you ask me; but I must point out, if that had been the form of the demand, there would have been no question about it. Assuming terms to be arranged, Great Britain and the United States would agree that that is reasonable. My point is, that to impose upon the nationals of another Country such a Regulation is going far beyond any mere question of agreement, and is laying down a penalty which is to be the consequence of a breach. I admit it also was open to the observation that we have gone too far in Article VIII. I accept the criticism, though I do not know that it injures very much the argument I have been contending for, that I have gone too

far in the Regulation that I propose. I do not know if there is anything else?

The PRESIDENT.—No.

I only wish to observe that we are not to be limited by any question concerning the mode of the execution of the Regulations we may award; because that is not our business, but of the inferior constitution of each country. Whether the country requires the interference of Parliament or of Congress, or does not require it, that is an affair which concerns each party; but we are here before Nations, and not before the Governments. The Government represents the Nation; and it is the business of the Nations between themselves to see how they divide their constitutional powers; we have not to enter into that.

Sir RICHARD WEBSTER.—No, and I would rather withdraw the 8th Regulation than lay myself open to any charge of inconsistency. It seems such a very minor point.

Sir JOHN THOMPSON.—The inconsistency could easily be removed by inserting in section 2 that such licenses shall only be granted to sailing vessels and to persons who have observed these Regulations.

Sir RICHARD WEBSTER.—Yes; but, in all probability, the language of Article 8 is open to objection.

Senator MORGAN.—I was about to say, Sir Richard, that I understand the position the United States has taken is that this Tribunal has no power to ordain Regulations to operate within Behring Sea, and the position of Great Britain is that we have no power to ordain Regulations to operate outside Behring Sea?

Sir RICHARD WEBSTER.—I have not heard that contention of the United States, Sir. It may come in reply, but I have not heard it hitherto.

Mr. CARTER.—That is not our view of our contention, Sir.

Senator MORGAN.—Then, the only question as to that branch of the subject is, whether this Tribunal has jurisdiction to ordain Regulations to operate outside of Behring Sea and in Behring Sea, as a concession? I merely want to know the attitude of the parties.

Sir RICHARD WEBSTER.—Well, I do not think that my learned friend Mr. Carter would put it as a matter of concession. Our view has been that the United States did claim to prohibit as of right British subjects from sealing in Behring Sea, and that the right of the Tribunal to make Regulations inside Behring Sea, which was the alternative of the five Questions, was obviously not any matter of concession by us. It is admitted, on the face of the Treaty, the only question is whether or not Article VII includes a question of Regulations outside Behring Sea on that point.

Mr. CARTER.—Our view is there is no difference between Behring Sea and outside Behring Sea on that.

Sir RICHARD WEBSTER.—So I said.

Mr. TUPPER.—With your permission, Mr. President, I would interpose for a moment. The Tribunal will recollect that a statement was prepared, to aid the Tribunal, of the Facts which the British Government desired to be found; a Counter-Statement was submitted by General Foster, for the United States, as to the facts which the United States desired should be found, and with the aid of counsel on both sides, General Foster and I have been able to agree upon this statement which of course removes the other two statements from the consideration of the Tribunal.

The Findings of Fact upon which we are agreed are as follows.

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the Schedule to the

British Case, pages 1, to 60, inclusive, were made by the authority of the United States Government. The questions as to the value of the said vessels or their contents or either of them, and the questions as to whether the vessels mentioned in the schedule to the British Case, or any of them, were wholly or in part the actual property of citizens of the United States, have been withdrawn from and have not been considered by the Tribunal, it being understood that it is open to the United States to raise these questions or any of them, if they think fit, in any future negotiations as to the liability of the United States Government to pay the amounts mentioned in the schedule to the British Case.

2. That the seizures aforesaid, with the exception of the "Pathfinder" seized at Neah Bay, were made in Behring Sea at the distances from shore mentioned in the Schedule annexed hereto marked "C".

3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States, instructions, a copy of one of which is annexed hereto, marked "A" and that the others were, in all substantial respects, the same: that in all the instances in which proceedings were had in the District Courts of the United States resulting in condemnation such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked "B", and that the libels in the other proceedings were in all substantial respects the same: that the alleged acts or offences for which said several searches and seizures were made were in each case done or committed in Behring Sea at the distances from shore aforesaid: and that in each case in which sentence of condemnation was passed, except in those cases when the vessels were released after condemnation the seizure was adopted by the Government of the United States; and in those cases in which the vessels were released the seizure was made by the authority of the United States. That the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed in Behring Sea at the distances aforesaid from the shore.

4. That the several orders mentioned in the Schedule annexed hereto and marked "C" warning vessels to leave or not to enter Behring Sea were made by public armed vessels of the United States the commanders of which had, at the several times when they were given, like instructions as mentioned in Finding 3, above proposed, and that the vessels so warned were engaged in sealing or prosecuting voyages for that purpose, and that such action was adopted by the Government of the United States.

5. That the District Courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel seized as mentioned in the Schedule to the Case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of Courts of Admiralty, including the prize jurisdiction, but that in each case the sentence pronounced by the Court was based upon the grounds set forth in the libel.

ANNEX "A".

[See British Counter Case, Appendix, Vol. I, p. 72.]

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, April 21, 1886.

SIR: Referring to Department letter of this date, directing you to proceed with the revenue-steamer "Bear," under your command, to the Seal Islands, etc., you are hereby clothed with full power to enforce the law contained in the provisions of Section 1956 of the United States Revised Statutes, and directed to seize all vessels and arrest and deliver to the proper authorities any or all persons whom you may detect violating the law referred to, after due notice shall have been given.

You will also seize any liquors or fire-arms attempted to be introduced into the country without proper permit, under the provisions of Section 1955 of the Revised Statutes, and the Proclamation of the President dated 4th February 1870.

Respectfully yours,

C. S. FAIRCHILD, *Acting Secretary.*

Captain M. A. HEALY,
Commanding Revenue-Steamer "Bear" San Francisco, California.

ANNEX "B".

[See British Case, App., Vol. III, U. S. No. 2, 1890, p. 65.]

In the District Court of the United States for the District of Alaska, August Special Term, 1886.

To the Honourable LAFAYETTE DAWSON,
Judge of said District Court:

The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present

here in Court in his proper person, in the name and on behalf of the said United States, against the schooner "Thornton" her tackle, apparel, boats, cargo, and furniture, and against all persons intervening for their interest therein, in a cause of forfeiture, alleges and informs as follows:

That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1st day of August, 1886, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring Sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel, commonly called a schooner, the "Thornton," her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:

That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

And the said Attorney saith that all and singular premises are and were true, and within the Admiralty and maritime jurisdiction of this court, and that by reason thereof, and by force of the Statutes of the United States in such cases made and provided, the afore mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo and furniture became and were forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

Wherefor the said Attorney prays that the usual process and monition of this honourable court issue in this behalf, and that all persons interested in the before mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States in such cases made and provided.

M. B. BALL,

United States District Attorney for the District of Alaska.

ANNEX "C".

The following Table shows the names of the British sealing-vessels seized or warned by United States revenue cruizers 1886-90, and the approximate distance from land when seized. The distances assigned in the cases of the "Carolena", "Thornton", and "Onward" are on the authority of U. S. Naval Commander Abbey (see 50th Cong., 2nd Sess., Senate Ex. Doc. No. 106 pp. 20, 40, 50). The distances assigned in the cases of the "Anna Beck", "W. P. Sayward", "Dolphin", and "Grace" are on the authority of Captain Shepard, U. S. R. N. (Blue Book, United States No. 3 (1690), pp. 80-82. See Appendix, vol. III, Neah Bay is in the State of Washington, and the "Pathfinder" was seized there on charges made against her in Behring Sea in the previous year. She was released two days later.

Name of vessel.	Date of seizure.	Approximate distance from land when seized.	United States vessel making seizure.
Carolena.....	August 1, 1886...	75 miles.....	Corwin.
Thornton.....	— 1. —.....	70 —.....	—
Onward.....	— 2. —.....	115 —.....	—
Favourite.....	— 3. —.....	Warned by "Corwin" in about same position as Onward.	—
Anna Beck.....	July 2, 1887...	66 miles.....	Rush.
W. P. Sayward.....	— 9. —.....	59 —.....	—
Dolphin.....	— 12. —.....	40 —.....	—
Grace.....	— 17. —.....	96 —.....	—
Alfred Adams.....	August 10. —.....	62 —.....	—
Ada.....	— 25. —.....	15 —.....	Bear.
Triumph.....	— 4. —.....	Warned by "Rush" not to enter Behring Sea.	—
Juanita.....	July 31, 1889...	66 miles.....	Rush.
Pathfinder.....	— 29. —.....	50 —.....	—
Triumph.....	— 11. —.....	Ordered out of Behring Sea by "Rush". (1) As to position when warned. 35 miles.	Rush.
Black Diamond.....	July 11. —.....	66 —.....	—
Lily.....	August 6. —.....	Ordered out of Behring Sea by "Rush".	—
Ariel.....	July 30, 1889...	Ditto.....	—
Kate.....	August 13. —.....	Ditto.....	Rush.
Minnie.....	July 15. —.....	65 miles.....	—
Pathfinder.....	March 27. —.....	Seized in Neah Bay.....	Corwin.

Senator MORGAN.—Is that to go in as a part of the Award?

Mr. TUPPER.—This is to go in connection with the discussion of the questions in order to assist the Tribunal in the preparation of their Award, and to intimate to them how far we agree upon the facts in dispute.

Senator MORGAN.—Is that to be in any sense part of the Award?

Mr. TUPPER.—It is for the Tribunal to say in their framing of the Award; but these are facts upon which we agree, which the Arbitrators, we submit, must consider, in making their Award.

Senator MORGAN.—An interesting point suggests itself to my mind. If this is to be a part of the Award, it would imply that this Tribunal has a right to leave certain matters open for negotiation connected with this whole subject.

Mr. TUPPER.—In reply, I may say frankly, the position is simply this. We found ourselves in dispute as to certain subjects—for instance the ownership of vessels and the amount of damages,—and in order to relieve the Tribunal of dealing with those questions, we took the responsibility (and we take it now), of withdrawing them from this Tribunal with the understanding among ourselves that neither party will be prejudiced when those questions come up, by this action on our part, instead of asking the Tribunal to hear a long discussion first as to the law touching these questions, and then asking for an examination into the facts and the contradictory statements that are before them, or might be before them, in that connection.

Senator MORGAN.—That is all very proper, but it suggests to my mind that the Tribunal of Arbitration possesses (in the estimation of Counsel on both sides), a power of submitting some of the questions brought to our attention—I do not say questions submitted—questions brought to our attention—to future negotiation between these two Governments.

The PRESIDENT.—I believe, Mr. Senator, that it is in conformity with Article VIII of the Treaty.

Sir RICHARD WEBSTER.—That is exactly what I was going to call the Senator's attention to. It says either party may ask for.

The PRESIDENT.—It says:—"the question of the liability of either government upon the facts found to be the subject of further negotiation."

Senator MORGAN.—That would excuse us from saying that it was to be the subject of future negotiation, because the Treaty has so ordained it.

The PRESIDENT.—May I beg General Foster to give us his official confirmation of that?

General FOSTER.—I express my acquiescence in the statement submitted by the Agent for Great Britain with this explanation:—that the United States has never asked for any finding of facts. I have submitted some amendments to the Finding of Facts submitted by the Agent for Great Britain, and we agree upon the paper that has been just now presented.

The PRESIDENT.—Thank you. I understand that these Facts or Findings are submitted to us merely for our consideration?

Mr. TUPPER.—Certainly.

The PRESIDENT.—They are not considered to be necessarily embodied in our final Award—that is what I take from your words?

Mr. TUPPER.—I am not insisting on the particular method in which that Award is to be framed. I guarded myself by stating that so far as we could relieve the Tribunal, we have done so by telling the Tribunal upon what facts we are agreed.

The PRESIDENT.—But according to Article VIII the Tribunal is called upon to find.—

Sir RICHARD WEBSTER.—All facts submitted.

The PRESIDENT.—To find questions of fact involved in certain claims which would be submitted to us, but only if they are submitted to us. That is why I enquired whether you, Mr. Tupper, submitted them to us in such a way that we, in making our Award, are to award upon them, or whether they are merely for our own private consideration?

Mr. TUPPER.—Among the facts submitted were the two facts, ownership and damages. They are now withdrawn and are not submitted.

Sir RICHARD WEBSTER.—Mr. Tupper put it perfectly clearly, and Mr. Carter will agree with me I am sure. A number of facts mentioned here, (which are not in dispute), are questions of fact which are submitted by Great Britain. With regard to certain other matters, desiring to reserve fairly the rights of the United States, we have simply stated, upon the face of this, certain other matters which are not submitted in order that it may not be said that the Tribunal have decided them one way or the other.—That was all.

The PRESIDENT.—What is the use of submitting to us questions of fact upon which you both agree?

Sir RICHARD WEBSTER.—Because it is desirable that there should be a record of the matter.

Senator MORGAN.—We have to make an award.

Mr. CARTER.—The Tribunal of course will understand that it has been no part of our purpose to supercede the judgment or action of the Tribunal on these Findings.

Sir RICHARD WEBSTER.—Of course not.

Mr. CARTER.—Great Britain desired that certain Findings of Fact should be made pursuant to the provisions of that Treaty. For that purpose the Agent for Great Britain submitted a form of those, some days ago. We objected to the Findings in that form, and proposed certain Amendments to it. At a subsequent interview between us, inasmuch as we were satisfied as to the facts which were proved, and which could not, in our judgment, be disputed, we agreed as to the form in which this submission should be made by Great Britain—it is Great Britain's submission; not ours. But, at the same time, of course it is not binding upon the Tribunal except so far as they are obliged, under the terms of the Treaty, to make a Finding upon such questions as are submitted.

Lord HANNEN.—The position of things seems to me to be very simple: the Counsel for Great Britain ask for a Finding upon certain Facts. Suppose you [Mr. Carter], disputed them, you would have to go into evidence upon the subject. But instead of disputing them, you admit them. Thereupon this Tribunal is in possession of the materials upon which to give a Finding.

Sir RICHARD WEBSTER.—Yes.

Mr. Justice HARLAN.—Or if we chose not to accept that Finding of fact, we could make a Finding for ourselves.

Lord HANNEN.—Undoubtedly.

Mr. CARTER.—Undoubtedly; that is our understanding.

Senator MORGAN.—But if we accept the Finding in the form in which it has been presented by agreement of Counsel, the form of the proposition is, that this Arbitration has a right to decree that a certain matter may be left open and negotiated upon.

Mr. CARTER.—I do not so understand.

The PRESIDENT.—According to the provisions of article VIII.

Senator MORGAN.—If you leave it to article VIII, that is all very well.

Mr. CARTER.—The fact is simply stated—that certain questions are withdrawn from the Tribunal, and not passed upon by them. If the Tribunal chooses to accede to that statement, why, it will stand acceded to. What the consequence of it may be is another thing. That will have to take care of itself.

The PRESIDENT.—In the name of Great Britain, you, Mr. Tupper, call upon us to make a Finding?

Mr. TUPPER.—Yes. The Counsel have done so, and I stated upon what Facts we agreed.

Senator MORGAN.—I suppose if we adopt it in the form presented by the agreement of Counsel, what we do is to affirm that this Tribunal has a right to leave a matter open to negociation which has been submitted to us for decision?

Sir RICHARD WEBSTER.—Nothing is left open not contemplated by the Treaty.

Senator MORGAN.—I merely speak of the form in which it is submitted. I am not adverse to it because I think there are probabilities in this case in which we might find it necessary to leave some matters open to negociation.

The PRESIDENT.—I think the matter has been cleared in so far as it can be cleared at present.

FUR-SEAL ARBITRATION.

ORAL ARGUMENT

ON

REGULATIONS

BY

MR. CHRISTOPHER ROBINSON, Q. C.,

ON BEHALF OF GREAT BRITAIN.



FORTY-FIRST DAY, JUNE 20TH, 1893.

Mr. ROBINSON.—Mr. President, my learned friends have asked me to dispose of two or three matters of detail connected with this branch of the case; and I think it would be better for me to dispose of them before I proceed to make such general observations as may seem worth while to me in regard to the question of regulations generally. Those points are: The question of the food of the seals; the question of the waste which is consequent upon pelagic sealing by reason of the numbers lost; and the question of raids.

It may be remembered that the question was asked as regards the food of these seals, what their general food was, where they come to take it, and whether they are in the habit of living upon salmon. I think those questions were asked in connection with the subject which, as the learned President remarked, might become more material when the question of regulations came up for consideration, namely, the effect of the seals on the industry of the food fish.

The question is of course a material one. We have the evidence upon it analyzed and connected so that we can show exactly what the nature of the proof is which the case affords. I may say generally that there seems to be little question of this:—That the seals feed to a large extent upon salmon and upon herring; that they follow the schools of herring into the interior waters and sounds, and that their movements depend to a large extent upon the movements of those fish. I think that is the effect and character of the evidence. I do not think the seals confine themselves to any special kind of fish; but, as I have said, salmon and herring are the chief kinds upon which they live. Then they live very largely upon the squid, and it so happens for some reason that many of the witnesses speak to that upon our coast—that is to say, upon the eastern coast—they live very largely upon salmon and herring, while upon the western coast they live very largely upon squid. Whether it is that salmon are not to be found there, or what the reason may be, I do not know; but is so stated.

Senator MORGAN.—What is a squid?

Mr. ROBINSON.—I would hardly like to say.

Lord HANNEN.—It is a kind of cuttle fish, a small cuttle fish.

Mr. ROBINSON.—Then, may I ask whether the beaks that are found are the beaks of squid?

Lord HANNEN.—Yes; that is what you may call the skeleton of the squid.

Senator MORGAN.—Do you mean that the seals follow the herring and the salmon into what we would call the interior waters along the coast?

Mr. ROBINSON.—Into the sounds and up the inlets, etc.—Barelay Sound for instance. Barelay Sound is on Vancouver Island. I am not quite certain of its exact location.

Senator MORGAN.—On the inside or outside?

Mr. ROBINSON.—Barelay Sound is on the inside. Think it is on the eastern coast of Vancouver.

Senator MORGAN.—In the Georgian Channel.

Mr. ROBINSON.—I am not quite certain of the position of Barclay Sound. I know it is a sound on the coast of Vancouver Island.

Senator MORGAN.—To go into the Straits of Georgia the seals would have to go through some of the openings in the Pacific Ocean, the Straits of Fuca, or some other opening.

Mr. ROBINSON.—Yes; they would have to go through the straits of Juan de Fuca. I have the location now. I was wrong. It is in the southwest corner of Vancouver Island, opening on the ocean.

The PRESIDENT.—Do the seals ever go in fresh water?

Mr. ROBINSON.—I have never heard of it. I have seen them in brackish water. I cannot say more than that. It may be known to some of the members of the Tribunal that the water in the St. Lawrence is brackish until you get a considerable distance down.

Senator MORGAN.—Do you refer to the fur-seal?

Mr. ROBINSON.—Oh no; the hair seals. There are no fur-seals on the Atlantic Coast that I ever heard of.

The PRESIDENT.—Do they require salt water?

Mr. ROBINSON.—No; they do not require salt water. I think that in the Zoological gardens they are not always supplied with it; and I have seen them high enough up to say that they go into water that is not quite salt. That is the hair seals. I do not know anything about the fur-seals.

We have all this evidence collected; and it is given by 27 white hunters and a large number of Indian hunters—I should think some 30 or 40. Several Indians refer to the fur-seals following the herring into the bays. All this evidence is to be found in Appendix II to the British Counter-Case; and I shall read to the Tribunal some few extracts to show the character of it. I have it all here and I could give it to the Tribunal either verbally, the whole of it, or put it in writing, as would be most convenient, so that all of it would be before them. I do not think it would be wise, or that there would be any sufficient object in it for me to detain you while I read all the affidavits. I merely mean to read one or two or half a dozen as specimens of the whole; and then I can either give you the names of the others or give you the printed list, whichever may be found most convenient.

For example, at page 43 of that Counter Case there is a man named Petit, one of the white hunters. He says:

I have seen seals opened and find in them salmon, cod, and sometimes squid.

At the same page, another man, Abner Sinclair, speaks to the same effect:

Seals eat cod, salmon and squid; more squid than either of the others from what I have seen.

A man named Luke McGrath, of the city of Victoria, at page 46, now a hunter in the "Dora Diewind", a sealing schooner, says:

I have found that seals eat salmon principally along the coast, but squid principally in Behring Sea: cod also.

Then Ralph Starrat, at page 48 of the British Counter Case, says:

The principal food of the seal along the coast is salmon; but they eat any kind of fish.

The PRESIDENT.—Is that in the Counter Case or the Appendix?

Mr. ROBINSON.—It is in the Appendix to the Counter Case, Volume II. You will find that our Appendix to the Counter Case is arranged in this way, may say, Mr. President: From page 43 to 139

is "Testimony relating to pelagic sealing"; but the affidavits relate to a great many points in regard to pelagic sealing: That is to say, each man will speak on several points in connection with it.

Then at the beginning of that Appendix to the Counter Case we have got a collection of the evidence on different points of that kind; but I do not think we have it collected there with regard to the food. I have it in a separate analysis of my own here in print with regard to the food; and that I can give to the Tribunal if it would be convenient for them. But they are collected very much from pages 43 onward. In point of fact, all these affidavits of white hunters are to be found from pages 43 to 98. Then come the Indian hunters, which extend from 140 to 159 or 160.

James McRae, at page 48 says:

Codfish, salmon and squid are the principal food of the seals.

R. O. Lavender, page 54, says:

Salmon, squid and a small black fish.

Two of them speak of a fish "like a mackerel." What that may be, I do not know.

Otto Buchholz, at page 58 says:

The food of seals on the coast is mostly salmon. On the Asiatic side mostly squid.

That is one of the persons I refer to for that statement.

Herman R. Smith, at page 61, says the same thing:

Over there (that is to say, Copper Islands he is speaking of) the seals get only squid and devil fish; largely the latter.

I suppose there are no salmon on that coast.

Andrew Mathison, at page 69 says:

Seals on the southern coast feed principally on salmon; up north on salmon, and squid.

Another man says p. 80:

Shrimps and insects.

John Christian, at page 86 says:

On the coast I have noticed more salmon food in the stomachs of seals than anything else; but in Behring Sea it is mostly squid.

Walter Heay, at page 87 says the same thing:

On the coast the seals eat principally salmon; in Behring Sea mostly squid.

Then there are a large number of Indian hunters, who I suppose would be confined to the eastern coast.

An Indian, Schoultwick, at page 142 of that same Appendix. These Indians speak more particularly of herring, and I account for that in this way: The Indians as a rule know more of the coast sealing. That is to say, they are more accustomed to hunt within shorter distances of the coast, and their knowledge of seals is more confined to the migration of the seals along the coast and the interior waters. Of course many of them are hunters on the schooners; but they have a more intimate knowledge probably of the coast sealing. This man was living on the coast of Vancouver Island in Barclay Sound, and he says:

The seals are always most numerous when the herring are most plentiful, which they follow as far as the head of Barclay Sound, and we kill them there every year if the bait go that far.

That is to say, if the herrings go in as far, as I understand it, as up to the head of the Sound,

Senator MORGAN.—Within the three mile limit?

Mr. ROBINSON.—I do not know; but if they go to the head of the sound I suppose it would be within the three mile limit.

At page 146, a man named Charles Hayuks of Barclay Sound says:

When the herring are plentiful and come in close there are plenty of seals, but when the herring are scarce, or do not come in close, we do not get many.

At page 147, a man named Oquaghu says:

Seals come into Barclay Sound every year in the month of January, and are more plentiful some years than others, and years the seals are plentiful have noticed that the herring were very plentiful near shore. Seals are as plentiful as ever but they do not come in so close to shore now.

A great many of the Indians say that the guns have frightened them away from the shore.

Then another man, at page 149, says:

They are most plentiful along the coast and in the Sound when the herring come in to spawn, and the more the fish the more the seal. All kinds of fish that are got on the coast are found in their stomachs.

Senator MORGAN.—Does this testimony show that the herring do come in to spawn on that coast?

Mr. ROBINSON.—No; I do not remember that it does, Mr. Senator. I do not know that it does. That is a fact, of course, that could be readily ascertained. One of these witnesses speaks of the seals following the herring in when they go to spawn. Others speak of their following them in January; but I do not know anything about that.

Senator MORGAN.—On the Atlantic coast, you say it is quite different?

Mr. ROBINSON.—I think it is. The Atlantic Coast and the Pacific coast have different seasons.

At page 153 another Indian speaks to the same effect:

Years herring are plentiful the seals are very plentiful.

Another Indian, at page 159, says:

Seals come into the Barclay Sound every year, and I have seen them right in here where the boat is anchored and saw them in here last spring. Some years ago they were very plentiful; years the herring are very plentiful in the sound and along the coast seals are very plentiful, and come in close to land.

The PRESIDENT.—From all these affidavits it would appear that the quantity of seals does not merely depend upon the quantity of destruction, but also upon the quantity of food?

Mr. ROBINSON.—It must to some extent. All wild animals will be found very much to depend upon the quantity of the food that they follow. If we are to talk of natural history, there are mysterious things which cannot be accounted for by us. But I can say at least that the herring are unusually plentiful every few years and scarce in other years. One year they will be unusually plentiful. No one knows where they come from; and the next year there may be very few, and you will not find another influx, so to speak, for several years.

The PRESIDENT.—Would that be an annual migration?

Mr. ROBINSON.—No; they are not migratory fish at all, according to the knowledge of my friends. I have seen years, for example, when black squirrels have been swarming. They would swarm one year but the next year they would be very scarce.

The PRESIDENT.—We all know that about cockchafers.

Mr. ROBINSON.—It may be the same with regard to cockchafers. I am not familiar with that; but there is no doubt that in some years the herring are more plentiful than in others; and when they are more numerous, the seals collect there in greater numbers than at other times. That is all I can say about it.

I read from page 157. At page 162 there is the statement of an Indian, confirmed by eleven others, and he speaks in the same way:

Some years there are more than others, and years that the herring are plentiful there are more seals.

Several of these witnesses refer very particularly to the fur seals following the herrings into the bays. One of them, at page 140, refers to that particularly. He says:

About Christmas time they come into Barclay Sound on this coast among the islands there, and are seen in great numbers following the run of herring. I have noticed that when the herring is plentiful on the Halibut Banks the seals are more numerous than when the feed is scarce.

Then a man at page 158 speaks of it in the same way:

Seals are first seen along this coast about Christmas time, and are seen till about the time the berries begin to get ripe—

I do not know what connection there is between the two.

but we only hunt them for about three months from the shore, when we go away in the schooners. I have always seen the big ones come first, and towards the middle of the season the smaller ones come. They are always most plentiful when the herring are thickest, and I have seen them following the herring right in here, where we now are—in Ucluelet Harbour—in the night time, and have gone out and killed them.

I think there is only one other worth referring to at p. 159, who says:

Some years they were very plentiful; years the herrings are very plentiful in the Sound and along the coast seals are very plentiful, and come in close to land.

That is all the evidence out of 70 or 80 affidavits that it is necessary now to call the attention of the Tribunal to; but I can give you a written list of them all if the Tribunal should desire to have it; I believe they prove what there can be no ground to dispute, that the seals live largely upon herring and largely upon salmon, that when the herring and salmon are most plentiful the seals are most plentiful, and that they follow the schools up into the inner waters and into the sounds, wherever the herring go. That I think would be the result of all the testimony.

The next topic that I desire to touch upon is the question of waste at sea by pelagic sealing. That has an indirect bearing, no doubt, upon this question of regulations. It may be said that if there is undue waste or undue loss by the system of pelagic sealing, the question of regulations would be affected by that, and would be framed as far as possible in view of it. The United States have asserted very strongly that something like 66 per cent, I think, of the seals that are shot at sea are lost. That we venture to say is utterly and wholly wrong, some twenty times an exaggeration, and I propose to speak of the evidence which we say shows that. Of course there is no question in the world that the pursuit of every wild animal—I do not care what it is or where it is—is accompanied by a certain amount of loss. It is inherent in the very nature of every kind of hunting, every kind of pursuit of wild animals. I do not know any that is free from it. My learned friend, Mr. Coudert, at part 4, page 699, exerted his powers of ridicule and sarcasm upon the sentence in our Commissioners Report in which they say this:

The accusation of butchery laid against those who take the seals on shore cannot be brought, this pelagic method of killing the seal, which is really *hunting* as distinguished from *slaughter*, in which the animal has what may be described as a *fair sporting chance for its life*.

Mr. Coudert, after considering that question during lunch time, said on the reconvening of the Tribunal:

When this learned Tribunal adjourned for the recess, I had just read extracts from the British Commissioners' Report charging butchery against those who killed the seals on the islands, and expressing the opinion that the slaughter which I have described at sea was sportsmanlike in its character, in that it gave the animal a fair sporting chance for its life. I could not do justice to that by any comment, and I leave it for the Tribunal without any criticism.

I should infer from this that my learned friend Mr. Coudert, however wide his sympathies may be—and I have no doubt they are very wide—has no sort of sympathy with what is called the instinct of sport. His idea would seem to be that humanity is the one thing to be considered. He would approve, for instance, of a man who would sneak up to a pheasant, get within 20 yards of it, and shoot it out of a tree, or would shoot it on the ground. He would think that much more humane, and much more to be encouraged, than the method of the ordinary sportsman, who shoots on the wing and does give the bird a chance for its life. In fact, he would agree with that person of whom I have read a story, that when he was about to shoot a partridge running in a field, his friend who was with him put his gun up, and said: "Surely you are not going to shoot a bird in that way?" His answer was: "No; I will wait until it stops"; and that was his idea of fair sport.

We maintain that pelagic sealing gives the seal a fair chance for its life and is in that respect preferable. There is one thing very certain: if you were to propose to nine men out of ten to go and join you in the system by which the seals are killed on the Pribilof Islands, namely, by knocking them on the head with a club when they are looking in your face they would probably turn from you with no small degree of contempt; while if you were to propose to the same men to go out in the open sea in boats and kill the seals by shooting them, they would think that a sort of thing to be encouraged, and would have no hesitation in joining you. Mr. Coudert can have none of the sportsman's instinct, or he would not have thought the remark of the British Commissioners so very ridiculous. It so happens that at the end of one of these books, vol. IV, App. British Case, there is an article from an American newspaper, quoting from the London Times, in which they take the same ground, that it is butchery, and unsportsmanlike, and that it ought to be condemned on that ground. Every one on the other side of the water knows of the complaints that are made in regard to the method of pursuing deer. They are driven into a, where the pursuers paddle out to them in a boat and put a bullet through their heads. I think very much may be said against this system on *that but it ground, that is a matter of taste*. I infer only from my learned friend, Mr. Coudert's conception of it, that he has not much sympathy or feeling for the instinct of sport.

Pelagic sealing is spoken of in several places as having been destructive elsewhere, and I do not stop now to read extracts, because I think the time has come when we may take it for granted that the Tribunal have in mind a great deal that has been read and repeated to them in these affidavits. In the Case of our friends, I find it often stated that pelagic sealing is in part responsible for the extermination of the seals in the southern hemisphere and elsewhere. As a matter of fact, pelagic sealing has never exterminated seals anywhere.

Lord HANNEN.—Has not that been very fully gone into?

Mr. ROBINSON.—It has perhaps been very fully gone into, and I am not going into it any more. All that I was going to do was to point out the sentence of the British Commissioners, paragraph 65, I think it is,

where the fact is stated. I say this pelagic sealing has never been practised elsewhere and never was known until it was practised in these waters.

Now the statement in the United States Case at pages 195 and 196 is that 66 per cent are lost out of every 100 killed, and the probability is the percentage is even more. In the British Commissioners' Report, paragraph 627, you will find a table given, and I think the better way of treating this is not to trouble you with special affidavits, but to give the result of the analysis which we have here of a large number of affidavits, putting together some 50 or 60 affidavits of different people who speak to the number they have killed. We have aggregated that number, and we have 9,337 skins taken and a loss of 4 per cent. That is in the table appended to paragraph 627 of the British Commissioners' Report.

If you look at the British Counter Case Appendix, vol. 2, page 6, Mr. President, you will see a further table. Of course, between the preparation of the Case and Counter Case we were collecting evidence, and there is a large list of affidavits by different people tabulated in this way, giving the names of the deponents, names of the vessels they belonged to, the number of skins obtained, and the number of seals lost, the percentage, and the different years, with remarks.

Now in those affidavits we have 39,879 skins taken, and we add to that the 9,000 odd in the previous table, making together 49,216, or say 50,000; with a *up* of 1,602, making a loss of 3-2 per cent. From page 7 to page 10, we have some 80 witnesses, or an abstract rather of their testimony, which forms the evidence which has been tabulated and analysed, as I have mentioned. It would seem to be impossible to present that kind of evidence more satisfactorily. There is no doubt evidence on the other side both ways; that is to say, witnesses called on behalf of the United States who say that they have lost a good many, and witnesses called on behalf of the United States who say that they have lost but very few, and you must collect from the evidence *pro* and *con* in that matter what you may take to be the reasonable inference from it, taken as a whole. That is treated of again in the British Counter Case, pages 191 to 193, in the British Commissioners' Report at paragraphs 616 to 626, and in the Counter Case at pages 158 to 159. I do not think, though it is tempting to read some of these affidavits, that it would be worth while to detain the Tribunal while I call attention to any of the details. The net result is that we have tabulated them all, and have the statements of different people of the number they state, by actual count, amounting to 10,000. We have the statement of the number that those people swear to as having lost, and it comes to 3-2 per cent. That is the total, if you recollect on the first 9,000 odd. Then we get 39,000 more, making close on 50,000 which was a total of 3-2 per cent.

Now I desire to call attention to the affidavit of Mr. Behlow in the Appendix to the United States Case, on another question, volume 2, page 402, which we think must certainly be a mistake. I call attention to it more particularly because it seems worth while to call attention to anything that this gentleman says, with regard to which we conceive him to be inaccurate, for he is a gentleman who has made no less than 11 or 12 affidavits on behalf of the United States. His statement is that he examined 1,342 salted fur-seal skins, *ex* schooner "Emma and Louisa" from the North Pacific Ocean; and he undertakes to tell you what kind each skin belonged to, that is to say, whether pup, male, or female, and to give an analysis of the whole.

Now in answer to that, if you will turn to volume 2 of the appendix to our Counter Case, page 173, you will find first the affidavit of Mr. *Belodo*, who says he is the managing owner of that vessel; that she did bring the 1,342 skins, that he was there when Mr. Behlow came to examine them; that he only lifted a few up from the pile, not exceeding five or six, and looked at them, and then went upstairs; and the time that they were down there would not be more than five minutes. On the same page, 173, that is followed by an affidavit by Mr. Barber, who was a clerk in the employ of Mr. Ladd, the owner of the sealing vessel "Emma and Louisa"; that she returned on a certain day,

Having on board 1,342 skins, and these skins were delivered at the place of business of the afore mentioned C. D. Ladd on the 12th day of the same month.

In the forenoon of the day following, that is, on the 13th July, Charles I. Behlow of this city, came into the store of the aforesaid C. D. Ladd and asked to see the skins which had been brought from the vessel "Emma and Louisa", and I took him to the basement where they were all lying in one pile in the elevator. I made no objection to his seeing the skins, as I had been informed that all seal-skins of the pelagic catch had to undergo inspection before any disposition could be made of them, and at the same time had been told that the firm of H. Liebs and Co. had been appointed by the Government the inspectors for that purpose, and I knew the said Charles I. Behlow as a member of the firm of H. Liebs and Co. for many years.

On being shown the skins which, as I before stated, were all in one pile, the said Charles I. Behlow remarked to me that he had to say he had seen them, for it did not pay to inspect them as he was only paid 5 dollars a day for doing it; and on saying this picked up and looked at a few skins, not exceeding 5 in all, but gave even these no such scrutiny as would be required to determine the sex. The whole time the said Charles I. Behlow was so employed did not exceed five minutes.

Then we have also the affidavit of Mr. Wester at pages 175 and 176, and Mr. Wester is the Captain of the vessel. He describes Mr. Behlow's visit, and then he says that the skins were immediately trucked up; the time occupied was not more than 3 1/2 hours in landing, and it was impossible to tell what the sex was—it was only a matter of guess work. Then in case it should be said that 3 1/2 hours was sufficient, we refer the Tribunal to the evidence of Mr. Phelan, at page 518 of the United States Case Appendix, volume 2, who says he spent 4 days going through a lot of skins, working about 7 hours a day, so that if even 3 1/2 hours is supposed to be the time, it is impossible that Mr. Behlow could have examined these skins with any such attention as would enable him to give the information he professes to give. This is material when we find the same deponent making 11 or 12 affidavits.

Then the only other point that I desire now to touch upon is the question of raids. That is a material question from two views—material as regards the protection given to the Islands, and material as testing the opinion of those who have spoken on the part of the United States, and who have said that in their judgment raids are too unimportant to play any part in the question they are considering.

Mr. Stanley Brown, in volume 2 of the Appendix to the United States Case, at page 18, says with regard to that:

The statistics which I have examined, as well as all the inquiries made, show that in the raids upon the rookeries themselves by marauders the loss of seal life has been too unimportant to play any part in the destruction of the breeding grounds. The inhospitable shores, the exposure of the islands to surf, the unfavourable climatic conditions, as well as the presence of the natives and white men, will always prevent raids upon the islands from ever being frequent or effective.

Now, we have not treated that question in our Report in that way at all. The British Commissioners Report is in an entirely different sense, and gives evidence which, in our view, it is impossible to disregard or to displace by mere assertion of opinion or as even the result of enquiry.

The chapter on "Raids" is to be found in the British Commissioners' Report, paragraphs 727 to 770. I do not propose to read from that at all at any length; but you will find at paragraph 762 they say:

The evils of raiding are very great. It is by far the most destructive form of sealing, combining all the disadvantages and none of the advantages of the other forms. The killing is chiefly of breeding females, as the raiders cannot penetrate far enough inland to obtain the young bachelors or immature females.

And so on.

We ourselves noticed the great ease with which, under present arrangements, raids might be successfully carried out.

—and they give particulars of that.

For instance, we steamed into the anchorage of the settlement at St. Paul, close past the Zapadnie and Tolstoi rookeries, one bright moonlight night (14th September), and moved early the next morning by daylight round the Garbotch and Reef rookeries to the other landing, without our presence becoming known in any way at the settlement.

In short they say under present regulations and arrangements, there is no difficulty or danger whatever to vessels raiding along shore any night, or in any of the frequent fogs at several of the best rookeries, except when a revenue-cruiser chanced to be close by, an occasional occurrence well known to every marauding schooner.

If you look at the British Counter Case, the Appendix Volume I, pages 153 to 154, you will find Mr. Macour's report on that subject, which is very definite and specific. He says:

During the months of July and August, 1892, no guard was stationed upon any rookery on either island with the exception of North-east Point on St. Paul Island, and Zapadnie on St. George. Polavina and Zapadnie Rookeries on the former island, and Great East and Starry Arctel Rookeries on the latter, were left without a guard of any kind, and three of these four rookeries are known to have been raided in recent years.

On the 16th of July I walked on St. George Island from the village to Zapadnie Rookery with the two natives who were going to relieve the watchmen there. One was a young man about 20 years of age, the other a boy of 12 or 13. When we reached the guard-house, I found that the guards to be relieved were an elderly man with but one arm, and a boy of about the same age as the one referred to above. I was afterwards told by Dr. Noyes, the manager on St. George Island for the Company, that when the killing season was at its height this one armed man was the only guard kept at Zapadnie. He was unable to assist in any way at the killings, so was employed as a watchman.

Two or three men were kept at North-East Point, St. Paul Island, and this place is connected with the village by a telephone line. Early in August, 1892, however, the receiver or transmitter at one end of the line got out of order, and it was rendered useless as a means of communication between these places.

At the time of my departure from the island on the 12th of September it was still in this condition, and there was apparently no prospect of its being repaired before next spring. More than two hours would be required by the watchmen to reach the village were a raid to be made at North-east Point, and the same time to return with assistance. This, with the time consumed in rousing the people at the village, would give any raiders ample opportunity to do their work, as I have been assured by several men who have actually raided the islands that four hours is the time usually required to make a successful raid, so that North-east Point was in 1892 practically without protection.

Polavina rookery is 5 miles from either the village or North-east Point, and any night the wind served, or even on foggy days, raids might be made there and nothing be known of them at the village. Although Zapadnie rookery can be seen from the village, and on this account is supposed to be safe, it was at this very place that the skins taken by the crew of the "Borealis", late in 1891, were procured. I was told by one of the men engaged in the raid that, at the time it was made, a revenue-cutter was lying at anchor near the village, and less than 2 miles from the rookery, that the night was clear,—so clear that they could see from the schooner not only the lights of the cutter, but the vessel itself. They were desperate, however, and sailed in close to the rookery, landed, and secured 400 skins without being seen or heard.

While on St. Paul Island, in 1892, three different rookeries were named to me as the one on which this particular raid was made. Nothing was known of it on the islands until the arrival of the revenue cutters the next spring, and the officers on these vessels had heard of it through the raiders themselves.

While in Victoria, British Columbia, in May, two of the schooner "Challenge" gave me particulars of the raid made on Great-East Rookery, St. George Island, late in 1891; and when on St. George Island in July, I asked Dr. Noyes, the Manager of the North American Commercial Company on that Island, for an account of the raid. He told me that the morning after the raid, a native who had been collecting wood came in with the report that there were dead seals on Great East Rookery, but that no vessel was in sight. The number of seals killed was not ascertained, as they did not wish to disturb those still on the ground. A man was sent across the island, and came back with word that a schooner was anchored in Garden Cove. Guards were put on all the Rookeries, but no further attempt at raiding was made, and nothing more was seen of the vessel.

Then:

In this connexion, Mr. Wardman, United States Treasury Agent on the Pribilof Islands for several years, may be quoted: "I asked a man one day if he would shoot if we took after a pirate, and he said he would not. It was only with great persuasion I could get him to pull me off in a boat. It is no use putting guns into their hands. I asked him why he would not shoot, and he said he did not want to kill a man. They are very cowardly."

Then they go on to point out:

Even were native guards placed on every rookery on both islands, they would thus afford no real protection against raids. They might be bribed by the raiders, or might neglect their duties and not patrol the rookeries on dark or foggy nights, and even were good watch kept and the presence of raiders detected they would be useless, and at the most would but hurry to the village for help. It is assumed that if a revenue-cutter were kept at each island, no further protection would be necessary.

and so on.

All the revenue-cutters habitually come to anchor at night-fall when near the islands, if possible at the village, so that practically the whole island excepting that part of it near the village is open to the raiders. Vessels are known to have anchored to the northward of St. Paul Island for weeks, running in to the island at night to kill seals on the rookeries. A proper guard stationed at each rookery might prevent such raids, but a vessel anchored at the village can never do so.

Then in the British Counter Case, Appendix, vol. 2, pages 41 and 42 the Tribunal will find an analysis of all the affidavits relating to raids made on the Pribilof Islands.

They are 8 in number, and particulars are given as to the raids they themselves are aware of.

On one occasion.

(A Mr. Folger says):

We once ran in too near the village and saw a cutter there and went away again, but we found the coast clear the next night and got about 500 skins. We could see the light at the village.

We knew very well the natives did not keep a good watch. We got about 2,000 skins that year off the Islands.

And John Kraft speaks of the same thing. I am not certain if Mr. Folger is a citizen of the United States. I think so, however, for the simple reason that it is stated in several places there is no instance of a Canadian vessel having raided the Islands and, therefore, I assume these persons like Mr. Folger are American citizens. I find, that he is so described at p. 88.

Then we have very direct evidence of the manner in which these raids were carried out, in the British Counter Case page 297; and in the Appendix to that Counter Case volume I page 154 and page 293 specific evidence is given as regards a great many raids which have occurred

and which have not been mentioned by the Treasury Agents. I will conclude this, I think, by referring to the evidence of one Lenard, a Witness called for the United States, or one of the deponents whose affidavit they give in the Appendix to the United States Case, volume 2, page 217; and I refer to him to show the consequence of such raids more than any thing else. I am not quite certain for what reason they put in his evidence.

He says:

I reside at Belkofsky, Alaska Territory. I have been a sea-otter hunter for forty years, and have occasionally raided the Russian seal islands. When on a raid we would watch for a favorable opportunity to make a landing and then kill male and female fur-seals indiscriminately. Probably for every 500 marketable skins secured double that number of pups were destroyed.

That is practically what from the habits of the seals and what we have read you would imagine. These men proceed with no care, and they probably create a stampede among the older animals, and the pups are killed in that way and in others.

Senator MORGAN.—That leads me to enquire, Mr. Robinson, for the purpose of obtaining information, if it is correct that the rookeries occupy the sea front, and in rear of those come the older seals and holluschickie. Is that correct?

Mr. ROBINSON.—No, I think not. I think the holluschickie haul out on a different place.

Senator MORGAN.—Some of the witnesses speak of open ways being left. That is what I meant.

Mr. ROBINSON.—That is seals on the rookeries. You will see in the evidence that the holluschickie haul out at a different place.

Senator MORGAN.—Entirely independent?

Mr. ROBINSON.—Yes, because the old seals will not let them come near the breeding section, so to speak.

Mr. CARTER.—That error ought not to be allowed to go uncorrected, because it is in evidence that the holluschickie haul out in the rear of the rookeries as well.

Sir RICHARD WEBSTER.—But not in the same place.

Mr. ROBINSON.—Perhaps Mr. Carter is right in this way: what I mean to say is this, that they land at a different place. I do not say they do not spread round and get to the rear.

Senator MORGAN.—There are witnesses who speak of open ways for the seals to pass through.

Mr. ROBINSON.—I do not think that is connected with the holluschickie, but I will not put my recollection, where I do not recollect clearly, against anything that Mr. Carter thinks is correct. Mr. Folger, in the Appendix to the British Counter Case, Volume 2, page 89, refers to one of these occasions when he is speaking of a raid.

He says:

I was at Robben Reef at the time the Alaska Commercial Company sent a vessel there—the "Leon", Captain Blair—to destroy the seals. They had tried their best to protect the island, but we were too much for them. We had the guard in our pay, and when the "Leon", which had been sent there to guard the place would go away, lights would be put out and we would come over from Cape Patience, where we had men on the look-out constantly, or if we got impatient the fastest sealer in the fleet would go there and be chased by the "Leon" (a sailing vessel), and the others would make the raid; we worked together, and the schooners would divide up.

It is hardly necessary to suggest in conclusion that it is only natural to suppose these raids must have been frequent. The price then paid for seal skins was an object of temptation. The natives are not to be depended upon, and the United States cared little about it; it was a

matter for the lessees; and unless a very strict guard was kept, this locality, with constant thick fogs and a class of men not by any means timid in their operations of that kind, would be almost certain to be subject to raids. Given natives to watch, and given white men to want what the natives are watching, the white man will get what he wants. Those three points I have now dealt with.

The PRESIDENT.—Any others we shall be happy to hear you urge in the morning.

[Adjourned till Wednesday the 21st June at 11.30 o'clock A. M.]

FORTY-SECOND DAY, JUNE 21ST, 1893.

Sir RICHARD WEBSTER.—Mr. President, before my learned friend Mr. Robinson begins, you will remember that when the Attorney General communicated to you the fact of a communication having been made from the Foreign Office as to the Russian seizures, objection was taken by my learned friend, Mr. Phelps, that the communication was not public or official; and you were good enough to call attention, when I was addressing you, to the fact that however much you might, of course, believe what we had stated in the matter it was not a public document and, therefore, reference could not be made to it properly. I told you I had no doubt the Papers would be presented to Parliament in a few days. They were presented yesterday, and I have handed my learned friend copies. Copies will be supplied to the Tribunal, though we have not sufficient at present I believe, and I may state on page 5,—

Mr. CARTER.—One moment; do you read the contents as evidence? Because if so, we object to the reception of this matter. The ground of our objection, Sir, is that it is new evidence designed to prove some new fact or other; and, therefore, does not come within provisions of the Treaty, that the only way in which the Treaty contemplates evidence is to be received by this Tribunal is that it should be incorporated in the Case or Counter Case, and that this, therefore, is not admissible.

The PRESIDENT.—I would say that we do not admit fresh evidence, and it is not as evidence that we would like to take it. I do not believe it is within our proper power, however, to prevent anybody from reading anything that may be read in the newspapers of what happened that day or the day before. We simply take it as a newspaper communication; I do not say more than that.

Mr. CARTER.—With great deference, Sir,—

The PRESIDENT.—Do you object to that?

Mr. CARTER.—I should think it was in the power of this Tribunal to prevent the reading of any newspaper in evidence, or to prevent the reading of anything which is intended to bring before the Tribunal any additional fact (that is, evidence) in reference to what may have been done between Russia and Great Britain in the way of adjustment or settlement of a controversy. Our learned friends on the other side have a way, which we are deprived of, by which they can bring those matters before the Tribunal.

If the objection is that they are of an unofficial character, they have an easy method by simply laying them in the first instance before the British House of Parliament now in Session, and having them printed to give them an apparently official character. But the objection is to the admission of new evidence, and lies as well to evidence of any official character as any other. The impropriety, as I conceive it, is this; it brings a fact partially before the attention of the Tribunal; and how can we complete the record, and how can we furnish the additional information that is necessary for its proper understanding unless we have access to all the documents, which we have not? How do we know what oral interviews may have been indulged in by the Representatives of Great Britain and Russia in this matter? How do we

know what other facts never disclosed by these records may have transpired? It is permitting one party to lay before the Tribunal a partial view when it is not in our power to complete the view. That is the objection, and it is a serious one; and that is the reason why it was provided by the Treaty that the place, and the only place, in which evidence was to be contained is the Case and Counter Case. It is, on that that we ground our objection; that we ought not to be put to the trouble, that we ought not to be put to the injustice, that we ought not to be put to the inequality, of having a partial fact laid before this Tribunal when we have had no opportunity and can have none to lay before the Tribunal such other additional facts as may belong to it and which must be regarded in order to arrive at a proper understanding.

Sir RICHARD WEBSTER.—I do not intend to answer the observations that have been made, Mr. President, except to remind you of what the circumstances are. In the United States Case they asserted that Russia had claimed to exercise the jurisdiction of seizing ships outside the three-mile limit. That correspondence between Russia and Great Britain respecting the *modus vivendi* has already been admitted, and, not only admitted, but referred to by Mr. Phelps, he stating he intended to argue upon it.

The PRESIDENT.—Facts already incorporated in the documents before Tribunal, which is not quite the same thing.

Sir RICHARD WEBSTER.—These were papers not incorporated in the documents. It was a Parliamentary paper handed in last week and to which Mr. Phelps referred, saying he intended to rely upon it. We informed the United States that at no time had Russia made this claim the Attorney General made a statement to the Tribunal publicly with reference to the fact that Russia had agreed to indemnify ships that had not been inside the territorial waters, and that statement being made, Mr. Phelps got up and said—he will endorse what I say—that in the previous debate in the House of Lords, not a week ago, Lord Rosebery had not referred to it—was he at liberty to refer to that debate and I said Yes, to any documents public or otherwise supporting his contention Mr. Phelps might refer. You interposed, Sir, and said I had gone too far and it was only public documents that ought to be referred to, and called attention to the fact that the telegram to the Attorney General was in the nature of a private document and not public I then informed you, Sir, feeling the weight of what you said, I would ascertain if the papers were going to be presented to Parliament.

They have been presented to Parliament, and I, having given copies to my learned friends, make good my promise by presenting them before the Tribunal. I say that it is not new evidence at all. It is simply to show the Tribunal the real facts respecting the action of Russia.

Lord HANNEN.—Suppose Russia are under some terms with reference to compensation, has that any bearing on the enquiry we are going into.

Sir RICHARD WEBSTER.—It has no bearing at all.

Lord HANNEN.—Then why go into it?

Sir RICHARD WEBSTER.—If your Lordship will pardon me except the United States have introduced into their argument a statement that Russia has claimed to exercise these rights outside territorial waters. It is not a question of bargain at all. I told the Court before, the matter was investigated by a special commission, and the documents will show what the actual claims of Russia have been in regard to the matter. It is only to prevent the Tribunal being under a misapprehension in consequence of an inadvertent statement made the United States,

The PRESIDENT.—I must say, as there has been an objection raised, that I cannot allow you to proceed without a consultation with my colleagues in a matter which I, for myself, should have conceived was open to every body; but, perhaps, that is because I am more accustomed to the French procedure which enables you to bring before the judges any new fact that may arise, with the object of having before them every thing that has taken place. As the history of the world goes on, every day brings forth new facts, and we do not shut our eyes to what goes on, but then the rules of English Common Law, such as are enforced both in England and America, are more severe, as concerns evidence, than anything I have been accustomed to even in theory.

Mr. CARTER.—Which rules have been adopted in the Treaty and the preparation of these Cases.

Sir RICHARD WEBSTER.—I may be allowed to say, Mr. President, that I should not have kept faith with the Tribunal had I not brought these documents before them, because in reply to the statement made by yourself, with the concurrence, as I understood, of the other members of the Court, that the public documents passing between the countries can be referred to, I said recognizing that if the papers were made public and were presented to Parliament, they should be laid before the Tribunal; and therefore I should not have kept faith if I had not presented them.

The PRESIDENT.—We thank you for your intention, Sir Richard, which is very loyal indeed, but we must consult between ourselves before we allow you to go any further.

Sir RICHARD WEBSTER.—Might I point out that the United States cannot be allowed to found an argument that Russia has taken this action, without our being in a position to put the true facts before you.

The PRESIDENT.—Of course, that is a thing we shall consider.

The Tribunal then consulted for a short time.

The PRESIDENT.—I wish personally to explain what I meant when I spoke of newspapers. I meant to say, of course, it is not the reading of a newspaper which might be the embodying of an argument, but I want to say, as men are naturally brought to take heed of all public events which take place and such public events, we considered, are in the reach of everybody, and that we might take heed of them. Of course, if we were to hear by some commotion of nature that all the seals had disappeared off the face of the globe, it would be strange if we could not take heed of it.

Mr. CARTER.—Our own law contemplates a certain amount of information which the Court might take note of, but not so far as you go.

The PRESIDENT.—It was only with reference to such an observation of that kind, and I should not like to be misunderstood with regard to it. So far as regards this particular case, after consideration, we do not deem that it would be fit, at the present moment, to stop the proceedings of this Tribunal, and we therefore will raise no objection to hearing the document; but we will reserve to ourselves to consider whether we will take it as evidence or reject it, when we have more leisure to deliberate about the matter. It is only under that reserve now that we will ask Sir Richard Webster to proceed with his reading.

Sir RICHARD WEBSTER.—I quite understand, Mr. President, that it was subject to all reserves of that kind. I will read nothing but official documents. On the 29th May (10th June) 1893, Mons. Chichkine writes from St. Petersburg—and my learned friends have copies of this:

I have had the honour to receive the notes which your Excellency was so good as to address to the Imperial Ministry, dated the 17th (29th) November, and the 4th (16th) and 9th (21st) December 1892, relative to the seizure in Behring Sea of Canadian schooners and fishing boats by Russian cruisers.

A special Commission having been appointed by Imperial Decree to examine into the circumstances under which those seizures were made, the Imperial Ministry did not fail to lay before it the depositions (affidavits) of the captains and crews of the schooners concerned which accompanied the above-mentioned notes.

In reply to these communications I make it my duty, M. l'Ambassadeur, to transmit to you the two reports inclosed.

Your Excellency will observe from the perusal of the first of these documents that it deals with the assertions of the Canadian crews as to the privations alleged to have been inflicted upon them at Petropavlovsk. In the opinion of the Imperial Government the Commission has fully elucidated this matter. Nevertheless, if the interested parties consider it necessary, they have the power to avail themselves of the regular course provided by law in order to present their claims either to the superior naval authorities or to the proper Tribunal.

Then follow two paragraphs about the treatment of the captain and crew that are not material:

The second of the accompanying reports contains a detailed examination of the circumstances which accompanied the seizure of the schooners and their boats. In considering the legality of the captures effected by the Commanders of the Russian cruisers and by the District Governor of the Commander Islands, the Commission was guided by a principle the justice and equity of which cannot be disputed. It recognized as lawful seizures of all vessels whose boats were seen or captured in our territorial waters. It cannot, indeed, be denied, that the boats constitute, juridically, an appendage of the schooner to which they belong. Consequently their seizure in territorial waters renders the capture of the vessels, of which they in some respects form part, perfectly legal.

If it were otherwise, a schooner could with impunity pursue seals on the coasts by sending her boats there, and thus infringe the inviolability of territorial waters, although herself remaining outside the said waters. Taking this view of the matter, the Commission recognized the legality of the seizure of the schooner "Marie", "Rosie Olsen", "Carmolite" and "Vanconver Belle" but was unable to do so in the case of the seizure of the schooners "Willie McGowan" and "Ariel". There can, however, be no question as to the serious nature of the indications which induce the Commanders of our cruisers to institute a search on board these last-named vessels.

The "Willie McGowan", took flight as soon as she had sighted the Russian cruiser, and she refused to heave to at the summons of the "Zabiaca".

Though the Commander of the Russian cruiser did not, see the boats of the "Willie McGowan" engaged in the illegal pursuit of seals in our territorial waters, he had been informed of it by the inhabitants of the coast. The search revealed the presence on board of implements used for sealing on the coast, as well as of seventy-six skins, of which sixty-nine had been taken from female animals, who must therefore have been killed close to the shore; 90 per cent of the skins found on board the "Ariel" had probably also been taken from nursing females, and belonged to seals caught in Russian territorial waters.

The importance of this evidence was fully recognized by the Commission. It was not considered, however, as amounting to positive proof such as would justify the seizure of the schooners, owing to the absence of an essential condition: their boats had not been sighted in actual pursuit of seals in Russian waters.

In bringing what precedes to your knowledge, M. l'Ambassadeur, I consider it my duty to inform you that, in view of the findings of the Commission as described above, the Imperial Government would not refuse to proceed to an assessment of the indemnity to be paid to the owners of the schooners "Willie McGowan" and "Ariel".

I need not trouble the Court by reading the other papers which are before the Tribunal. They are the detailed particulars going into each ship, and all the papers are at my learned friends disposal.

The PRESIDENT.—But we do not admit that the papers are before the Court, because they are not here.

Sir RICHARD WEBSTER.—I understood they were before you, Mr. President, or I would not have begun to read it. I was not aware they had not been handed in and I apologize.

Lord HANNEN.—It was quite right not to hand them in till it was decided they were admissible.

Sir RICHARD WEBSTER.—Except that I understood that the President rather complained of my statement that they were not before the Court. I thought they were on the table or I would have waited. I do not wish to read the last page. It is the same thing, and, again, any passage in the papers will be at the disposal of my learned friends. There is nothing to qualify what I said in any way.

The PRESIDENT.—Now, Mr. Robinson, will you proceed?

Mr. ROBINSON.—Sir, there is one matter as to which I wish to give a reference in order to clear up what has been a misconception. There has been a misapprehension with regard to a letter of Mr. Tupper, to which Mr. Couderc referred at pages 692 and 693, and he founded an argument upon it, and read it with considerable emphasis as against my learned friend. He spoke of it as the *Couronne de l'Edifice*, but he read only a letter at pages 90 and 91 of N° 3 (1892), volume 3 of the Appendix to the British Case. He was asked to read a letter at page 105, and he said he would do so if he had time. Unfortunately, it escaped his attention, and he did not read it. That shows exactly what was Mr. Tupper's meaning, and does not at all bear the construction which my learned friend, with considerable triumph, pointed to as bearing against the view that we were advancing on a question that was practically more a matter of damages than anything else.

The Government is of the opinion that the total cessation of sealing in Behring's Sea will greatly enhance the value of the produce of the coast fishery, and does not anticipate that British sealers will suffer to any great extent by exclusion from Behring's Sea.

Now, if you will turn to page 105 of that same part, in the same Appendix, you will see that in a letter by Mr. Tupper of the 19th of September some eight days later, to the Victoria Sealers' Association, he says:

I will, however, repeat that Her Majesty's Government has intimated that, while they incline to the belief that the closure of Behring's Sea to all sealing operations both on land and at sea will so enhance the value of the catch that the prices realized will compensate the sealers for their loss of the Behring's Sea catch, they will be prepared to consider claims to recompense where it can be shown that actual loss has accrued by reason of the legislation under review.

This shows that the cessation Mr. Tupper was referring to was the cessation on the Islands and elsewhere, and not the cessation merely at sea; and that the argument assumed to be founded on his letter is not well founded.

I have done now with all the matters of detail connected with this question of Regulations which I desired to refer to, and I wish only to refer to two other general matters before proceeding to those few remarks which I desire to make with regard to the subject of Regulations in general. These are the conduct of Canada in this matter, and the conduct of the Commissioners.

The conduct of Canada has been made the subject of very severe stricture by my learned friend, Mr. Phelps, in the United States Argument on pages 177 to 179; and you will also find that Mr. Blaine in his despatch of the 29th of May, 1890, volume 1, Appendix to the United States Case, page 212, and in the same volume at page 218, complains I may almost say bitterly of the conduct of Great Britain, practically because Great Britain had taken the advice of Canada and consulted the interests of Canada in this matter, and had not concluded an arrangement for a close time, as to which there was some misunderstanding between my learned friend, Mr. Phelps, and Lord Salisbury.

Now I venture to say, in the first place, that Canada did simply what it was her duty to do: and, in the second place, that for what she did is entitled, not to the strictures of the United States, but to their thanks. What Canada did, and what they complain of, as you will see by reference to the pages I have just given the reference to—177 to 179—is that she prevented the arrangement for that close time being consummated. Mr. Phelps says at page 177:

It will be seen from the correspondence between the governments of Great Britain and the United States, printed in the Appendix to the Case of the United States, that a convention between the two countries was virtually agreed upon as early as 1887, with the full concurrence of Russia, under which pelagic sealing in Behring Sea would have been prohibited between April 15 and October 1 or November 1 in each year, and that the consummation of this agreement was only prevented by the refusal of the Canadian Government to assent to it. The propriety and necessity of such a repression was not doubted, either by the United States, Great Britain, or Russia. This convention, if completed, would have fallen far short both of the just right and the necessity of the United States in respect of the protection of the seals, as is now made apparent,

and so on. And then they speak of the conduct of Russia, which we have been speaking of just now, and they say

Instead of taking its defence into its own hands, the Government of the United States has refrained from the exercise of that right, has submitted itself to the judgment of this Tribunal, and has agreed to abide the result. Its controversy is only nominally with Great Britain, whose sentiment and whose interest concur in this matter with those of the United States. It is really with a province of Great Britain, not amenable to her control, with which the United States Government has no diplomatic relations, and can not deal independently.

And so on.

Now let us see for a moment what was the proposition that was made, and what were the circumstances at the time. The seizures had taken place; and Great Britain had protested against them, and had set out the grounds on which she conceived those seizures to be illegal. You will find Lord Salisbury's despatch in the third volume of the British Appendix at page 88. The trial, as you will remember, had taken place sometime in the autumn of 1887. The brief is to be found at page 112; and Mr. Bayard on the 7th February, 1888, had written a letter suggesting this close time from the 15th April to the 1st October or November.

On the 17th February, 1888, Mr. Phelps had submitted that letter of Mr. Bayard to Lord Salisbury, and the misunderstanding arose between these two gentlemen as to the question whether Lord Salisbury had really definitely assented to such a close time or not. Now what was the close time that was suggested? You remember that the controversy had been as to the right of Great Britain to take seals in Behring Sea. We had been disputing about this matter, and, substantially, the proposition was this: "You have been taking seals in Behring Sea; you assert that you have an equal right there with us; we assert that your action there is illegal; let us settle it all amicably by providing that you shall never go into Behring Sea while there are any seals there to be taken". Now I venture to think, as the learned Attorney General said, this is not a proposition which either Mr. Bayard or Mr. Phelps, if they had known the facts of seal life, would have advanced, because practically it was a suggestion to give up everything Great Britain had been contending for from the beginning. As we all know now, to say that no vessel shall enter Behring Sea and that there shall be a close time for seals between the 15th April and the 1st October is practically to say that there shall be no sealing there at all, because there is no other time except between those dates when you can take seals there.

Then that letter was submitted by Mr. Phelps, as you will find at page 181 of the Appendix to which I have been referring, with these observations, as they are reported by Lord Salisbury to Sir Lionel West:

The United States Minister called to-day at the Foreign Office and spoke to me about the question of the protection of the fur seals in Behring's Sea.

He said that the difficulties in regard to the seal fisheries in that sea were mainly connected with the question of the close time, and that no attempt had been made by the authorities of the United States to stop the fishing there of any vessels at the time when it was legitimate.

Surely that contains a plain inference that there was in Behring Sea a legitimate and an illegitimate time, that is to say, other than the one proposed: in other words, that there was a time when it was legitimate to take seals in Behring Sea and there was a time when it was illegitimate to take seals in Behring Sea; and I suppose that Mr. Phelps thought that those were the facts.

Now what was done upon that was that this offer, as is usual and right, was referred to the Colony which had the most important interest in the matter by the Foreign and Colonial Office in London. On the 3rd March, as appears at p. 182, the Foreign Office transmitted to the Colonial Office a copy of Mr. Bayard's letter. Lord Knutsford, having received that, on the 12th March says, p. 183:

It will be necessary to consult the Canadian Government on the proposal to establish a close time for seals in Behring Sea before expressing a final opinion upon it.

Showing that neither he nor Lord Salisbury at that time had the knowledge of seal life which was necessary in order to enable them to see the effect of this proposal.

Mr. PHELPS.—What was the letter you referred to?

Mr. ROBINSON.—It is shewn it was submitted, and Lord Knutsford at page 183 says it will be necessary to consult:

Mr. PHELPS.—That is Mr. Bramston's letter I believe, on behalf of Lord Knutsford.

Mr. ROBINSON.—Yes, he was one of the Secretaries.

In reply, to your letter of the 3rd instant, I am directed by Lord Knutsford to acquaint you for the information of the Marquis of Salisbury, that he thinks it will be necessary to consult the Canadian Government on the proposal to establish a close time for seals in Behring Sea before expressing a final opinion upon it.

A copy of your letter and its inclosure has been forwarded to the Governor General.

That was Lord Lansdowne at the time

with a view to obtaining an expression of the views of his Ministers upon it.

I am to add that Lord Knutsford is inclined to view the proposal of the United States Government with favour, but that he presumes that it will be made quite clear, should Her Majesty's Government assent to it, etc.

The rest is not very material and does not affect the subject matter of the controversy. Then, the proposal having been sent out in accordance with that view, on the 7th July, 1888, referring to page 213 of that same Appendix, the Government of Canada, having considered it, sent a memorandum expressing their view upon it, and citing the despatch or conversation referred to by Lord Salisbury. In this memorandum it is said.

This clearly implies that Lord Salisbury had been led by the United States minister to believe that there is a fixed close and open season for the killing of seals in Behring's Sea which is common to all vessels of all nationalities, and that during the open season these may legitimately and without molestation pursue the business of catching seals.

The facts of the case appear to be that within the limits of the Territory of Alaska, which by the United States contention includes the waters of Behring's Sea as far westward as a line drawn from a point in Behring's Straits south-west to the merid-

ian of longitude 173° west, the killing of fur bearing animals, amongst which the seal is included, is prohibited by law; that repeated warnings to this effect have been given by the United States authorities, and that vessels both of Canada and the United States have within the past two years been seized and condemned for killing seals within these waters. It also appears that in the Islands of St. George and St. Paul during the months of June, July, September and October of each year, the United States Government allows the slaughter of seals to the number of 100,000 by certain citizens of that country known as the Alaska Commercial Company, for which monopoly the United States Government is paid a yearly revenue of more than 300,000 dollars. At no season of the year, and to no other persons whatever, is it permitted to kill a single seal within what is claimed as the limits of the Territory of Alaska. It is evident, therefore, that there is no part of the year when citizens of any country, with the sole exception of the Alaska Commercial Company, can legitimately kill seals within the limits named; and when Mr. Phelps stated to Lord Salisbury that "no attempt had been made by the authorities of the United States to stop the fishing there of any vessels at the time when it was legitimate" his statement should be read in conjunction with the fact that there is no period of the year when it is legitimate for any vessels to fish for seals in the waters of Alaska?

And then, after citing some other things to show the killing on the Islands, it proceeds to say:

The time proposed as close months deserves consideration, viz., from the 15th April to the 1st November. For all practical purposes, so far as Canadian Sealers are concerned, it might as well read from the 1st January to the 31st December.

And then it explains the reason, and says:

But the United States Government propose to allow seals to be killed by their own citizens on the rookeries, the only places where they haul out in Alaska, during June, July, September, and October, four of the months of the proposed close season. The result would be that while all others would be prevented from killing a seal in Behring's Sea, the United States would possess a complete monopoly, and the effect would be to render infinitely more valuable and maintain in perpetuity the seal fisheries of the North Pacific for the sole benefit of the United States.

It is to be noted that the area proposed by Mr. Bayard to be affected by the close season virtually covers the whole portion of the Behring's Sea in which the exclusive right of sealing has, during 1886 and 1887, been practically maintained by the United States Government.

To this is added a part of the North Pacific Ocean, north of 50° of north latitude, and which commands the approach of the seals to the passes leading into Behring's Sea. By the adoption of this area and close season the United States would gain, by consent, what she has for two years held in defiance of international law and the protests of Great Britain and Canada.

And while this area would be held closed to all operations except to those of her own sealers on the Pribilof Islands, the north-west coast of North America up to the 50th parallel of north latitude and the sealing areas on the north-eastern coast of Asia would be open to her as before.

Then:

It is to be borne in mind that Canada's interest in this industry is a vital and important one, that she has had a very large capital remuneratively employed in it, and that while by the proposed plan the other Powers chiefly interested have their compensations Canada has none. To her it would mean ruin so far as the sealing industry is concerned.

Upon that, of course, when received by England any idea of accepting that proposal was rejected.

Now I ask again is there any reason why the United States should find fault with the course Canada took? Is there not on the contrary every reason to say that Canada rather deserves their thanks, because, if that proposal had been made with knowledge of the facts, could it have been termed a fair proposal? If they had said to England, or proposed to England, instead of putting it in that form, what it really and inevitably means,—“Let us settle this matter amicably by providing that you shall never seal in Behring Sea at all”,—the proposal would have been a mockery. That is all that Canada did and pointed out. It is for this that Canada seems to be blamed as she has been;

and I therefore desire, so far as it is within my power, to present the facts before this Tribunal, to endeavor to set it right. It does seem strange to one of us to find the United States complaining of the conduct of England in consulting and deferring to the wishes of one of her most important colonies; and certainly the existence of their own great country is not a very appropriate illustration of the advisability of a different course on the part of the Mother Country. If she had known long ago what she knows now, and had been as well advised as now, the circumstances might have been very different; and from whatever source such a reproach might come, it does not seem to us to come very appropriately from my learned friends.

Now I wish to say a word as to the conduct of the Commissioners, which has been also very severely commented upon in different places by my learned friend.

Senator MORGAN.—I do not know whether it is stated any where in the papers, Mr. Robinson, but, if so, can you give us the date of the first official act of Canada in claiming the right for her citizens of pelagic hunting in Behring Sea?

Mr. ROBINSON.—From the beginning, in 1886.

Senator MORGAN.—I wanted to know the beginning.

Mr. ROBINSON.—The moment that the vessels were seized.

Senator MORGAN.—Not before that?

Mr. ROBINSON.—No there was no object in asserting it till somebody interfered with it. As you know, we had been fishing in Behring Sea for some years. If I recollect rightly the first vessel entered Behring Sea to seal in 1884.

Senator MORGAN.—The first Canadian vessel?

Mr. ROBINSON.—The first Canadian vessel.

Senator MORGAN.—Can you inform me if the vessel went in under a fishing license?

Mr. ROBINSON.—No, I cannot.

Senator MORGAN.—You do not know what the clearance was?

Mr. ROBINSON.—No, but I should have thought not.

Mr. TUPPER.—There was no license required.

Senator MORGAN.—But there is a clearance in every case that states the destination of the ship.

Mr. ROBINSON.—Yes, I should suppose there would be.

Lord HANNEN.—Are vessels of that size required to make any such declaration? I should doubt it.

Mr. ROBINSON.—I cannot say.

Sir JOHN THOMPSON.—They do not make any declaration, I think.

Mr. TUPPER.—They clear for any place, and they would say "North Pacific".

Sir RICHARD WEBSTER.—Simply where they are going to sail for; that is all.

Senator MORGAN.—But every ship that carries a national flag is bound to have a destination when it leaves a port.

Mr. ROBINSON.—I find in a memorandum that I have made that pelagic sealing began in Washington Territory and British Columbia in 1869. There were only four schooners, in 1878 to 1879, and the first vessel that sealed in Behring Sea was the "Mary Evans" in 1884. That is the first British vessel. The "San Diego" was there before, but she was American. Those are the facts.

Now, with regard to the conduct of the Commissioners, as to which I desire to say a few words, I wish to speak of that for this reason; those Gentlemen have been subjected to very severe strictures, and I venture

to say strictures absolutely and utterly unfounded. I do not know that it would be possible to speak in terms more severe of Gentlemen pretending to any character in the scientific world, or to make charges which, if true, would be more certain to ruin their reputation and standing there.

Now, let us see if I am justified in saying that? In the first place, I refer to the United-States Argument, at pages 72 to 75, concerning the Reports of the Commissioners: but I do not desire to read more than is necessary; and I will, therefore, only read from page 74.

Such being the view which the Commissioners of Great Britain took of their own functions, their report should be regarded as partaking of the same character, and such it appears to be upon inspection. There is in no part of it any purpose discernible to discover and reveal the true cause which is operating to diminish the numbers of the fur-seal, and to indicate the remedy, if any, which science points out. It is apparent throughout the report that its authors conceived themselves to be charged with the defense of the Canadian interest in pelagic sealing; and it consequently openly exhibits the character of a labored apology for that interest, particularly designed to minimize its destructive tendency, and to support a claim for its continued prosecution. This being its distinguishing feature, it is, with great respect, submitted that any weight to be allowed to it as evidence should be confined to the *statements of facts* which fell under the observation of its authors, that these should be regarded as the utterances of unimpeachable witnesses of the highest character, testifying, however, under a strong bias; and that the opinions and reasonings set forth in it should be treated with the attention which is usually accorded to the arguments of counsel, but as having no value whatever as *evidence*.

Then, at page 206 of the same Argument, they are spoken of in these terms:

The Commissioners of Great Britain have in their report studiously avoided the real problem which it was their business to solve. That problem, according to their own view, was to devise some scheme of pelagic sealing which would preserve that pursuit, and at the same time not be fatally destructive to the herd of seals.

Then it proceeds to say to what they should have done; and then:

The fundamental error of the Commissioners of Great Britain, as of all who either deceive themselves or attempt to deceive others, with the illusion that it is possible to permit in any degree the indiscriminate pursuit of a species of animals like the seals, so eagerly sought, so slow in increase and so defenseless against attack, and at the same time to preserve the race, consists in assuming that the teachings of nature can be replaced by the cheap devices of man. The first and only business of those who, like the Commissioners, were charged with the duty of ascertaining and declaring what measures were *necessary* for the preservation of this animal, was to calmly inquire what the laws of nature were, and conform to them unhesitatingly. It would then have been seen by them that *no capture whatever* of such animals should be allowed except capture *regulated* in conformity with natural laws; and that all *unregulated* capture was necessarily destructive, and a crime.

Then they go on to say:

This error is not imputable to ignorance on the part of the Commissioners. It does not arise from any failure to take notice of the nature and habits of the animal. There is, indeed, in their report an avoidance, which appears to be industrious, of any special inquiry into the nature and habits of seals, with the view of ascertaining and reporting for the information of this Tribunal whether they really belong to that class of animals which are the fit subjects of property, or that of which ownership cannot be predicated, and which can consequently be protected against excessive sacrifice only by the rough and ineffective expedient of game laws; but, nevertheless, they fully admit that perfectly effective regulation of capture is easily possible at the breeding places and there alone.

They say:

It is, moreover, equally clear from the known facts, that efficient protection is much more easily afforded on the breeding islands than at sea. The control of the number of seals killed on shore might easily be made absolute, and, as the area of the breeding islands is small, it should not be difficult to completely safeguard these from raiding by outsiders and from other illegal acts.

That is a quotation from what the Commissioners say.

What *is* the avowed ground (the word "is" being in italics) aside from the assumed right of individuals to carry on pelagic sealing, upon which these Commissioners felt themselves not warranted in yielding to the decisive facts thus stated by them, and declaring that a perfect protection would be given to the seals by simply prohibiting capture at sea? It is, to shortly sum it up, that the power thus possessed by the occupants of the breeding places has been abused in the past, and probably will be in the future, by an excessive slaughter of young males.

In other words, these gentlemen ask, as if it was something they were unable to comprehend, the Commissioners having found it was easy for those who own the Islands to kill the seals under efficient protection, what was there to prevent them from simply saying that the rights of all others, if they had any, should be taken from them, and all the rights over the seals given entirely to those who own the Islands? They did not take the same view of rights as my learned friends, that the ownership of these Islands gave them a right to slaughter the whole race of seals and take away all rights from others. That is a matter which my learned friends, with the one sided view which they take of their case, seem unable to comprehend. Then they go on to say:

We are reluctant to make any reference to *motives*; but, where opinions are, as in this case, *made* evidence, the question of good faith is necessarily relevant. Why is it that these Commissioners have chosen to disregard the plain dictates of reason and natural laws which they were bound to accept, and to recommend some cheap devices in their place, when they so clearly perceived those dictates? We are not permitted to think that this was in *conscious* violation of duty, if any other explanation is possible. The only apology we can find comes from the fact, clearly apparent upon nearly every page of their report, that the *predominating* interest which they conceived themselves bound to regard was not the preservation of the seals, but the protection of the Canadian sealers.

And then they proceed somewhat further with what I need hardly continue to read. Now if the Tribunal will turn to page 251 of the same argument it speaks of the "wild assertion" of the commissioners about some other matters, and say that nothing can justify it. Let us see what that "wild assertion" is.

It would seem from the testimony in the Case quite certain that the pregnant females would lose their young if they were on the point of delivery when reaching the islands, and if driven off by man, or by accident, they certainly would be exposed to great danger while looking for another home, even assuming this exercise of sound judgment *in extremis* to be probable. Such difficulties do not, however, trouble the Commissioners, who are satisfied that if they were to be debarred from reaching the islands now chiefly resorted to for breeding purposes, they would speedily seek out other places upon which to give birth to their young. (Report of British Commissioners, Sec. 28.)

This is based upon "experience recorded elsewhere." We fail to find any such recorded experience which would justify so wild an assertion.

I venture to ask any Member of this Tribunal, has any one the slightest doubt that if you were to line the Pribilof Islands with men and prevent the seals landing there, the seals would not as soon as possible find another place to haul out upon? Does anybody believe that if the Pribilof Islands were submerged to-morrow the seal race would disappear? Our Commissioners did not believe it; and yet it is asked what can justify their wild assertion that the seals would find some other place?

Then, if you will turn to my learned friend, Mr. Carter's, oral argument, he says, after speaking of what he conceives to be the course they took, at page 421:

That is a pretty decisive fact. In what category does it put them? Why they are partisans, just right off, just as much as my friends on the other side are here. They are defending from the beginning to the end the interests of pelagic sealing.

How does that operate upon the confidence which this Tribunal ought to place on their conclusions? It is entirely destructive,—that is the simple matter of it,—except as to a very limited extent. Where these gentlemen speak and testify as to facts which they say fell under their personal observation, of course they are to be treated as witnesses of those facts of the most unimpeachable character, but, nevertheless, witnesses acting under a strong bias. Where, on the other hand, they proceed to give us their opinions as to what the facts are, their opinions are to be discarded altogether as being the opinions not of impartial but of partial observers, which are like the opinions of Counsel, and differ in no respects from them.

At page 595, Mr. Coudert speaks in much the same way. He says they seem to assume that:

There was a rivalry between the Canadian sealers on the one side and the United States on the other; and that it was their patriotic duty to support pelagic sealing whatever might be the results to the seals. My friend Mr. Carter has already alluded to this, and spoken upon it, and, in answer to a question from the learned President, has stated that he attaches no importance whatever to statements in the report.

In another sense I attach a great deal of importance to the statements in the report whenever they may be construed as admissions. I say it now, and I say it frankly, I consider these gentlemen as hostile witnesses; I am at liberty to dispute their statements whenever they are against the side which I am advocating,—of course not statements of what they have seen themselves, for I accept their assurances without hesitation; but whenever they testify against me I have a right to dispute it; and whenever they testify in my favour I have a right to accept it as an admission; and when I am able to produce an admission from the British Commissioners that squarely, flatly, emphatically covers a certain point, I shall consider my function fulfilled as to that, and assume that my friends on the other side are satisfied with that kind of evidence. And this derives an additional force from the fact that it is a part of the case. These gentlemen have received the very high honour (and their zeal, if nothing else, entitled them to it) of having their report incorporated into their Country's Case, and treated as part of it.

At another page of that learned gentleman's argument, page 638, he makes use of perhaps as strong an observation as could well be used, in its result and effect, when he says:

They are our seals. That is conceded in this way: the British Commissioners themselves say (and, as I have said, the value of a concession from them is enormous, I conceive it to be more valuable than one from my learned friend, Sir Charles Russell).

In other words, these gentlemen were absolutely blinded by prejudice, and incapable of performing their duty or of understanding what their duty was.

Now, let us turn to page 229 of the printed Argument, which is, if possible, even stronger. The Report is spoken of in these terms:

But they have presented a great mass of statements of their own, evidently based in a great measure upon conjecture, much of it directly traceable to manifest partiality, and marked, to a singular degree, by the exhibition of prejudice against the one party and bias in favor of the other. The extent to which this has been carried must, in the eyes of all impartial persons, deprive it of all value as evidence.

Now, at some place, they speak of their own Commissioners by contrast.

Mr. CARTER.—I think that is on page 75.

Mr. ROBINSON.—Yes; I am much obliged. It is on page 75. They speak of their own Commissioners, and contrast the view which they took of their duty with the view the British Commissioners took. It says:

They are not, indeed, to be presumed to be less interested in behalf of their own nation than their associates on the side of Great Britain.

Mr. CARTER.—You should begin a little earlier if you want the whole of it.

Mr. ROBINSON.—I will begin where you like.

Their conception, however, of the duties imposed upon them was widely different. They regarded themselves as called upon simply to ascertain the truth, whatever it might be, concerning seal life in Behring Sea, and the measures necessary for its proper protection and preservation. This seemed to them essentially a scientific inquiry, and not to embrace any consideration of national rights, or of the freedom of seas,—a class of questions which they would probably have deemed themselves ill qualified to solve. They are not, indeed, to be presumed to be less interested in behalf of their own nation than their associates on the side of Great Britain; but as they did not conceive themselves charged with the duty of protecting a supposed national interest, they could remember that Science has no native country, and that they could not defend themselves, either in their own eyes or before their fellows of the scientific world, if they had allowed the temptations of patriotism to swerve them from the interests of truth.

In other words, that is a charge, almost as plain as if made directly, that while that was the character of their Commissioners, the British Commissioners cannot defend themselves in their own eyes, or in the eyes of the scientific world, because they have allowed the temptations of patriotism to swerve them from the interests of truth.

Now, it is worth while to see what our Commissioners were charged to do, and what they did do. One thing is plain: these charges are either well-founded or ill-founded. If there is a shadow of foundation for them, these Commissioners ought not to have been appointed; they were unfit for their duty; they misunderstood their duty, and ought not to be employed again, because their patriotism, or temperament, or bias, unfits them for any such functions.

Now you will find on looking into the Commissioners' Report,—and I do not know that I need trouble the Tribunal with reading any of it because I do not understand it to be charged against them that they have reported upon any subject that they were not instructed to report upon: in other words, I do not understand—at all events, I understood Mr. Carter to say, that that was not what he did charge when we thought that he made such an accusation—that they have reported upon what they were not instructed to report upon, or have expressed opinions connected with seal-life which they were not authorized to express,—you will find, at page V of the first part, of their Report, they are directed to enquire

What international arrangements, if any, are necessary between Great Britain and the United States, and Russia, or any other Power, for the purpose of preserving the fur-seal race in Behring Sea from extermination?

Her Majesty's Government have proposed to the United States that the investigation should be conducted by a Commission to consist of four experts, of whom two shall be nominated by each Government, and a Chairman, who shall be nominated by Arbitrators.

If the Government of the United States agree to this proposal, you will be the Delegates who will represent Great Britain in the Commission.

But, in the meanwhile, it is desirable that you should at once commence your examination of the question, and that for that purpose you should proceed as soon as you conveniently can to Vancouver, from whence the Lords Commissioners of the Admiralty have been requested to provide for your conveyance to the various sealing grounds and other places which it may be expedient for you to visit.

Application has been made to the United States Government for permission for you to visit the seal islands under their jurisdiction, and a similar request will be addressed to the Russian Government in the event of your finding it necessary to visit the Commander Islands and other Russian sealing grounds.

Your attention should be particularly devoted to ascertaining—

1. The actual facts as regards the alleged serious diminution of seal life on the Pribilof Islands, the date at which such diminution began, the rate of its progress, and any previous instance of a similar occurrence.

2. The causes of such diminution; whether, and to what extent, it is attributable

(a.) To a migration of the seals to other rookeries.

(b.) To the method of killing pursued on the islands themselves.

(c.) To the increase of sealing upon the high seas, and the manner in which it is pursued.

I need scarcely remind you that your investigation should be carried on with strict impartiality, that you should neglect no sources of information which may be likely to assist you in arriving at a sound conclusion, and that great care should be taken to sift the evidence that is brought before you.

Now, they certainly had no right to misapprehend their duty. They were expressly directed to conduct this investigation with great impartiality. The charge is that they have conducted it with nothing but partiality, have left out of consideration every duty which impartiality made incumbent upon them, and have been guided only by their bias and partiality.

Then I do not know that there is anything else, except that in their report they say their main object was to enquire what international arrangements were necessary, and describe the course they took and what they did.

Now let us see what it is they reported upon. Having been directed to go to the Islands, and the United States having concurred in that, and having offered all facilities for their making that investigation, we must assume that they came to their conclusions either honestly or dishonestly. If in their judgment, as is the fact, they found the methods pursued on the islands were defective, and were, to a large extent, accountable for the present defective or injurious state of the seal herd, were they to say so, or were they not. Would it have been consistent with their duty if, having enquired and found certain defects, they omitted to report them? If for example, they came to the conclusion (and, as my learned friend put it to you, it was the simplest thing in the world) all you have to do is to stop killing on the islands or improve your methods there, or stop pelagic sealing on the other hand, and then the seals will not be destroyed, they might have said that after this investigation, or indeed without any investigation at all; but was that their duty? When they found you could kill on the islands with discrimination was it their duty to say, and is it incomprehensible that they should not say at once: "As they discriminate on the islands, and can kill with care what they choose to kill, you should, therefore, take away such rights as have been exercised from time immemorial to kill at sea." If not, they have performed the exact duty they were sent to perform. As the commissioners have in another place said, undoubtedly the best remedy would be to prohibit all killing; but they were aware of the existence of these rival interests, and that it was that which led to this enquiry, and they could not but be aware that the object of their being sent to make the investigation was, as a matter of fact, that these rival interests had come to a certain extent in collision, and the difficulty was to reconcile them.

For that purpose they had to enquire into these matters, and report the conclusion they had arrived at. I do not desire to say more than to ask the Tribunal to refer to, as I have no doubt they will, and read the respective reports, on both sides. I desire the Commissioners to be judged, not by what any person may say or think of them. I do not speak of their character, because personal knowledge and personal feeling might influence what one might say; but I speak of their work as it is presented to this Tribunal, and I ask the Tribunal to judge of them by their work. I will venture to say this. I am glad indeed that on our side there has been no such tone adopted or charges made. I am willing to say that I think we should not have been justified in making them; but I assert that we have, at least, as much justification for making such charges against the United States Commissioners as they have for making them against the Commissioners of Great Britain; and

I will endeavor to justify that by a Comparison of the two reports. What have our Commissioners reported? They have gone there and examined, and reported not only the facts they believed to be true, but the evidence upon which they came to those conclusions; and when they found it impossible to come to a positive conclusion, I think the Tribunal will bear me out in saying, they have indicated those matters upon which, in their judgment, the evidence is yet so incomplete that doubt must remain.

Now what is it that the United States Commissioners have done? As a matter of fact our Commissioners spent more time in the enquiry, and paid three visits to the islands, and visited the Commander Islands, and, on the whole, made a longer investigation, though whether it was more thorough or not must depend on the judgment of those who read the detailed Report of what they did given by each body; but the United States Commissioners, having investigated, have expressed positive opinions on almost every thing, and positive opinions on nothing in a direction that is not in favor of the United States. I do not charge them with being blinded by bias, patriotism, or prejudice, I simply point to facts. They say, for example, in the United States Case, page 362:

The assumption that driving is seriously injurious to the reproductive powers of the male is doubtless unfounded, being quite contrary to the declared belief of Captain Webster and other sealers of long experience. Against every assertion of this kind it is only necessary to put the fact that there is no evidence of a lack of virility on the rookeries,

and so on.

Now then I ask—you have heard all the evidence—is that a Report that carries value in the eyes of an impartial Tribunal? What becomes of the statement of Messrs. Lavender, Elliott, Palmer and Goff, who all state to the contrary from personal observation. I do not deny there are others who differ from them; I simply say that is a fact upon which there is the strongest body of evidence in favor of the contrary conclusion, which the United States Commissioners utterly ignore, when they say that any idea of that sort is doubtless unfounded, and that the United States, or rather their lessees on the island, are not in any way in fault. Our Commissioners having investigated for themselves, and being supported by the evidence of these United States officials, come to the contrary conclusion, and I venture to submit they are more supported by the weight of evidence.

Now the United States Commissioners in another place say that to propose a radius of ten, thirty, or even fifty miles gives you the impression that such a proposition was not intended to be seriously considered. Now is that a reasonable, fair, unprejudiced statement, when we know that this idea began by the proposition of a zone from the United States—and when we know it is supported by the adoption of a zone on the part of Russia, which probably has the best information in the world on the subject? Is it reasonable or sensible to say—is it unprejudiced to say—that such a proposition, when made, could not have been intended to have been seriously treated? I do not care whether it is adopted or not—I say the proposition when made is entitled to the serious consideration of any reasonable unprejudiced man, and I say nothing more. Then they say that if there is not to be a repetition with regard to these rookeries of what has happened with the rookeries of the Southern Ocean and of other localities where seals once flourished, measures adequate to the existing evil, heroic if need be, must be adopted. Now I venture to say they knew very little, or they would

have known that there never has been in the southern ocean the extermination of any seal herd by pelagic sealing, and that there was no chance of there being a repetition of what had happened in the Southern Ocean, except by raids on the islands. It was either want of information, I say, or forgetfulness: but if this was inaccurate information, does it show proper care? They say:

In short, if we do not wish the history of the fur-seal in Behring Sea to be a repetition of that of the rookeries of the southern Ocean and of other localities where seals once flourished, measures adequate to the existing evil, heroic, if need be, must be adopted.

And then they repeat what must have been told by others about the rookeries of the south seas. Now we know perfectly well how those rookeries were destroyed, and we know there is no possibility of there being a repetition of what had happened there, in the case of the Pribilof Islands. Then they say at page 378:

It may be worth while to add that the suggestion has been made that the decrease in the number of seals is due to piratical raids upon the islands themselves during the breeding season.

While it is unquestionably true that such raids have occasionally occurred during the past and that some skins have been obtained in that way, the number of these is so trifling in comparison with the annual pelagic catch as not to affect in any way the question under consideration. It is also difficult for one familiar with the rookeries and the habits of the seal to conceive of a raid being made without its becoming known to the officers in charge of the operations upon the islands. The "raid theory", therefore may be dismissed as unworthy, in our judgment, of serious consideration.

I do not desire to accept that as anything but the best judgment they could form, and an honest judgment, but I say the judgment is of very little value unless it is supported by evidence, and unless the evidence is produced; because our Commissioners coming to a contrary conclusion have produced before the Tribunal the evidence upon which they found it, and unless that evidence is displaced it entirely supports such conclusion. Whether it is right or wrong I am not here to say, nor does it make any difference. I am not discussing it in that light just now. It was read to the Tribunal yesterday, and they will form their judgment upon it.

That is the nature then, of the Report of the United States Commissioners. And I ask, am I not justified in saying simply, that upon subjects which are still in doubt—upon subjects which nobody can speak of as positively known—upon subjects, I will say, as to which the weight of evidence is on some of them at least the other way—they have adopted positive conclusions every one of which is in favor of the contentions of their own country? Now I do not charge them with bias, I do not charge them with being blinded by prejudice, but I say we have least as good a right to charge them and as strong evidence to found such a charge upon as exists for charge made by my learned friends against our Commissioners. I am very glad then that we have abstained from any such charge against gentlemen whom we believe to be entitled to respect. In the same way of Mr. Stanley Brown I will only say I have not a shadow of doubt that Mr. Stanley Brown went there, observed to the best of his ability, and reported to the best of his judgment. But I have equally no doubt that upon some subjects it is impossible (if evidence is to carry any weight whatever), for his conclusions to be adopted. Mr. Stanley Brown, for instance says, upon the question of coition at sea, he believes it to be impossible. As a matter of fact we have the evidence of 38 witnesses who speak of it from actual observation under circumstances which make it impossible

that they could have been mistaken. I do not charge Mr. Stanley Brown, under those circumstances, with having a bias, or anything else—I simply say he has made a mistake.

If the Tribunal desires the reference to that evidence, it is in Appendix II of the British Counter Case, page 33, where the names of all the 38 witnesses, and the pages at which their Affidavits are to be found, are all given. And we find that Mr. Melntyre also thinks the thing impossible; and another gentleman, Mr. Morton I think, also says he believes it to be impossible. All I have to say is, it is absolutely impossible, now, to read the evidence on that subject and entertain such a belief unless you can come to the conclusion that all these witnesses—38 in number—were either mistaken in what they profess to have seen with their own eyes, or for some reason did not state the truth. In the same way I may mention another subject upon which Mr. Stanley Brown expresses a positive opinion. I mention it because to my own apprehension, apart from having heard anything about it, it seems beyond question. I believe any one would have said—and would consider now, in view of what has been said about it by either side, that the assertion of the females and others feeding at sea when living on the rookeries is absolutely incomprehensible. I refer to a letter which is to be found in the Appendix to the Supplementary Report, from Mr. Bartlett of the Zoological Gardens. I make no apology for this, because I do not understand that what is to be found in the Supplementary Report, though it may be practically only a statement of some Natural History matter—the habits of Deer and so on, which you can read for yourselves anywhere—is not that sort of knowledge which my friends in another part of their case have described as “Barn-Yard knowledge,” and, in another place, as knowledge which it is plain every intelligent man can acquire and make use of for himself. Mr. Bartlett tells us that the excrement of these animals is similar to that of dogs. Now we know as a fact that it is absolutely impossible to keep, any where, twenty dogs in one place for a fortnight without making the place intolerable.

There must have been 100,000 seals living on an island not of an absorbent soil, to say the least—I do not think it would make any difference whether it was or not. Is it conceivable to any one that these seals were feeding regularly? Is the thing possible? One knows from general experience and actual knowledge that with the smallest bird even it is customary to follow them by such signs. You cannot, if passing through a sheep field where they have been kept for a few days or a fortnight, pass through it without knowing they have been there. You cannot go through a field where there have been a number of rabbits without seeing that they have been there beyond doubt. Is there any possibility of conceiving, if these seals are properly described by Mr. Bartley—and there is no reason to doubt his statement in that respect, seeing who he is and where it comes from—is it possible for any man to conceive they do feed? If they do feed, I submit to any unprejudiced judgment from any point of view, that it must be a matter of common observation and ordinary common knowledge. The only explanation of what is known to be the fact it seems to me must be that they do not take in the food which otherwise you would find signs of beyond all question on the place where they were living, huddling together in thousands, tens of thousands, if not hundreds of thousands.

So much then for our Commissioners. We make no charge ourselves, and regret that our friends have felt it their duty to make charges of this sort, which it is no use minimising, which it is no use mitigating,

which it is no use trying to explain. If true, they are discreditable and disgraceful to the men against whom my learned friends have brought them; and of those charges I will only say that while there is no reasonable ground for suggesting them on either side, there is at least as much on our side as on that of the United States.

Then I proceed to the question of Regulations, speaking of it generally, and I do not propose to go into the matter in detail. I desire to make a few general observations on the subject of Regulations as regards their extent—by which I mean their area—their purpose, and their character.

In the first place, as regards the extent of the Regulations, this in our apprehension is a very important subject, which has been discussed, and our position indicated, but which perhaps may bear a few more words being said upon it. Now in the first place (and it is well to get rid of any charges of that sort at first)—my friend Mr. Carter has indicated at all events, if he has not expressly said, that the taking of such a position indicates want of sincerity on the part of Great Britain. It is better always, to meet charges of that sort at once, and to express exactly the view which you take when such a charge is made. We have no hesitation—no doubt—no difficulty—in taking that position, because from beginning to end, at all times, and now, we have been and are perfectly ready to join with the United States in any reasonable Convention, not to be decided by ourselves but to be decided impartially, which will ensure the preservation of the fur-seal in all parts of the world—where they can be found I mean, I am speaking of the Alaskan herd of course—having due regard to the interests involved on the Islands, in Behring Sea, and in the North Pacific Ocean. Our friends have never claimed, and never attempted to exercise any exclusive rights south of the Aleutian Islands, any more than we have claimed or would have had a right to claim in any way exclusive rights or any rights whatever on their islands; and so long as they say:

We will manage our islands just as we please—we will allow you no voice—no say whatever, in that matter. We will kill as much as we please, in such a manner as we please, in such numbers as we please, and not allow you to have any voice.

We answer:

There is no reason in equity or fairness then why You should have any exclusive right in the sea south of the Aleutian Islands. You have never claimed and never have pretended to exercise there any exclusive right whatever. When you are willing to submit the whole question to any reasonable arrangement we are, and always have been, perfectly ready to meet it. Our view about the protection of the fur-seals, is founded on the Report of the Commissioners, which we ourselves believe. We admit that for the protection of the fur-seals efficiently there must be Regulations on the Islands, in Behring Sea, and in the North Pacific Ocean. They never will be sufficiently protected, and the whole subject never will be efficiently dealt with, until some such arrangement is come to, and we are ready to make it.

I adopt entirely, so far as my own view is concerned, what I will refer to hereafter—the opinion of Professor Huxley, to which my friends seem to attribute some weight on that subject. We think his opinion is reasonable.

The PRESIDENT.—Do you think we are competent under the Treaty, to make such Regulations?

Mr. ROBINSON.—No, I am not saying that—perhaps you have not quite followed me in the other instance where we think you are not com-

petent. We know you are not competent to make Regulations on the Islands, and we submit you are not competent to make Regulations outside Behring Sea—that is all I say.

The PRESIDENT.—You think we cannot do good work?

Mr. ROBINSON.—I do not think you can do efficient and full work—I hope I shall not be misunderstood in that. I do not think your powers are sufficient to enable you to frame Regulations for the efficient protection of the seal race. In our judgment that would require Regulations on the Islands; in Behring Sea; and in the North Pacific Ocean.

The PRESIDENT.—I am satisfied that you have stated it distinctly.

Mr. ROBINSON.—I understand—and I wish to have no misapprehension—that whenever one side or another is charged with insincerity, it at least becomes them to be sincere in stating the view they take of the position they assume; and I hope, Mr. President, you understand me in regard to that.

We are perfectly willing to concur in the only Regulations which we believe will ensure the object which both sides have at heart, and which ought to be carried out; but so long as on the part of the United States they say:

“We are going to enter into no such agreement—we are going to allow you no voice in the place where you think some Regulations are perhaps most essential.”

Then we say:

“We shall confine you, in the Regulations you are imposing upon us, to the words of the Treaty.”

Now the first consideration that comes before us is naturally, and of course, the consideration of the words of the Treaty. I have heard it said that if you take the words of the Treaty by themselves it is difficult to argue that they do not authorize Regulations extending any where.

Of course I am speaking altogether of clause 7. I ought to have said in commencing this argument, that I think our argument upon this subject, namely upon the area of Regulations, is largely connected with the argument as to the area of the claim of Property Rights. The learned Attorney General has argued that, and you will find his argument in the Shorthand Writer's notes, pages 944 to 964. I am not going to return to that, or touch upon it, more than to give the Tribunal the reference to it. If that argument was not powerful and convincing to the minds of the Tribunal, it would be presumption in me to attempt to strengthen it or add to it. I have no thought of doing anything of the kind, but I proceed on the assumption that the learned Attorney General has made out his position, that the area of the claim of rights in Question 5 is limited in its extent to Behring Sea; and I propose, now, to say a word about the area of Regulations. I shall have to come back perhaps to one point which it may be as well to call the attention of the Tribunal to at this moment. You will remember, Sir, that in the Argument of the United States upon that Question 5 they take this position. They say—and for the first time they say as far as we know in the course of these discussions—for the first time they say in their printed Argument that they are entitled to Regulations in addition to protection. You no doubt understand what I mean. In the beginning, and from the beginning, the claim was Rights or Regulations—in other words, they have said:

“We claim to own these seals in Behring Sea, or to protect them in Behring Sea; and we say, if we have not either this Right or the Right of Protection, then you should agree with us in making some Regulations which will supply its place.”

That was the position they took, as I shall be able to shew you in a few moments. *Now* they say in their argument:

We are entitled to Regulations even if you give us the property rights or the right of protection, for the right of protection which you may give us, or the right of property which you find to be in us, may not be sufficient to enable us efficiently to protect the seals, and therefore you must add to Award of Property or Property rights some Regulations which will enable us to protect them efficiently.

Now that, so far as we know, is an entirely new argument, advanced for the first time in the United States written Argument; and not only that, but we think that the opinion of both parties up to that time has been expressed in a directly opposite sense—that is to say, that the claim was to Regulations in substitution for rights. Our understanding always was: If you own these seals or if you have a right of protection of these seals, that will be sufficient for you; you cannot want Regulations in addition to that; and we never thought they were claiming such Regulations. Now let me see whether I have ground or not for saying that we were justified in that belief?

In other words, to put it differently, we had always thought that those words, “the determination of the foregoing questions as to the exclusive jurisdiction of the United States being such as to require the establishment of regulations”, meant the determination of those questions in favor of Great Britain. That was the idea that we had. “In the determination of the foregoing questions as to the exclusive jurisdiction of the United States is necessary to the establishment of Regulations” we believed was never intended to mean anything else, and was never thought to mean anything else, until the time I have spoken of, than the determination of those questions in favor of Great Britain.

Let me see whether that was not also the understanding of the parties. In the first place, I find a letter from Lord Salisbury of the 21st of February 1891. I have not taken the reference to that, which I ought to have done. However, it is of no consequence, I have written down what he said. I can find the reference in a moment.

Mr. Justice HARLAN.—It is in the United States, Appendix, Volume I, page 290.

Mr. ROBINSON.—I may just as well take it from that, though I have the reference in another place. I read from page 294, the last paragraph but one from the bottom. Lord Salisbury there says.

The sixth question, which deals with the issues that will arise in case the controversy should be decided in favor of Great Britain, would perhaps more fitly form the substance of a separate reference.

The sixth question then, as you know, has now become article VII. When these questions were originally proposed by Mr. Blaine, they were in the form of six questions, and what was then the sixth question is now Article VII.

So there was Lord Salisbury writing to Sir Julian Pauncefote, asking him to read that dispatch to Mr. Blaine, and putting this construction upon that sixth question, which is the construction I have indicated.

Then I find that that construction is repeated by Lord Salisbury in his instructions to the British Commissioners, which are dated the 15th of January, 1892, at page VII of the preliminary pages to the British Commissioners' Report. There he says:

The Regulations which the Commissioners may recommend for adoption within the respective jurisdictions of the two countries, will of course be matter for the consideration of the respective governments, while the Regulations affecting waters outside the territorial limits will have to be considered under clause six of the

Arbitration Agreement, in the event of a decision being given by the Arbitrators against the claim of exclusive jurisdiction put forward on behalf of the United States.

There was Lord Salisbury again repeating in his instructions to the Commissioners that meaning and that construction which he had always put and which we have always put upon that section. I do not find that anywhere on the part of the United States that construction has ever been questioned. On the contrary, I find it, as I understand, adopted by Mr. Wharton in the United States Appendix Volume I, page 358, near the foot of the page, where he says:

In your note of February 29, you state that Her Majesty's Government has been informed by the British Commissioners that so far as pelagic sealing is concerned there is no danger of serious diminution of the fur-seal species as a consequence of this year's hunting, and upon this ground Lord Salisbury places his refusal to renew the *modus* of last year. His Lordship seems to assume a determination of the Arbitration against the United States and in favor of Great Britain, and that it is already only a question of so regulating a common right to take seals as to preserve the species.

Is not that a plain intimation by Mr. Wharton that he adopts precisely the same view? He says his lordship in taking that view seems to assume a determination of the Arbitration against the United States and in favor of Great Britain—that is, on the question of rights—and that it is already only a question of so regulating a common right to take seals as to preserve the species.

Of course there could be no question of common right until the exclusive rights had been decided against the United States and in favor of Great Britain. We say that the view which we have always taken is consistent not only with the words but with the avowed intention of the parties so far as we can gather it otherwise. My learned friend also points me to the conclusion of the Case of the United States, at page 303, where they seem to take the same view, and perhaps more strongly, because it is in a more considered document than any other I have referred to:

Second. That should it be considered that the United States have not the full property or property interest asserted by them, it be then declared and decreed to be the international duty of Great Britain to concur with the United States in the adoption and enforcement against the citizens of either nation of such regulations, to be designed and prescribed by the high Tribunal, as will effectually prohibit and prevent the capture anywhere upon the high seas of any seals belonging to the said herd.

Is not this again their own statement of that as the construction which they at that time took to be the construction and meaning of that clause, that if the decision was in favor of Great Britain and against the United States, then they claimed regulations; but never so far as we know, until their written argument, has there been a claim of regulations in addition to the claim of right, either of property or of protection, which they set out in the fifth clause.

Then we come a little nearer the question as to the construction of the treaty itself. Of course it is always to be remembered—and I am sure I need not cite anything in the shape of authority for a mere statement of law of that sort—that every document, treaty, agreement or statute, is to be construed with reference to all the surrounding circumstances, which include the circumstances out of which the treaty arose, and the subject-matter with which the treaty deals. Our books are full of cases in which words absolutely comprehensive, absolutely including everything, are nevertheless restricted to certain subject-matter, because they are found in such a context as to show plainly that that was the only thing that could have been intended when the words were

used. To those who are accustomed to the law of England, there are many very ordinary cases of that sort that could well be referred to. I remember one for example, merely as an illustration, where, if I recollect rightly, it was said that in an act of Parliament certain assignments under certain circumstances should be held to be null and void to all intents and purposes whatever. It could not use a stronger expression to avoid a document under any circumstances and in any case; but that being under an insolvent act it was held, of course, that it was only made void against an assignee in solvency. That is merely an illustration of the elementary doctrine in law, that you must always construe the words of a statute in relation to the circumstances out of which the Act arises, and the subject-matter with which it deals, always providing of course that this must be a possible and reasonable construction.

Now then, bearing that in view, let us see what is the fair construction of these words:

If the determination of the foregoing questions shall leave the subject in such condition that the concurrence of Great Britain is necessary to regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea.

First does that mean, by any fair construction, the fur-seal which are in or which habitually resort to the Behring Sea, no matter where they may be found:—that if you find a fur-seal a thousand miles south of Behring Sea, but which fur-seal for certain months of every year goes to Behring Sea, it is to be within those regulations and that regulations are to be protect it there? Let me put what might be an analogous instance.

Supposing it was said that regulations should be framed for the protection of the safety and health of people living in or habitually resorting to a certain city, say Paris, if you like. Would anybody say that if you found a person at the other end of the world, in Egypt, for instance, who spent three months of every year in Paris, that those regulations were to provide for his safety and comfort in Egypt, because he was a person who habitually resorted to Paris? And that is precisely the case of the fur seals. Does it not reasonably mean when they are habitually resorting, and at the time that they are so resorting? And is it possible that such words can be used, is it not startling to hear that they are intended to be used, to protect seals which habitually resort to Behring Sea, no matter where they may be found, in any part of the world, at any time of the year? And is such an analogy as I have presented a forced analogy, is it not a reasonable analogy?

The answer would be: No; what we mean is people who either live there all the year or who are found there at certain periods of the year. When they are found there we have to protect them by proper regulations and by proper enactments, but we have not to follow them all over the earth and protect them wherever they may be found, at any distance or at any time of the year, because for a certain period of the year they resort to the area which they are said to resort to and in connection with which the regulations are to be made, and as to which, my learned friend says, the discussion has arisen.

Our view, we think, is strengthened, at all events, by considering the course of this discussion. What was it that the United States had been attempting to do before that? What area had they been attempting to police? They had been attempting to police Behring Sea. They had never attempted to police any other waters, or to extend their jurisdiction for the protection of the seals, or exclusive jurisdiction,

over any other waters. Is it possible that this article was intended to provide, without the slightest limit, for every other water in the world, when you recollect how the provision is made, and as a substitution for what rights it was intended to be used?

Then again, if the construction is to be as my learned friends contend, you are met with this difficulty. Outside of Behring Sea, if we are right, it is impossible to say whether the seals you meet with are seals which habitually resort to this side of Behring Sea or the other. No question, so far as I have observed, has ever arisen between us with regard to the fur seals in any part of Behring Sea except that eastern part the jurisdiction of which has been transferred to the United States. There never has been a question between us as to the other part. Nobody will pretend that they ever claimed any special right of protection for the seals which resort to the Commander Islands.

It has never been thought of and never spoken of. When you get south of the Aleutian Islands and you find a seal—I am not going back into details or into evidence—but if our evidence is to be believed it is impossible to say whether that is or is not a seal which habitually resorts to the Pribilof Islands. He habitually resorts to the Pribilof Islands or to the Commander Islands, or it may be some other place. He may go to the Commander Islands or he may go to the Pribilof Islands. He may go to them one year or another, or may be not for two or three years. As we all know, there are some seals which do not go there from their first year to their third. Is the construction claimed a reasonable one? Was it ever intended to claim regulations which would impose upon us the duty of protecting seals coming from the western part of Behring Sea and resorting to the Commander Islands? If not, it is impossible, as we submit, under the evidence, to extend those regulations beyond Behring Sea without imposing upon us that duty.

Again, I think there are other considerations, and strong considerations I venture to submit, which tend to support the same construction. The treaty reads "If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations". Therefore that seems to imply that the questions of right may be so decided that the concurrence of Great Britain shall not be necessary. But outside of Behring Sea the concurrence of Great Britain always was and must be necessary. There never has been a pretence of anything else. Inside of Behring Sea the United States claim that they have exclusive jurisdiction, and that they could act without the concurrence of Great Britain, but outside of Behring Sea no such claim has ever been advanced. That hypothesis therefore could have no application in the mind of the person who framed those questions at the time they were framed, and it could have no application, and no intended application, to anything but Behring Sea, because it is only if the concurrence of Great Britain is necessary that regulations shall be made. But there was no "if" about it outside of Behring Sea. That hypothesis and that "if" and that condition was utterly meaningless and useless and inapplicable as regards anything but Behring Sea; for there never was any question of being able to make regulations outside without the concurrence of Great Britain. It was not "if" the concurrence was necessary, but as a matter of fact her concurrence under all circumstances was necessary.

Now then what is the reasonable construction of those words, looking back, as I am always looking back, at the history of this thing from the beginning, connected as it is with and confined to the area of

Behring Sea. To my apprehension there is perhaps a stronger argument than all; but all these arguments present themselves in different lights to different minds. If the learned Attorney General is right in the confinement of the area of rights to Behring Sea, then the result of the construction of our friends is that we should be worse off if we succeeded in all our contentions as to rights than if we failed. Could that have been intended? If the claim in question 5 is confined to Behring Sea then if we fail as regards that there would be no regulations at all, because they would have got all the rights they claim. But they say, "If Great Britain succeeds as to that, and we have got no rights, then we can get regulations all over the world". It is much better for us that we should fail and they should succeed. Is that a reasonable construction? These are all considerations arising upon the construction of the words.

Senator MORGAN.—It seems to me, Mr. Robinson, that would depend upon whether the purpose was to preserve the seals or whether the purpose was to destroy them.

Mr. ROBINSON.—I am perfectly willing to admit that the purpose was not to destroy them. There is no question about that; but, with great deference, I cannot understand how that can affect the construction of the treaty.

Senator MORGAN.—If the purpose is to preserve the seal, you would not be any worse off by doing it, would you?

Mr. ROBINSON.—I do not know. Does that affect the construction of the Treaty? If what you mean to say is that the construction of this treaty necessarily gives the right to do everything for the purpose indicated, then that is simply deciding the question in advance, so to speak. I am not here to say that we would be better or worse off by destroying those seals than by saving them. I am simply here to discuss whether the regulations to be imposed upon us as compulsory shall extend beyond a certain area. This is a very serious question. It is one thing for a nation to agree by convention and of her own free will that regulations shall extend over a certain area. It is another thing altogether to have those regulations imposed upon her against her will by another power. We are quite willing to meet together and to agree, if we can, or to leave it to other persons to arrange reasonable regulations for the whole area where we think regulations are needed; but it is one thing to do that and another thing to have regulations imposed upon you by a Tribunal, without your consent, the observance of which would involve an enormous expenditure and enormous difficulty, and I might say in regard to the proposition of my learned friends, almost insuperable difficulty, whether you like it or whether you do not.

Therefore we present all those considerations, and to my apprehension the last one is perhaps the strongest, for it is founded on reason. Can the parties have meant, when these questions of right were the real substantial matters that had to be decided between the parties—can it be contended that the power which failed on those questions should be worse off than if she had succeeded? If that was the purpose, what was the object of submitting those questions? It would have been far better that we should lose on the questions of right.

So much for that question.

The Tribunal here adjourned for a short time.

Mr. ROBINSON.—Mr. President, Mr. Senator Morgan asked a question as to the time of vessels going to Behring Sea, and I may say that if you refer to the third volume of the Appendix to the British Case, page 358, you will find all the particulars about that. I need not delay you

to read them now, but everything connected with the sealing industry and its progress is there referred to. You will find in the House Executive Documents n^o 177, 40th Congress, 2nd session, vol. 13, page 255, the beginning of the cod fishing in that sea:

Two or three small schooners sailed from Victoria and made fair catch, so much so that the importation of cod into British Columbia has ceased.

That was in 1866.

Then you will recollect, Mr. Senator Morgan, you asked me a question yesterday about the movements of the holluschikie, and their either going through the other seals or ranging in the rear; and I have taken the trouble, as a matter of interest more than anything else, to look into it. If you desire to pursue that, you will find it in Mr. Allen's Monograph on North American Pinnipeds at page 393; and next, in Mr. Elliott's book, commonly called the Census Report, page 43. The result is that it seems to vary very much in different rookeries, and their habits are very peculiar.

In some rookeries they have been by common consent allowed a lane, so that they pass up the middle, and if they keep to that they are left alone, but if they diverge a foot from it they are torn to pieces. In others they are not allowed the concession of a lane, and are forced then to go all the way round and haul up in other places. That is the substance of it, and their habits seem very strange and peculiar in that respect.

Senator MORGAN.—I gathered from my view of the evidence that the seal family had some strict regulations like the bees for the different grades, the pups, the holluschikies, the males, the females and the old males. It was that that prompted me to ask the question.

Mr. ROBINSON.—Yes, it is interesting to look into. They are allowed the lanes and if they go up the lanes they are left alone; but if they stray they are torn to pieces by the owners of the place they intrude upon.

Senator MORGAN.—The point of my question was, whether the seals separated themselves from each other in classes while on the land, so as to provide an opportunity for their being taken in one class without the disturbance of another.

Mr. ROBINSON.—Of course, I was not aware of the point you were directing your question to. I have only given you information upon the subject to the extent I have been able to find it.

Then there was a question that the President asked as to the increase of the sealing fleet after the *modus*. I have a little memorandum of how that happened. You must remember that the sealing schooners always clear between January and April, and the *modus* for the season of 1891 was not signed till the 14th June—that is in our Appendix, volume 3, No. 3, page 18. By that time of course and before the *modus* was signed all vessels would have cleared, and there were 48 vessels of the United States and 50 for British Columbia making 98. In 1892 there was no *modus* expected, and on the 18th March Lord Salisbury had objected, as you will find in the Appendix n^o 3, volume 3, to the British Case, page 160, but on the 18th April the *modus* was signed for two seasons.

None having been expected the sealing fleet increased that year, that is to say, 46 United States cleared and 65 British Columbia making 111. On the 18th April the *modus* was signed for two seasons, and the moment that was agreed upon the fleet fell off. In 1893 the fleet was United States 24 and British Columbia 55.

General FOSTER.—In 1893?

Mr. ROBINSON.—Yes.

Mr. CARTER.—Where is the evidence of that?

Mr. ROBINSON.—If you ask me how it is ascertained I cannot tell you, but I can ascertain for you.

The PRESIDENT.—Do you consider that that is not evidence Mr. Carter?

Mr. CARTER.—We want to see where it appears and what papers show it.

General FOSTER.—Because it is not possible yet to tell what it is.

Mr. ROBINSON.—They tell me that

55 sealers cleared from British Columbia, 25 British, to Asiatic side, all sailed, 24 from American ports half to Asiatic Milne.

That is the gentleman from whom the information comes.

Mr. CARTER.—Well we object to that as evidence of the sealing fleet of 1893.

Mr. ROBINSON.—Then let it be withdrawn, because I do not care about it.

Mr. CARTER.—Then I wish that Mr. Robinson would not read what he does not intend to be evidence.

Mr. ROBINSON.—I thought I was giving Mr. Senator Morgan some information that he asked for. If there is any sort of objection to it let it be withdrawn.

General FOSTER.—The objection is that we cannot tell at this time what the sealing fleet will be for this year.

Mr. ROBINSON.—I can tell you no more. I was not giving it with any view of that sort one way or the other. It had better be considered not to have been mentioned.

The PRESIDENT.—It has no bearing upon the question.

Mr. ROBINSON.—No.

Then I have spoken of the question of area of these Regulations. I have only to add to that what you will all remember, and what must not be lost sight of in considering any such question as this, that the Treaty only relates to and is concerned with the questions *that have arisen*, and no questions had arisen except with regard to Behring Sea. All that has a strong bearing on the construction of the Treaty. Further, with regard to the construction which I have put upon it, that it relates only to seals while they are frequenting Behring Sea, and to the protection of seals while so frequenting that water, I can quite fancy that, if it were necessary, it might be right and within the power of the Tribunal to give a certain zone around Behring Sea itself, if you understand what I mean, and the passes. Suppose it was a question of making regulations to protect wild animals in a certain field, if it were necessary for their protection while in the field that persons should not come within a certain distance of the field—I do not care what—I should think that that was included in the power to make regulations for protecting the animals while in the field, namely, you must not disturb them or annoy them, and they may stray and be killed outside the limits; and therefore you may give a zone outside that area; but my contention is, that the subject matter, the protection with which the Regulations are to be concerned, is the seal race while they are frequenting Behring Sea. That is the essential purport of it. Then, if so, there are these three circumstances, at least, which, in our point of view, are most material circumstances, which are all presented as difficulties to the opposite construction. In the first place, we say, that

that hypothesis, namely if the concurrence of Great Britain could be necessary, is meaningless and useless, except as applied to Behring Sea, it has no application and could not be intended. In the next place, we have this singular peculiarity: here are two persons, parties or Powers, differing and claiming certain rights—and claiming, in the event of those rights, which is the substantial thing, being denied to them and found not to belong to them, certain Regulations. We have the fact, that it is claimed, as the fair construction of a Treaty to settle those rights and Regulations, that they are better off if they get Regulations than if they get rights: in other words, that the Regulations, if they are found not to have property, may be to them much more effectual than if they succeeded on the question of property and got it. I wish the Tribunal to understand the first point that as to the concurrence; it is that outside Behring Sea, the concurrence of Great Britain must be necessary, there could not be an "if" about it or any hypothesis about it; but the very way of putting this question seems to show that the question may be so decided that the concurrence of Great Britain is not necessary. There was not a pretence there could be regulations outside of Behring Sea without her concurrence; and that condition attached to the 7th clause either related to Behring Sea or meant nothing, or had nothing to apply to.

I do not know that I can put it stronger, and the last thing I desire is, to waste time in useless repetition. It is worth while, perhaps, without reading documents, because it is most material, in connection with this question, to consider the history of that clause 7. All the documents relating to it will be found, I think, cited in the argument of the Attorney General, at the pages I have read, and I have no disposition to read them or refer to them again; but it is very singular to see how the difference has arisen, between its form as first proposed and as it now stands upon which difference this whole question depends, and upon which, and upon which alone, my learned friends have any ground to contend they can go beyond Behring Sea. If you remember, as I have no doubt you do—I have been through them so often that I know them almost by heart—those first six questions were proposed by Mr. Blaine in his well known despatch of the 17th December, 1890. The 6th question is that which has now become the VIIth Article in the Treaty. As first proposed by him on the 17th of December it unquestionably was confined to Behring Sea, and expressly confined to Behring Sea. No reading of it can make it apply beyond Behring Sea, or to any other water. It will be found to be beyond question or doubt on looking at it. When that was sent to Lord Salisbury, while he accepted the first and second questions, and objected to the fourth and fifth on other grounds which are quite immaterial here, he objected to the sixth question. His ground then simply was that it would more properly form the subject of a separate reference, but he did not object to it on any other ground at that time. Mr. Blaine on the 14th April, 1891, said that as Lord Salisbury objected not to the form of the question, but simply to the mode of procedure, that he had no objection to its form, and that it was accepted, and he repeated it again in the same form. All those letters are to be found following each other. The first I have stated is in the same volume of the Appendix to the United States Case, volume I, page 286. Then at pages 290 and 294, when Lord Salisbury objected to it on that ground, it was proposed again by Mr. Blaine on the 14th April 1891, at page 295. Then, curiously enough, it was left from April until June, and in June you will find that Mr.

Wharton proposed it in its present form, saying he was directed by the President to propose it in that form, and he thought it would remove Lord Salisbury's objection.

Now the objection Lord Salisbury had taken was, and was only, that that question seemed to attribute some abnormal rights to the United States arising out of Russian claims, which he said it ought not to do; but instead of altering it only to meet that objection, it was in other respects altered, and for the first time these words, "in or habitually resorting to Behring Sea" were introduced, which for the first time, gave ground for the contention that the regulations were intended to extend beyond Behring Sea. Why that was done I do not know exactly. I have gone through it with the greatest care, and can only point out this to the Tribunal—it would take too long to go into it minutely again, but it has arisen in this way. There were negotiations going on together for three different things; first, for the settlement of the questions to be referred, all of which had been settled except question 6. Then, a negotiation going on for a *modus*; and at the same time negotiations for the appointment of a commission. What you find is that these three negotiations were all going on together from about April, 1891, and if you trace, as I have done, the course which those negotiations took, and trace the various letters which were written in the course of them, these changes would seem to have arisen from letters written in May 1891. Perhaps, if I give you the pages of the book, without either reading them myself or troubling you to read them now, those who desire to follow this history, so to speak, and the genesis of this clause, will be able to do so without difficulty, and to pursue an enquiry which can only be pursued by reading these things and spelling them out for yourselves. The pages are 305 and 319, and if you look at our Appendix Volume 3, number 3, 1892, page 52, you will see what is not to be found in the United States volume, and the only thing which is not to be found there—the acceptance by Lord Salisbury, on the 6th July, of this question in the form in which it was proposed by Mr. Wharton on the 25th June.

Then the other letters to which I refer are to be found at pages 299 of the same Volume, namely Volume I of the United States Appendix; and pages 302; 303; 304 and 305; 306; 307; 308; 309; 310; 311; 312; 314; 315, and 316. At those pages you will find the history of this matter; and also at page 319. Those, I think, are the pages which will give you the whole history of this.

Then, at page 356, are letters which I think have been already referred to by the Attorney General in his argument. There is a great temptation to one who has spelt these out to try and explain them; but I do not think it can be satisfactorily explained in the course of an argument, because it requires one to spell out these letters for oneself one after the other and to see if from them you can arrive at the way in which this limitation came to be made. One thing is certain; as late as the 15th of January, 1892, in those instructions given to the Arbitrators, you find that this agreement for a Commission was intended to be separate; but it got into the Treaty because it was considered undesirable to have two different documents to pass through the Senate, and so they came together.

Senator MORGAN.—How is that?

Mr. ROBINSON.—You will find as late as the 15th of January, 1892, this was in the form of a separate document, and the explanation given was that it was thought undesirable to put two documents through the Senate, and, therefore, they incorporated it into the Treaty. That is

the history of it. I have never myself been able to ascertain for what reason it was that that enormous change in this original was made. It was not required to meet the objection Lord Salisbury had made; but goes far beyond that, and gives it, according to my learned friends' contention, a totally different scope and a totally different effect. I do not mean to say that you cannot suggest arguments about it by reading these letters.

I think you can. I only say that I have not been able to satisfy myself how it took place, but the pages I have given you will enable you to trace that out, and everything I know of is to be found at those references which will throw any light upon it.

The PRESIDENT.—At page 315, to which you alluded, there was a distinct allusion to the North Pacific, both in the despatch of Sir Julian Pauncefote and of Mr. Wharton.

Mr. ROBINSON.—Yes, Mr. President, quite right; there is a distinct allusion to the North Pacific, but there were other arrangements going on at that time for a *modus*, and that is where the difficulty comes in. You see the investigation of the Commissioners was always intended to go into the North Pacific or even all over the world, and the difficulty and confusion have arisen from the three negotiations going on together;—the negotiation for a Commission, which was to extend all over the world; the negotiation for this Treaty, which as we contend was confined to Behring Sea; and the negotiation as to a *modus*.

Senator MORGAN.—You say “all over the world;” but you mean, I suppose, the North Pacific?

Mr. ROBINSON.—As far as the seals went.

The PRESIDENT.—Do not you think there was logic in putting in the same area for both investigations?

Mr. ROBINSON.—I should have thought not; I should have thought you required clear words to show that you extended the area for Regulations beyond the controversy as to the right, and the best proof of that is that Mr. Wharton says in his letters the area of the *modus* is confined to the area of the controversy. He says,

We have never had a controversy beyond Behring Sea.

The Commission was never intended in its origin, or till it got into the Treaty in these words, to do more than to supply materials for a Convention. It was only intended to be a guide for a Convention.

The PRESIDENT.—But the materials were to be fetched from the Pacific, and, therefore, it is to be supposed the Convention was to apply to the Pacific.

Mr. ROBINSON.—Yes; but that is another Convention, and not this.

Senator MORGAN.—It seems to have been the hope of Lord Salisbury and of the American negotiators that the Convention to which you referred, which was substituted, rather anticipated the necessity for the Arbitration.

Mr. ROBINSON.—I think, up to a certain time, there was a great hope there would be some sort of an Agreement to put an end to the necessity for it.

The PRESIDENT.—Do not you think the Arbitration is an Agreement put in another form, and confided to other persons?

Mr. ROBINSON.—No; I find nothing to show that the imposing of compulsory Regulations on either Power was intended to be a substitute for the Commission; and the best proof of that is that the Commission from beginning to end was directed to show what Regulations were necessary not as between Great Britain and the United States, but as between Great Britain, the United States and Russia. The

Convention was never intended for any other purpose; it was to ascertain what Regulations were necessary, or what Agreement was necessary, as between Great Britain and the United States and Russia, and any other Power.

Senator MORGAN.—Having first ascertained that any Regulations were necessary.

Mr. ROBINSON.—I assume that of course. I never doubted that that if no Regulations were necessary none were to be made. It appears in the correspondence that Lord Salisbury at one time wanted a distinct understanding that if Regulations were not necessary they should not be made, and Mr. Blaine said it is no use putting that in because that is the understanding. This Commission for the purpose of assisting in framing Regulations to be imposed compulsorily on other powers was never thought of till it got into the Treaty in the present form. The Treaty covered the Islands, Behring sea and North Pacific, and the commission was to ascertain what arrangements were necessary, not between Great Britain and the United States, but between Great Britain, the United States and Russia, or any other Power.

Then I confess myself to having been always puzzled to ascertain what was the meaning of Mr. Wharton's proviso, that was put in by him, that the agreement for a Commission should be without prejudice to the question submitted to the Arbitrators. I do not profess to know why that was. It was suggested without explanation and accepted without explanation. My own view is that it was probably because the question as to rights was restricted while the Commissioners' inquiries were not—it may have been put in for that purpose, but for what purpose it was really put in we are absolutely left to conjecture.

The PRESIDENT.—It might mean that the conclusion come to by the commissioners, even if they both agreed, would not be binding upon the Arbitrators.

Mr. ROBINSON.—Yes, they might be of use but not binding.

The PRESIDENT.—I suppose that is what it means.

Mr. ROBINSON.—Perhaps it meant that. I have tried to conjecture a great many reasons for putting in a thing of which no explanation is given.

The PRESIDENT.—Yes it is all surmise and conjecture, and what you have been explaining is nothing but conjecture—ingenious conjecture, still it is nothing but conjecture.

Mr. ROBINSON.—It is, and I do not pretend to say anything with confidence about it, because when one man proposes a thing without explaining it and another man accepts it without asking for an explanation, it is only a question of surmise; and I have two or three different surmises and conjectures. One I have advanced—another you have suggested. We cannot say what it was. I have pointed it out to you as it strikes us in order to see what assistance can be given.

The next thing is the purpose of these Regulations, because when we get at the purpose, if we do get at it, we get a long way towards their proper scope and general character. There is no question as to the purpose of the Regulations; in one respect; the purpose was to prevent the seal race from extermination. But the question is, against what? It was to protect the seal race from extermination against something. It surely was not against excessive killing on the Islands or immoderate killing on the Islands, or wasteful killing on the Islands. That would be perfectly absurd, because you must recollect we are discussing this question on the assumption of equal rights.

It is assured that pelagic sealing is a lawful occupation, and that the rights upon which they claim to stand in consequence of its unlawful character are found not to exist. We, in following pelagic sealing, are following a lawful occupation. It would be absurd, and so unreasonable as not to bear argument at all, to say that that right is to be abolished in order to enable those who own the Islands to kill wastefully on the Islands. It cannot be to protect the seal race against their immoderate or excessive killing—that is plain. What then can it be? It cannot be predicated upon anything except upon a reasonable exercise of their rights upon the Islands. That is demonstrable to my apprehension as a mathematical proposition. If my learned friends are right in saying:

“You have nothing to say as to the Islands at all, with regard to our management or the number we kill,

“That is none of your business”;—if they are right in that, and if they are entitled to say,

“We will kill on the Islands every seal the whole race can spare stand.” Then there was no object in this Arbitration, because pelagic sealing must be abolished—that is plain. It is not a question of argument—there is no denying it. If that be so the two Powers that have come together to ask you to make Regulations did not know what they were about, for there were not any Regulations to consider *ex hypothesi*. If they are entitled to kill every seal that can be spared upon the Islands, there is only one Regulation that will put a stop to the Eventual extermination, and that is to say that no one else shall kill any.

It is perfectly unreasonable to suppose that that could have been the regulation intended if pelagic sealing be a lawful occupation and we are exercising a lawful right. You understand I hope what I mean by that. I do not wish to reiterate or repeat it, but sometimes if you put propositions in a short way they are not clearly appreciated by those to whom they are addressed, and I should be therefore much obliged to the Tribunal if they would say that they do not think I have made any particular point clear. I know what I have in my own mind—I know what I mean without thinking much of it—but sometimes another mind does not understand what is meant when it is suggested perhaps in a way that has not appeared to that mind before. But this is clear beyond all doubt or question. If they are entitled to say, as they do say in fact—“what we do on the Islands and the number of seals that we kill on the islands is none of your business, self-interest will guide us in that”—self-interest will prompt them to take every seal of the herd that can be spared in their belief. If they are entitled to do this there is no question of regulations; every seal killed after that tends so far to extermination—that is to say, that is more than should be killed, and, of course, every other killing ought to be put down.

Now on the assumption of equal rights, the suggestion of this proposition seems to answer it. You are to try and make such regulations as seem to you to be reasonable and proper upon the hypothesis and assumption of equal rights. The regulations which they contend for are simply regulations to enable their right to prevail wholly over all other rights, which can never be right—and to enable their right to prevail over others whether they exercise their right reasonably or excessively. There can be no sense in that. We are just as well without the right, if our right is to be wholly subordinate to the right of others, and to be abolished to enable them to exercise their right to the utmost. We had better not have had it, and we should have been saved all the trouble and expense of this reference. Our object in coming to the Tribunal is to contrive reasonable regulations for the exercise of our mutual rights,

but, according to our friends' case the only regulation admissible is the one they suggest.

The PRESIDENT.—We are supposed to be dealing with them as reasonable persons who have conducted themselves reasonably to take care of the husbandry. If they do not, you would want Regulations for the husbandry.

Mr. ROBINSON.—That must be obvious.

Senator MORGAN.—I suppose we are dealing also with the question of the preservation and protection of the seal race.

Mr. ROBINSON.—Unquestionably. But against what are you protecting it?

Senator MORGAN.—Against all animals which have power to destroy.

Mr. ROBINSON.—And not as against people who exercise rights wastefully and excessively or unreasonably? Why are they to do so?

Senator MORGAN.—Upon that, if you ask me the question, I would suggest this.

Mr. ROBINSON.—I am not asking the question in that view sir.

Senator MORGAN.—I would suggest that the right of fur sealing or any other rights on the ocean, are in the nature of easements rather than in the nature of qualities and rights.

Mr. ROBINSON.—Just the same it is an easement on the Island with reference to the seal—nothing more and nothing less.

Senator MORGAN.—Hardly, when according to the doctrine of *ratione soli* in the law of your country and mine, a man may be the owner of property that is found upon it.

Mr. ROBINSON.—No, with great deference, not. You can take the property, but you are not the owner. You have an easement which consists in the right to take it first before anybody else; but I am not going back into that question of property.

The PRESIDENT.—I think we have heard plenty about it.

Mr. ROBINSON.—I think so, sir.

Senator MORGAN.—So do I, but I always supposed the rights *ratione soli* to be positive rights.

Mr. ROBINSON.—They are subject sometimes.

Senator MORGAN.—They are subject to being modified, but the condition subject to which the title exists is a positive right.

Mr. ROBINSON.—A very positive right or easement, if you can take as many seals as you can get, and own them when you get them.

Senator MORGAN.—As much as a tree on a man's land is an easement.

Mr. ROBINSON.—You understand, Mr. Senator, that I am not responsible for the law. If I am told it is not the law I have nothing now to say. If it is the law, I did not make it; and beyond all doubt it is the law.

Senator MORGAN.—I was merely referring to the general character of the rights and privileges of sovereigns equally and their subjects and citizens upon the high seas in respect of some of the privileges of the high seas, that they may be classed as easements.

Mr. ROBINSON.—I do not care what they are classed as—we have a right to them.

I am arguing upon the assumption that you have given us a right to them. If you have not there is an end to it. This argument proceeds entirely upon the hypothesis that pelagic sealing is the exercise of a lawful right—just as lawful and as much a right as the right of the owners of the Islands to kill the seals on the islands.

Senator MORGAN.—It is only a different question so far as it extends.

Mr. ROBINSON.—As far as it extends, and it extends as far as we know without limitation. If it is a lawful right there is no limit to it.

Senator MORGAN.—That does not follow.

Mr. ROBINSON.—It follows, with great deference, if the right be lawful.

Senator MORGAN.—A lawful right of pasturage does not imply that a man owns the land upon which cattle graze.

Mr. ROBINSON.—Nobody says he owns the land. I am talking of the right to catch—of a certain right on the *high seas* which we are entitled to assert. The one is an easement as much as the other. I do not desire to spend time in trying to answer suggestions that you make in that respect, because the argument has been so exhausted that I think it cannot be added to, except by my saying this—that the argument is proceeding now on the assumption of the exercise of pelagic sealing as the exercise of a lawful right.

Senator MORGAN.—If you will allow me. I am merely suggesting on my part that the exercise of it as a lawful right is not an unlimited right, the exercise of it is according to the safety of any country or people—it must be restrained according to the rights and interests of other people in other situations.

Mr. ROBINSON.—I will only say I know of no law or principle of any sort which affirms that. I can say nothing more. If I am told the law must be so, I can only say I have examined the law to the best of my ability, and I do not find any such law anywhere. I am not able to say that I have seen anywhere any law which restricts the right of those to whom the high sea is open, in the exercise of their rights there just as they think proper.

Senator MORGAN.—Then, of course, you are going back to the same position which has been taken several times in this case, of the right of the pelagic hunter to put a cord round the Pribilof Islands, and destroy the seals as they come and go across the three mile limit.

Mr. ROBINSON.—I have referred to that before. I remember your asking me some question before about it. I say you can find no law to check or prevent it. It could be stopped by convention, but it is impossible to find any law which prevents it. The present argument proceeds on the assumption that we have rights that we are entitled to, and the question of regulations is in connection with that assumption. I am not going back to argue over again whether we have rights—the rights will be defined by your Award. We must proceed in this argument on regulations on the assumption that the rights which they have claimed are held not to exist, and that pelagic sealing is held to be a right, which it always was, from the beginning. If so it is impossible that it can be put down or abolished wholly in favor of another right, and wholly in favor of an unreasonable, or excessive, exercise of that right—if it could be so, as I have said, and as is absolutely clear, there is only one regulation which could be made; and our friends in that are logical. Instead of assisting us to make regulations, they have taken precisely that position.

Lord HANNEN.—Is it not a summary of your argument to say that under a power of regulation you cannot prohibit?

Mr. ROBINSON.—Certainly.

Lord HANNEN.—I ventured to suggest that that was a summary of your argument.

Mr. ROBINSON.—It is a summary of my argument. Your Lordship is perfectly right. It is another way, so to speak, of putting the argument. If we are to proceed to that, it is impossible under a power to regulate the pursuit of a certain industry to regulate it out of existence.

Mr. Justice HARLAN.—You must regulate so as to preserve must not you?

Mr. ROBINSON.—You must regulate so as to preserve the seal race.

Senator MORGAN.—Regulate to any extent, if you even do not prohibit?

Mr. ROBINSON.—I venture to say, and there are plenty of cases of this sort, you may not, under colour of regulation, prohibit. You may not pretend to regulate, and under the form of regulation prohibit.

Senator MORGAN.—Possibly under colour of a right of pelagic sealing you cannot destroy.

Mr. ROBINSON.—In other words, you cannot use any right or any power for a different purpose to that for which it was given.

A power of regulation here does not include power to prohibit either directly or indirectly. In other words, as the cases put it, it is an abuse of the power, under the name of "regulation", to prescribe what is an effectual prohibition. I will state a very familiar instance of that kind of case within my own knowledge. A municipal Corporation or authority having power to determine the number of taverns which should exist in a certain municipality, and having happened to be composed of men who desired to put down taverns altogether, said there should be only one tavern in that place, and that it should be situated at the northeast corner, I think it was, of the whole municipality—practically saying there should be none. The Court said that was not a proper exercise of the power; that it was given to them to prescribe in reason the number of taverns that should be allowed, not under color of allowing one to say there should be none.

Our courts are full of cases of that kind. It is only an elementary proposition, that you must use a power not only in form but in substance for the purpose for which it was given.

Then I proceed to the character of the regulations; and I have a few words to say upon that, which to my mind, is practically the most important question of all. We have now especially to bear in mind always that we are discussing regulations as between people having equal rights. I venture to say that you must go a little farther. It may be difficult for my learned friends to admit us to this position now, having called us criminals and pirates and everything else throughout the case, to find that, instead of being criminals and pirates, we are pursuing a legal occupation, and practically that they are in partnership with us in that occupation; but we have to take that view of it. If we have equal rights, I venture to ask the Tribunal, in all reason, to attribute to us the possession of equal sense. I say that we are fair in the propositions that we propose; and I do not put it upon any high ground, that we desire to be fair, or that our motives are fair. I simply say it is to our interest to be fair.

We have a large capital invested in this business. The men who have invested that capital are intelligent men. It is no object to us to destroy the seal race. It would be just as much against our interest to destroy these seals as it would be against the interest of the other people who have an interest in them. We do not want to do it, not that we profess to be either better or more pure than other people, or to have higher motives than other people. It is simply the ordinary business motive which impels every business man not to destroy that out of which he makes his living.

Therefore the regulations which we propose are such regulations as would preserve the seal race, in our interest as well as in theirs, and which must preserve the seal race, or else they are no use to us any more than they are of use to them. I only mention that because throughout this case, from the beginning—not confined to the question

of property rights alone, but all the way through the case—my learned friends have attributed to us a desire to exterminate this race, a desire, as they say, to prevent them from conferring on mankind the blessings of sealskins. Really, now that we have a share in this property, it would seem to be useless to discuss it on that ground.

The people who are interested in reality in this industry are the people who are making their living out of it, and the people whose capital is invested in it. The world practically neither care anything about it, nor have any practical interest in it. If to-morrow, for instance, those pearl fisheries of Ceylon, that we have heard so much about, were to be destroyed, I should sympathise very much with the people, if there is a large number of them, or whether the number be large or small, who have made their living out of it: but as to talking about the blessings of pearls to mankind, and sympathising with those people who have to mix their diamonds with pearls or to wear their diamonds alone without pearls, or do without pearls, the thing is absolutely absurd. Whatever evils may be in store for the human race in the future, the scarcity of sealskins is about the most extraordinary and fantastic fear for the mind of anybody to be directed to.

We are discussing this question then simply as persons jointly interested in an industry, which we both wish to have protected, or rather, the foundation of which we both wish to have protected, by reasonable regulations.

The first difficulty which strikes one in that aspect—at all events, which strikes me—is that turning again to the treaty, and turning to the knowledge which we have, and the only knowledge which we are permitted to have, on the subject, I question very much whether the Tribunal is in the position which they were intended by the Treaty to be in. If you look at Article 7, it is said that they are to determine what regulations are to be made, “and to aid them in that determination, the report of a Joint Commission, to be appointed by the Respective Governments, shall be laid before them.” Let me ask the members of this Tribunal, have you got the aid that the Treaty provides? You have got a joint commission which tells you nothing. You have got two separate commissions which contradict each other, and differ from each other in almost every essential particular.

Is that an exaggeration of the truth? I quite understand what was intended and what was expected by both powers. It was expected, though expected without any reasonable ground, and expected in our joint ignorance of the whole subject, that when we each sent up scientific commissioners to investigate and report upon this subject, there would be found no difference as to their views of seal life; but as a matter of fact we find these gentlemen going up, and I will assume now, notwithstanding all my learned friends have said, desiring to ascertain the truth. We find them coming back, differing about the most essential particulars; and these two reports, so different, are now handed to this Tribunal under the Treaty as what they were intended to have to aid them in determining the regulations. Have you got the aid the Treaty provides for? The bearing of that is simply this: that it leads one to consider more carefully what regulations, under the present state of things, and with the knowledge now existing, is it reasonable and right or desirable to make; and that is a question which is not in the interest of either one side or the other exclusively. It is a question to be decided in the interest of both sides.

Let us see for a moment, in that view, what are really the facts as to which there is a difference of opinion or as to which very little indeed is

known, because there are several such facts, and very material facts. In the first place, let me ask, what would you desire to know in order to enable you to decide what regulations are reasonable? We have not the least idea at this moment, with anything approaching to certainty, what is certainly one very essential condition: How far do the females go for food, or do they go for food at all? We are told by the United States Commissioners as a matter of positive opinion, that they go long distances. I think some people say they go 100 or 150 miles. Those who ought to know best, as the result of long examination, say that they think protection for 30 miles would be sufficient. Is there any sufficient knowledge then upon that subject?

Have we any knowledge whatever as to the age of these animals, to what age they live, either male or female? We are absolutely without any knowledge whatever. Have we any knowledge as to how long the females live, or how long they continue to breed? Absolutely none whatever. On those subjects we are in utter ignorance,—just the same ignorance as we were in before these Commissioners went up.

Then as to the date of weaning. We do not know that or how long, in other words, the pups are dependent upon their mother, which is a very material thing. They differ about that. Not only they differ, but the evidence which they are trying to come to a conclusion upon differs. It is impossible to say. It has got to be ascertained by some years of careful observation.

Then how long do these bulls remain on the rookeries? No human being knows. That is a most essential, perhaps the most essential, thing to ascertain with regard to any regulations of the killing. Then, when does the female resume her feeding? All that we know nothing about.

Now, those are perhaps the most essential facts which require to be known, in order to enable anyone to decide what conditions are reasonable. If we have not those facts then we have to consider what sort of conditions it is safe to make without knowing more.

Is it safe to make anything in the shape of permanent regulations, or is it desirable to attach any sort of conditions to the regulations which you make? It has been doubted whether—I cannot say doubted, for I do not know; at all events the question has been asked—you have a right matter to make regulations with the condition attached that either side at a certain time may denounce them? I venture to suggest that that can hardly admit of doubt. I cannot imagine that it was intended that you should make regulations here lasting for all time, when they might turn out next year to be radically wrong. Added to that, they are regulations which, in the very nature of things, must require from time to time, almost certainly, revision and modification. Was it intended that you should make regulations of a kind suitable or unsuitable, which within two or three years may fail to answer the purpose, or which may be totally inefficient? The only answer I have heard suggested to that is that this is to be accepted as a final settlement of the matter. That, though I may perhaps have taken too much the view of a lawyer in that respect, never occurred to me as meaning more than that this must be a final settlement in the sense that nobody has a right to appeal against it, or to re-open the matter; but whatever you choose to make as your settlement, whatever regulations you choose to prescribe, that is final in this case, and both parties are to accept it. But if you choose to say, We will make no regulations, or if you choose to say, “We will make regulations which shall extend for one year or ten years,” or anything else, that is a final

settlement; that is to say, it is final in the sense that it is irrevocable, and both parties are bound by it.

The PRESIDENT.—We cannot say that we could make no regulations, if we act under the conditions provided for in Article VII.

Mr. ROBINSON.—I did not mean that, Mr. President. I mean if the circumstances are such that you conceive it to be your duty to say that no regulations are wanted, that would be a performance of your power under the treaty. I was not referring to the special facts, or saying that you ought not to make regulations. That is not what I was thinking of. I was saying that if in your judgment you should say no regulations are wanted, that would be final. If you make regulations for a year or ten years, that is final. That is to say, neither side has a right to appeal against it, or to re-open the question so long as that decision lasts.

Then in that point of view, what is the principle upon which these regulations should be made? I venture to submit that there is but one principle that can be adopted. You cannot make regulations which will have any invariable and certain effect upon both or either of these industries unless you subordinate one altogether to the other. There is no priority between these industries. Nobody can point to a law which says that our industry shall be prior to theirs or that their industry shall be prior to ours. In other words, both sides have a right, so far as law is concerned, to exercise their rights as they may think proper. We have no power to prevent them from exterminating the seals on the seal islands. You have no power to prevent them. There is no right to say—when I am speaking of right, I mean no equity of any kind—to say that our right, which has just been given to us, shall be abolished in favor of land killing.

I venture to suggest again that the statement of that carries with it its own absurdity on its face. Is it to be supposed that they are to be better off without property than with property? Is it to be supposed that this Tribunal is to say to the United States in one sentence, "All these rights which you have claimed we deny to you, they do not exist; but we give you back all these rights and more too under the name of regulations"? Is it possible that that could have been contemplated? Or that they are to say to Great Britain, "You may go and seal as you please; you may exercise your right, which we say is your lawful right, to catch seals in the open sea"; and in the next sentence, "You must never do it". Is that a sensible arrangement or a sensible award to ask from any Tribunal? Is it possible that this is to be the result of what these two sides, these two nations, have been contesting about under the name of rights for the last three months?

How can it be a matter of vital importance to each of them, to deny and succeed in the denial of, or to assert and succeed in the assertion of certain rights, when as a matter of fact it is utterly indifferent whether the party claiming the rights has them or not, for he is perhaps worse off if he gets the rights than if he did not get them.

In answer to all these questions we say that the United States have no right. With regard to the seventh question, we say they cannot be better off than if they had no rights at all in.

The PRESIDENT.—You mean the right by award? You are able to give it by convention or agreement or regulation.

Mr. ROBINSON.—Oh, no doubt. I am not speaking of power. I am speaking of fairness. But is it sensible to say to Great Britain, "We award you all these rights, and then take them from you; and we not only take them from you, but order you to assist the United States in

preventing your subjects from exercising them". Is it possible that that can be a reasonable result of such a submission as the present? There must surely be some difference in the rights and regulations which are proper with property and which are proper without property. And upon what principle—because I am not now talking about power—upon what principle do you take away from a nation lawful rights which you have by your award decided to exist, except upon the principle that they cannot possibly be exercised without exterminating the seal race.

The PRESIDENT.—How many of the people are there on the English side who have an interest in the sealing besides the sealers—the furriers, for instance.

Mr. ROBINSON.—Oh none worth speaking of in the sense of money. That extends to this: The people who have an interest in the sealing besides the sealers are the Indians, who get to the extent of \$30,000 a year. That is the whole story. We speak for the Indians as well as for the English interest.

I may not know exactly what the learned President meant. Did you mean citizens of the United States or citizens of England?

The PRESIDENT.—I mean people in England.

Mr. ROBINSON.—Furriers?

The PRESIDENT.—The furriers; yes. You speak for them quite as well as for the Canadian sealers?

Mr. ROBINSON.—Oh, certainly; we speak for them also.

The PRESIDENT.—I say that must be a cause for the interest that England takes in the preservation of seal life.

Mr. ROBINSON.—Oh yes; I suppose she has an interest in the preservation of seal life on that account.

Senator MORGAN.—What interest could England have in the preservation of seal life if her interests were only those of Canada?

Mr. ROBINSON.—Canadian interests are English interests. How can any body say the interest of Canada is not the interest of England?

Senator MORGAN.—I do not mean that. The interest of Canada seems to be to take the seals.

Mr. ROBINSON.—To preserve them also.

Senator MORGAN.—And the interest of the English seems to be to preserve them for the purpose of maintaining a traffic and industry that is based upon the seals.

Mr. ROBINSON.—With great deference, Mr. Senator, the interest of Canada is precisely the same. The interest of Canada is to keep up this industry which we have founded, and to preserve the fur-seals for the purpose of keeping up the industry. We have no wish to destroy the race. Why should we? But if you speak of the interest of any one else in England all that can be said is that England is here representing their interest; and that those furriers, almost to a man, have put themselves upon record under oath as saying that they do not wish pelagic sealing put down, that in their judgment it would be detrimental to their interest to have it put down, for reasons which are perfectly sensible and sound.

The PRESIDENT.—We are led to understand certainly that both parties, both England and the United States, have evinced their wish of preserving the race, whatever may be the motives and whatever may be the particular interests which are the reason of this submission of the treaty.

Mr. ROBINSON.—That is perfectly true, by proper regulations.

The PRESIDENT.—We certainly take it for granted that both parties are here in good faith, and earnestly desire the preservation of the fur-seal race.

Mr. ROBINSON.—Certainly.

Lord HANNEN.—But the argument on your side has been that the killing on the islands is excessive.

Mr. ROBINSON.—Yes.

Lord HANNEN.—And if excessive that it tends to the destruction of the race.

Mr. ROBINSON.—Yes, my Lord.

Lord HANNEN.—Now we are called upon to make regulations which are necessary for its preservation.

Mr. ROBINSON.—Yes.

Lord HANNEN.—How is it possible to do that upon the hypothesis that the killing on the islands is excessive? We are asked an impossible thing.

Mr. ROBINSON.—There is no question about that.

Lord HANNEN.—On that hypothesis, of course.

Mr. ROBINSON.—On that hypothesis. There is no possible means of carrying out your duties without taking into consideration the management of the islands. The thing is absolutely impossible.

The PRESIDENT.—I think you have got a very bad opinion of the mandate that has been given to us.

Mr. ROBINSON.—I have, with great deference. What I mean is that I am perfectly satisfied, and I venture to say every member of the Tribunal must agree with me in this, that there is but one way of making reasonable and proper regulations. It is by a Tribunal which has power to make regulations adapted to the varying circumstances of each year, and subject to modification and rectification from year to year.

Mr. Justice HARLAN.—Suppose it were true that pelagic sealing will result inevitably in the destruction of the race. Do you doubt our power then to prohibit it?

Mr. ROBINSON.—I think if it were absolutely true that with careful management on the islands, and with proper exercise of their rights on the islands, any, pelagic sealing to any extent would exterminate the race, then you could not prohibit it, because you have not got the power to prohibit.

Mr. Justice HARLAN.—Have we not the power to make such a regulation as will preserve the species?

Mr. ROBINSON.—Prohibition is not a regulation.

Mr. Justice HARLAN.—Is not pelagic sealing, under the hypothesis that has been made, a destruction of the species?

Mr. ROBINSON.—What hypothesis?

Mr. Justice HARLAN.—The United States contend that pelagic sealing will inevitably destroy the race. I do not say whether that is true or not. But if that be true would you not call it a regulation for us to prohibit pelagic sealing?

Mr. ROBINSON.—I should not most certainly. I say that with great submission, of course. When you ask me a question you understand I merely give you my opinion.

Mr. Justice HARLAN.—Oh yes; I understand that.

Lord HANNEN.—There must be some amount of pelagic sealing which would not destroy the race, and though it may be a difficult task, that is what we are called upon to try, what amount of pelagic sealing will not destroy the race.

Mr. ROBINSON.—Just let me ask—because I do not care to entertain assumptions which seem to me to be absolutely unfounded—is there any pretence in the evidence for saying that a reasonable exercise of pelagic sealing is inconsistent with the preservation of the seal race? Consistently with reasonable management on the islands, I say that it seems out of the question, and on the evidence there is no pretence for saying it.

The PRESIDENT.—It seems to be a question of measure. Even the other side admit of a certain amount of pelagic sealing to the Indians.

Mr. ROBINSON.—Certainly, they say that; and further, if you recollect, they say—I do not like to use the term nonsense before a Tribunal of this description; but surely it is all absurdity to say that no degree of pelagic sealing can go on consistently with the existence of the seal herd, when, as a matter of fact, pelagic sealing has gone on from time immemorial, and that it is only in the year 1886 that it began to do harm to the seal race.

Mr. Justice HARLAN.—How long has pelagic sealing gone on with schooners and shot-guns?

Mr. ROBINSON.—It has gone on since 1879, I believe. That is the year I gave.

Just let us inquire about this matter for a moment, because one likes to know when suggestions of this kind are made, and when the question seems to be pushed to extremes. Killer whales have been exterminating these animals, to the best of their ability, male and female, young and old, ever since they have existed. That is a thing that has to go on. You are not to protect the seal race for the exclusive benefit of the United States, or for anyone else.

The PRESIDENT.—If you could destroy the killer whales, nobody would object.

Lord HANNEN.—You would have no objection to regulating them, even if regulation amounts to prohibition.

Mr. ROBINSON.—I have no objection to regulating killer whales at all. I may say here, that although the suggestion has been made to the people on these islands that they should do something to protect the seals against the assaults of these killer whales, and that it could easily be done, they have never done it.

I venture to say this with regard to these questions that have been put, and the question as to what facts are unknown: We hear a great deal about surplus males. I have the strongest impression, without prophesying, that some day or other it will be found that there is no such thing in connection with this race as surplus males, properly speaking. I mean if the race is to be perpetuated, it will be found that there are no such things as surplus males. I say that when this thing comes to be ascertained, it will be found that, as in the case of other animals *feræ naturæ*, these males in all probability do not last on the rookeries for more than two or three years; that they correspond to all other animals of the same class; and that the notion that these sexes were produced by nature in equal proportions simply to allow men to kill off the surplus males, has no foundation whatever. I believe there are no such things as surplus males consistent with the due preservation of the herd at its best, simply because it is a provision made by nature for the selection of the best for the purpose, and the constant selection of the best for the purpose, that can be obtained. Otherwise, if nature did not intend that there should be a use for an equal number of each sex, nature would not have provided so. It is no use talking about not tampering with the law of nature. My learned friends'

whole proceedings in the conduct of the business on the islands is a tampering with the laws of nature. You can do it with domestic animals, when you have the means of observing its effect constantly and regulating its operation, but not with animals *fera natura*. As a matter of fact, I question whether there are such things as surplus males either in the seal race, deer, or any other polygamous wild animals.

I do not know how far it may be a test, but I think it may be a reasonable test as affording something in the way of illustration. Supposing the United States or England, I do not care which, owned the country in which these islands were, as well as having the ordinary rights of the sea; suppose a British subject or a United States citizen owned these islands, and suppose the country of which the owners were subjects were called upon to make such regulations as they thought reasonable with regard to the two rights, pelagic sealing and killing on the islands. I submit it would not be thought reasonable to prohibit pelagic sealing, to take away the rights of one class in order to transfer those rights to another class; but that they would endeavor to make such regulations as would ensure the due and reasonable exercise of both rights.

Then some question was spoken of with reference to numbers yesterday. I do not believe you can regulate this upon the question of numbers, because you can name no number that is to be destroyed in each year where the natural conditions may vary in each year. It may be right to kill 10,000 this year, and wrong to kill 5,000 next.

I have thought that the regulations proposed by our Commissioners were most reasonable in principle. In other words they say, under normal conditions a zone of so many miles is enough; but there may come an epidemic, or a great loss of seals by a storm, as has happened before, and you may find it unreasonable to kill half the number that year that you killed the year before. If so we will give you a double zone. In principle that is correct.

Here we are with equal rights; one a right to exercise our right of pelagic sealing; and you must first see what Regulations are necessary to prevent pelagic sealing from killing an unreasonable number of nursing-females, and when you have succeeded in doing that, the consequence of our exercising that right in a reasonable manner must take care of itself. You cannot provide for it otherwise. I am prepared to face the consequences either way. If the consequences of our exercising that right in a reasonable manner are only to enable us to kill a few, then we must kill a few; but if the consequences are to enable us to kill a good many, then we shall be able to kill a good many; and that will vary from year to year depending upon circumstances. You can only carry on pelagic sealing in calm weather, because the canoes can only float in calm weather; and if you have a rough season, you will have very little pelagic sealing, and we should kill very few. If we have a calm season, we should be able to kill more. But those are things that no human power can regulate. You can only attach to the exercise of our rights reasonable conditions; and, when you have done that, the effect upon other industries must take care of itself, whether it is little or much. What I mean is, that I do not understand how the consequences can affect the legality of other rights in any way; but the conditions must be reasonable.

When you attach such conditions that our rights may be reasonably exercised under those conditions, the consequence upon other indus-

tries must take care of itself; and it is idle to say that you must kill 40,000, or 20,000, or 15,000 or 35,000, in one year, or in proportion to another industry, because you cannot do it.

The PRESIDENT.—Do you say the same for land killing as for sea killing?

Mr. ROBINSON.—Yes; but it is a little more difficult, because from the land the animals disappear for a portion of the year. I am glad that the President has alluded to that, because my learned friends attach importance to the fact that they can kill with discrimination, and only kill the surplus males. But you could do the same with regard to rabbits by spreading your nets, catching the rabbits, and killing only the bucks. Just the same with regard to pheasants, killing only cock-birds; but it has never entered into any-body's mind that that would give special rights. Just the same with regard to salmon; you can take them at the heads of rivers, and even mark them, or take out and kill the male salmon. But nobody ever suggested that that gives any exceptional or peculiar right, until it came to be argued here.

Then, Sir, there is only one more subject on which I desire to say a very few words; and that is the interest of this particular portion of the Empire in this subject; namely, the Province of British Columbia. The interest of it to this Province is very, vital, serious and important. It is a small Province, having a population, including Indians and Chinese, coast and inland, of 97,000, or, at all even to, under 100,000. It is a Province, as you all know probably, which came very lately into the Dominion, I think in 1871, and which has only within the last few years been connected with this outer world to the East by the Canadian Pacific Railway.

Now, in this industry, with this small population, of which there are only 75,000 not living inland, we have employed a population of 1,083, Whites and Indians, and have invested in it a capital of somewhere about half a million of dollars, I think. We got last year, and I am only taking that as an average, some 49,000 skins; and for them we got some \$600,000, for the price was \$12 a skin. I suppose that the 1,100 people interested in that industry probably represents a dependence on it of 4,000 or 5,000, because they are, naturally, heads of families; and, in that view, it is very important to us. But it is more vital and important to us, I venture to submit, in this view; we are trying to settle that outlying and distant Province with a population which must be largely dependent for their living upon what they get from the deep sea; and if any restriction is placed upon the freedom of the sea in that part of the world which enables the idea to go abroad that the freedom of the sea means one thing in British Columbia and another thing in another part of the world,—that those pursuing their lawful occupation are liable to be interfered with and hampered in the pursuit of their industry in a way which they would not be liable to elsewhere, it must exercise a most deterrent effect upon the future of that Province; and we feel strongly the importance of it in that way.

The PRESIDENT.—Does that apply to any restriction of a close season?

Mr. ROBINSON.—Do not misunderstand me. I will explain what I mean; the inference I draw from that is this, and I believe it to be the true test of what Regulations, as I submit with all deference, ought to be made. Such Regulations only ought to be made as you would in your wisdom say that we ought to have agreed to. If such Regulations are made as we can explain to our people in our judgment, and the judgment of reasonable men, should have been entered into by them,

those Regulations will be assented to, and will cause no difficulty or injury to the Province, because they will be Regulations it is to their interest and to the interest of everybody else to see observed. But if Regulations are imposed by which lawful industry is hampered or interfered with, by which that part of the world differs from any other, and by which they are put under disadvantages nobody else suffers from, and restrictions that you cannot explain, except by saying that you have given to another Power all the rights that would be the rights of our own citizens anywhere else, you cannot but do serious injury to the welfare of that Province. For that reason we are supply interested in this question.

My learned friends have attempted to separate the interests of England from British Columbia. I venture to say the interest of one part of the Empire is the interest of the whole, and if England asserts that it is her interest she is the Power to judge, and we have a right to ask, as we do ask, from this Tribunal, with deference, that only such Regulations shall be made and such restrictions imposed as in their judgment are reasonable and consistent with the rights which upon the assumption of rights at all they would have found us to possess. I thank the Tribunal very much for the kindness with which they have listened to me.

The PRESIDENT.—And we have to thank you, and were very pleased to hear you again.

We will adjourn till the usual hour in the morning when we shall expect to hear Mr. Phelps.

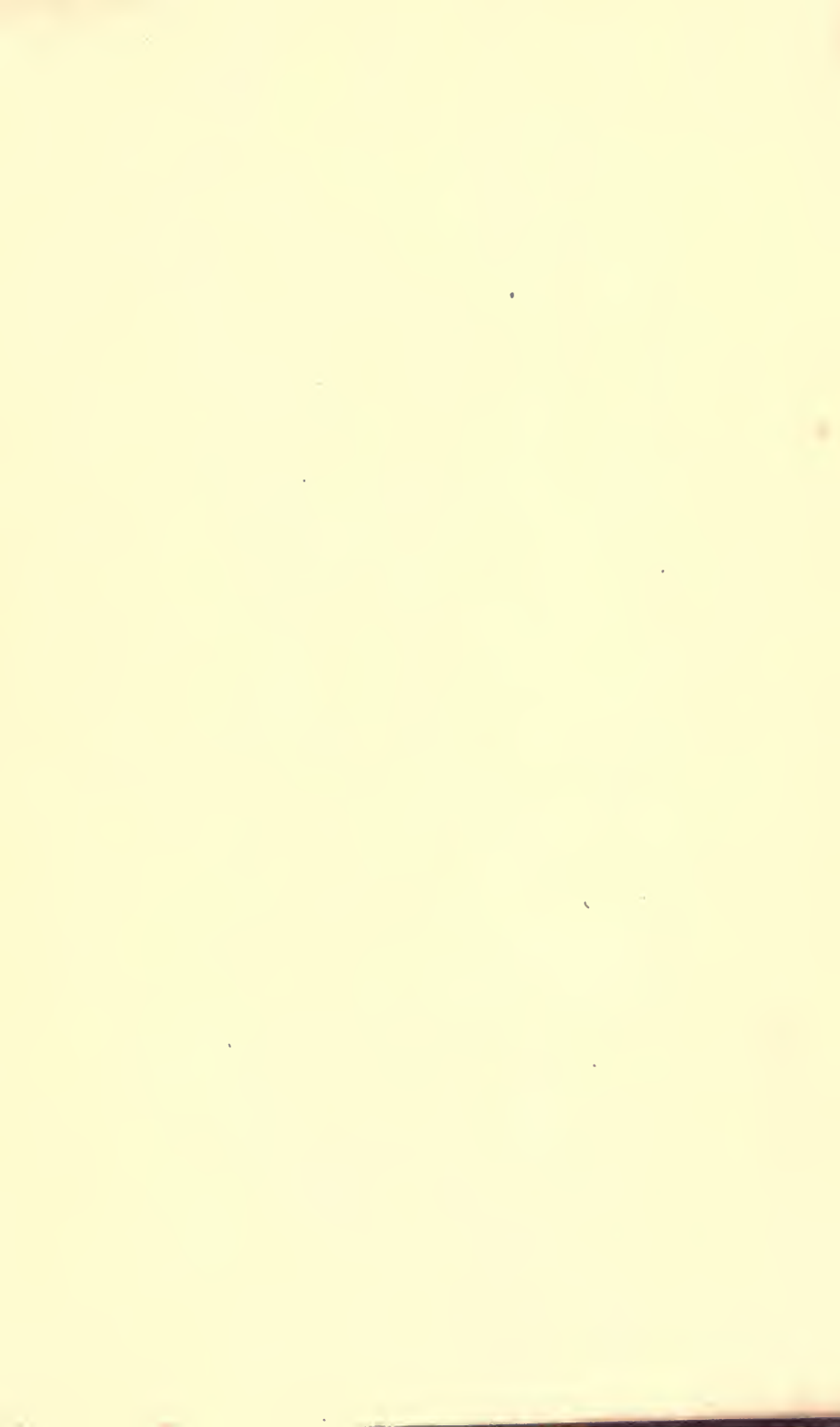
[The Tribunal thereupon adjourned till Thursday, June 22nd at 11.30 a. m.]







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